



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 505 OF 2013

JACKSON NYAKWARA MOGUSU PLAINTIFF

VERSUS

NEMWEL NYAMARI ONTITA 1ST DEFENDANT

EVANS GISORE 2ND DEFENDANT

JUDGMENT

1. The plaintiff brought this suit against the defendants on 20th December 2013 seeking:-

- a. **An order for the eviction of the defendants from all that parcel of land known as LR No. North Mugirango/Bokeira/354 (“suit property”).**
- b. **An order restraining the defendants by themselves or through their agents, servants or employees from wasting, damaging and/or alienating the suit property.**
- c. **An order that the District Surveyor do demarcate the suit property.**
- d. **Any other relief the court may deem fit to grant.**

In his plaint dated 19th December 2013, the plaintiff averred that at all material times he was and still is the registered owner of the suit property and that the suit property is in the middle of the parcels of land owned by the defendants one of which is on the left and the other on the right hand side of the suit property. The plaintiff has contended that although the defendants’ parcels of land aforesaid are separate and distinct from the suit property, the defendants have been interfering with the suit property and are planning to put up permanent structures on the property. It is on account of the foregoing that the plaintiff has brought this suit and sought the orders set out at the beginning of this judgment.

2. The defendants were served with summons to enter appearance but none of them did so. On 28th January 2014, interlocutory judgment was entered against the defendants in default of appearance. When this matter came up for formal proof on 17th July 2014, the 2nd defendant who had been served with a hearing notice attended court and asked for time to put in his defence. The plaintiff did not object to this request and the court set aside the interlocutory judgment that had been entered against the 2nd defendant and granted him leave to file his statement of defence within ten (10) days. The matter was therefore adjourned and stood over to 30th July 2014 for hearing.
3. When the matter came up on 30th July 2014 the plaintiff and the 2nd defendant attended court for the hearing. As at that date, the 2nd defendant had not filed his statement of defence. When the defendant was asked by the court whether he intended to do so, he told the court that he did not feel that a defence was necessary. In the circumstances, I allowed the plaintiff to proceed with the

- hearing. The plaintiff who was acting in person gave evidence and called two witnesses. The plaintiff told the court that he is 93 years old and that he used to work as a tea picker before he retired and came back home. He told the court that he has sued the defendants because they have encroached on the suit property from both sides. He produced a copy of the title deed for the suit property as an exhibit. He told the court that he does not know the land reference number for the parcels of land owned by each of the defendants who are his neighbours. He stated that the land registrar had come to the site of the three parcels of land to sort out the dispute over their respective boundaries but the defendants refused to co-operate in the process. The plaintiff produced as exhibits various letters from the land registrar, Nyamira on the issue.
4. The plaintiff stated that the defendants have encroached on the suit property and he wants them to vacate. He stated that the 1st defendant has encroached on the suit property to the extent of about 30feet from the common boundary while the 2nd defendant has encroached to the extent of about 25feet from the said boundary. In conclusion, the plaintiff urged the court to grant the reliefs sought in the plaint. With leave of the court, the 2nd defendant who had not entered appearance but was present in court was allowed to cross-examine the plaintiff. In cross-examination, the plaintiff stated that he used to live and work in Kericho and that he came back home from Kericho about 8 years ago.
 5. He stated that he stayed at Kericho for about 10 years and when he came back, he found that the defendants had encroached on the suit property. He stated that the defendants had destroyed the boundary of the suit property and entered therein and that when the land registrar, Nyamira visited the site for the last time, he advised him to file a suit. On examination by the court, the plaintiff stated that the 2nd defendant is cultivating the portion of the suit property on which he has encroached. The plaintiff's first witness, Wilson Kabinga Owindi (PW2) told the court that the plaintiff and the 2nd defendant are known to him and that he was familiar with the dispute between the parties herein. He told the court that when the land registrar, Nyamira visited the disputed properties to fix their boundaries, he did not fix the boundary beacons after he and the surveyor had taken ground measurements because the defendants refused to co-operate at that stage. He suggested that the fixing of the boundaries of the parcels of land owned by the plaintiff and the defendants be carried out through a court order.
 6. The plaintiff's second witness was Josiah Achochi Obwori (PW3). PW3 told the court that the plaintiff and the 2nd defendant are known to him and that he was familiar with the dispute between the parties. He told the court that the plaintiff had confided on him that he was desirous of dividing the suit property among his children and as such he wanted to establish the boundaries of the property. He advised the plaintiff to contact the land registrar and surveyor to assist him in the process. When the plaintiff brought the land registrar and surveyor to undertake the exercise of demarcating the boundary of the suit property, the two were chased away by the 1st defendant. As a result of this development, the land registrar advised the plaintiff to seek court intervention in the dispute.
 7. After the evidence of PW3, the plaintiff closed his case and informed the court that he wished to rely on the evidence on record. On his part, the 2nd defendant made oral submissions. The 2nd defendant submitted that the plaintiff is his uncle and that the parcel of land which he is occupying is separate and distinct from the plaintiff's parcel of land. He denied that he has encroached on the suit property. He also submitted that he has never interfered with the plaintiff's attempts to have the boundaries of the suit property demarcated.
 8. I have considered the plaintiff's case as pleaded and the evidence tendered by the plaintiff in proof thereof. The plaintiff's claim against the defendants is based on the tort of trespass. Trespass has been defined as any unjustifiable intrusion by one person into the land in the possession of another. On the evidence before me, I am satisfied that the plaintiff is the registered owner of the suit property. I am however not persuaded that the plaintiff has proved that the defendants herein have encroached on the suit property. The plaintiff has claimed that the defendants have encroached into the suit property to the extent of 30feet and 25feet from the common boundary respectively.
 9. It is not clear to me how the plaintiff has arrived at these measurements. The evidence tendered by the plaintiff was to the effect that the land registrar and surveyor who he had called upon to fix the boundaries of the suit property were not allowed by the defendants to carry out the exercise.

There is no evidence therefore that the defendants have indeed encroached on the suit property. In the absence of any proof that the defendants have intruded into the suit property without justification, a claim for trespass cannot be maintained. In the circumstances, the plaintiff is not entitled to the order of eviction and injunction sought in the plaint against the defendants.

10. I have noted from the letters by the land registrar, Nyamira that were produced in evidence by the plaintiff that the dispute between the parties herein revolves around the boundaries of the suit property and LR No. North Mugirango/Bokeira I/1594 and LR No. North Mugirango/ Bobeira I/1200. This court has no jurisdiction to determine boundary disputes. See, Section 18 (2) of the Land Registration Act, 2012 and **Wamutu –vs- Kiarie [1982] KLR 480**. The land registrar has the exclusive jurisdiction to determine disputes over boundaries in the first instance. The evidence before me indicates that attempts have been made by the land registrar and district surveyor, Nyamira District to determine the boundaries of the three parcels of land mentioned above whose boundaries are in controversy but the exercise has never been carried out successfully due to resistance from the defendants. I don't think that the plaintiff herein is left with no remedy if the defendants with whom he has a boundary dispute refuses to co-operate to have the dispute resolved or determined by the land registrar as provided for in law. In addition to the prayers for eviction and injunction, the plaintiff had also sought an order that the boundaries of the suit property be demarcated. I am of the opinion that this court has the power to grant that relief in the circumstances.

11. For the foregoing reasons, I hereby enter judgment for the plaintiff against the defendants as follows:-

- a. **The reliefs sought in paragraph (a) of the plaint are disallowed.**
- b. **The District Land Registrar and District Surveyor Nyamira District shall visit and fix the boundaries of LR Nos. North Mugirango/Bokeira I/354, 1200 and 1594 and shall indicate if there has been any encroachment on LR No. North Mugirango/Bokeira I/354 and if so, to what extent and by the owner or occupant of which plot.**
- c. **The officer commanding the nearest police station (OCS) shall provide security to the said officers if necessary while undertaking the said exercise.**
- d. **The cost of demarcation of the said boundaries shall be met by the plaintiff.**
- e. **The District Land Registrar, and Surveyor shall file their report in court within forty (45) days from the date of service upon them of the order herein.**
- f. **Upon filing of the said report, the plaintiff shall be at liberty to initiate new legal proceedings as he may deem fit to safeguard his interest in the suit property in the event that it is established that there has been an encroachment on the property.**
- g. **This matter shall be mentioned on 19th December 2014 to confirm if the reports by the District Land Registrar and District Land Surveyor aforesaid have been filed in court.**
- h. **Each party shall bear its own costs of this suit.**

Delivered, signed and dated at KISII this 14th of November, 2014.

S. OKONG'O

JUDGE

In the presence of:-

Plaintiff present in person

N/A for the 1st defendant

2nd defendant present in person

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE