



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELC CASE NUMBER 215 OF 2017

(Formerly Kisii Elc case No. 226 of 2016)

SIMON OTIENO OGOLA (suing through MARGARET ADHIAMBO

OGOLA, Holder of Power of Attorney).....PLAINTIFF

VERSUS

DAVID ODHIAMBO OKENDO.....DEFENDANT

RULING

A) INTRODUCTION

1. The present ruling is in regard to a report reference number TECH 14/MIG/SUB/VOL1/66 dated 1st April 2019 duly filed in court on 26th September 2019 by County Surveyor, Migori (The report herein).
2. The report was pursuant to orders of this court made on 29th January 2019 which read, inter alia;-

“The Land Registrar and County Land Surveyor Migori to revisit LR Nos. Kamagambo/Kanyajuok/1570 and 1571 (Hereinafter referred to the suit property and the other property respectively) to ascertain boundary fixed and established on 1st March, 2018 and or re-establish the boundary and file the report in court within the next 60 days from the date hereof.”

3. The suit property is measuring approximately zero decimal eight two hectares (0.82 Ha) in area. The same is contained in Registry Map Sheet Number 32 located in Rongo sub county within Migori County.
4. The plaintiff is represented by the firm of Oguttu, Ochwangi, Ochwal and Company Advocates formerly, M/S Oguttu Mboya and Company Advocates.
5. The defendant, David Odhiambo Okendo (sued through Zablon Odari holder of purported power of attorney dated 21st November 2016 and filed on even date) appears in person.

B) THE PLAINTIFF’S CASE

6. By a plaint dated 20th July 2016 and filed in court on 1st August 2016, the plaintiff is seeking orders infra:-

- a) Declaration that the plaintiff is the lawful, bona fide and registered owner of the suit property herein.
- b) An order of eviction against the defendant herein, together with his agents, servants and/or any other person acting and/or claiming under the defendant herein.
- c) Permanent injunction restraining the defendant either by himself, agents, servants and/or anyone claiming under the defendant from re-entering upon, trespassing onto, laying a claim to, cultivating, leasing, building onto, interfering with and/or in any other manner, whatsoever dealing with the suit property or any portions thereof in any manner prejudicial and/or adverse to the rights and interests of the plaintiff.
- d) General damages for trespass.

e) Costs of this suit be borne by the defendant.

f) Such further and/or other relief as the Honourable Court may deem fit and expedient so to grant.

7. The gist of the plaintiff's case as per the plaint is that on 9th January 1997, the defendant who was then the registered proprietor of the suit property entered into a land sale agreement whereby he sold the same to Justo Okongo Odida who became its registered proprietor. Later Justo Okongo Odida sold and transferred the suit property to Margaret Adhiambo Ogola (the plaintiff's attorney) who in turn transferred it to the plaintiff who therefore, became its registered proprietor with effect from 6th June 2011. That in March/July 2013, the defendant who is the registered proprietor of the other property pushed the boundary of the same and caused it to encroach unto the suit property by fourteen (14) meters thus, provoking the instant suit.

8. In his reply to defence and defence to counter claim dated 31st May 2018 duly filed on 6th June 2018 reiterated the contents of his plaint. He denied the defendant's counter claim and raised a preliminary objection to the counter claim at paragraph 20 on the grounds, inter alia, that the same is statute barred, constitutes an abuse of the due process of the court and non-suited.

9. On 26th September, 2019, this court granted the parties twenty-one (21) days to file their respective comments on the report. On 2nd December 2019, Mr. D. Adawo, learned counsel for the plaintiff informed this court that the plaintiff had no issues with the report.

C) DEFENDANT'S CASE IN BRIEF

10. By a statement of defence and counter claim dated 21st April 2018 and filed in court on 16th May 2018, the defendant is seeking the following orders;

a. The execution of the orders of this court dated 8th March, 2018 be stayed pending the hearing, determination and/or disposal of the counter claim.

b. The plaintiff is entitled to the whole of the suit property and the defendant's suit about boundary dispute filed before settling property ownership is premature, void and/or a nullity in the circumstance.

c. Permanent injunction be issued against the defendant, restraining him in person, agents, servants and/or one claiming under him from entering upon, taking possession, trespassing onto, cultivating, erecting structures, interfering with and/or any other manner or dealing with the suit property and/or portions thereof.

d. Costs of the counter claim suit and interests thereupon at court rate be provided for.

11. Briefly, the defendant denied the plaintiff's allegations in the plaint. He stated that he is the first registered proprietor of the original land, LR No. Kamagambo/Kanyajuok/308 which on subdivision, produced the suit property and the other property, both registered in his name. That the alleged sale and transfer of the suit property is fraudulent rendering the plaintiff's claim untenable.

12. On his part, the defendant failed to file submissions further to the orders and directions as noted at paragraph 9 hereinabove and pursuant to this court's orders of 14th July 2020 and 21st September, 2020.

D) ISSUES FOR DETERMINATION

13. I have carefully examined the entire report, the parties' respective pleadings, agreed issues (the plaintiff's version) dated 28th August 2016 and oral comments by the plaintiff's counsel. Therefore, has the report finally determined the dispute between the plaintiff and the defendant herein?

E) DISCUSSION AND DETERMINATION

14. At the outset, it is important to note that by the orders of this court given on 29th January 2019, the Land Registrar Migori and County Surveyor, Migori were to revisit the suit property and the other property to ascertain boundary fixed and established on 1st March 2018 and or re-establish the same. The plaintiff stated at paragraphs 7 to 16 of the plaint and paragraphs 8, 19 and 20 of the reply to defence and defence to counter claim that the defendant encroached into the suit property. Conversely, the defendant asserted at paragraph 11 of the defence and the counter claim that the present dispute concerns ownership of the suit property. Be that as it may, the plaintiff's contention is fortified by the court order(s) of 29th January 2019 and the report. Therefore, the instant dispute relates to boundaries of the suit property and the other property.

15. The orders of this court were issued pursuant to Sections 18 and 19 of the Land Registration Act, 2016 (2012) respecting boundaries and fixed boundaries respectively. Section 20 of the same Act provides for maintenance of boundaries. Section 18(1) of the said Act reads;

“The court shall not entertain any action or other proceedings to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with the Section.”

16. The Land Registrar and Surveyor are mandated to establish and fix boundaries of registered land under Section 19(1) of the Act. As such, this court lacked jurisdiction in the first instance to entertain the instant dispute hence referred the same to the Land Registrar and the County

Surveyor, Migori who are mandated under the Act to deal with the matter.

17. In the foregone, I endorse the position taken by my brother, Mutungi J in the case of **Andrew Marigwa v Josephat Ondieki (2017)eKLR**, where he reasoned at paragraph 13 of his ruling, inter alia;

“...The Land Registrar is the custodian of the records relating to land, have the technical ability or capacity to determine, establish and fix boundaries of parcels of land as required under the Land Registration Act, 2012...”

18. By its nature, the report is opinion evidence. Sections 48 to 54 of the Evidence Act Chapter 80 Laws of Kenya govern opinion evidence. However, as a general rule, opinion evidence is not binding on the court which is at liberty to accept or reject it depending on the facts and circumstances of the case as noted in the case of **Amosam Builders Developers Ltd vs Gachie and 2 others (2009)KLR 628** as well as the decision of this court in **Registered Trustees Legio Maria Africa Church Mission vs Simeon Nyamweya Obwocha (2018)eKLR**.

19. According to the report, the plaintiff and the defendant were notified of the visit to the disputed site by the Land Registrar and County Surveyor Migori. That the road serving the suit land and the other land was non-existent and the said two officers re-established the road on the ground accordingly.

20. The conclusion and recommendations read, inter alia;

“.....the boundaries of parcels number Kamagambo/Kanyajuok/1570 and 1571 were intact on the ground save for the road serving them on the ground which was non existence due to sugarcane plantation on the road reserve but was re-established and demarcated on the ground during the field visit day....”

21. The findings of the report show that disputed boundary between the suit property and the other property was re-established. The facts and circumstances of the case as per the report favour the adoption of the report which I find cogent, firm and reliable.

22. Clearly, the parties herein were given opportunity to exercise their rights under Articles 25(c), 48 and 50(1) of the Constitution of Kenya, 2010. By his oral comments on the report, learned counsel for plaintiff urged this court to endorse the report as judgement of this court in terms of the plaint in this suit.

23. This court is quite aware of the definition of the term “Trespass” at paragraph 1733 of the **Black’s Law Dictionary, 10th Edition**. Furthermore, in **Clerk and Lindsell on Torts (18th Edition)** paragraph 18-01, the same term means:

“An unjustifiable entry by one person upon the land in possession of another.”

24. It is very evident from the plaint, the report and the plaintiff’s submissions on the report that the defendant entered into the suit property without any justification whatsoever. Any unlawful possession of private land is prohibited under Section 152A of the Land Registration Act, 2016(2012).

25. In my considered view and going by the Court of Appeal decision in **Nguruman Ltd v Jan Bonde Nielsen and 2 others (2014) eKLR**, and under Article 40(1) of the Constitution(supra), the plaintiff is entitled to reliefs sought in the plaint. In respect of the claim of trespass to the suit land, an amount of Kshs 75,000/= , would be appropriate in view of the character and circumstances of the case. So, I award the same to the plaintiff; see also the Court of Appeal decision in **Eric Edome and another v Pauline Kasumba Osebe and another (2014) eKLR**.

26. It is noted that the Land Registrar and County Surveyor, Migori duly implemented this court’s orders of 29th January 2019 as revealed in the report which has finally disposed of the instant matter as observed in **Marigwa and Legio Maria cases(supra)**. In that regard, I proceed to adopt the report as judgement of this court since the plaintiff has proved his claim against the defendant on a balance of probabilities.

27. On the strength of the plaintiff’s pleadings and the report, the defendant’s counter claim dated 21st April 2018 is devoid of merits. The same fails. I proceed to dismiss the counter claim with costs to the plaintiff.

28. Thus, judgment be and is hereby entered for the plaintiff against the defendant for orders of declaration, eviction, permanent injunction as sought in the plaint dated 20th July 2016 as well as general damages for trespass assessed at **Ksh 75,000/=** (Kenya shillings Seventy-Five Thousand Only).

29. The defendant shall vacate the suit property within the next Seventy-Five (75) days from this date in default the Officer Commanding Station (OCS) Kamagambo Police station to evict him therefrom.

30. The costs of this suit shall be borne by the defendant.

31. It is so ordered.

Delivered, Signed and Dated at Migori in open Court pursuant to,inter alia, Articles 7 (3) (b),159 (2) (b) and (d) of the Constitution of Kenya, 2010, Section 3A of Civil Procedure Act chapter 21 Laws of Kenya and Sections 3 and 19 of the Environment and Land Court Act, 2015 (2011) due to the Corona Virus pandemic challenge, this 7TH day of OCTOBER, 2020.

G.M.A ONGONDO

JUDGE

In presence

Ms. Ochwal, learned counsel for the plaintiff

Mr. Kirui, learned counsel for the defendant

Tom Maurice – Court Assistant