



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERICHO**

**ELC CASE NO. 73 OF 2015**

**JOHN KIMUTAI BII.....PLAINTIFF**

**VERSUS**

**CHARLES KIPROTICH NGENO.....DEFENDANT**

**JUDGMENT**

**Introduction**

1. By a Plaintiff dated 31<sup>st</sup> January 2011 the Plaintiff filed suit against the defendant claiming that the Defendant had trespassed onto his land parcel number KERICHO/KIPSONOI S.S/977 measuring 10.99 acres, excised and appropriated to himself 5 acres thereof thus denying the plaintiff the quiet and peaceful enjoyment of the said parcel of land. The plaintiff therefore prays for the following orders:

*a) Delivery of vacant possession, in default, an eviction order be issued against the Defendant.*

*b) A permanent injunction restraining the defendant by himself, his agents, servants and assigns from trespassing and/or interfering with the plaintiff's parcel of land.*

*c) Costs of this suit*

2. The Defendant filed a Defence and Counterclaim dated 28<sup>th</sup> June 2011 in which he denies that the plaintiff is the registered owner of all that parcel of land known as KERICHO/KIPSONOI S.S/977 measuring 10.99 acres and claims that contrary to the Plaintiff's claim, it is the Plaintiff who has encroached into a portion of the Defendant's land and fraudulently had himself registered as the owner thereof.

3. In his Counterclaim the defendant (now Plaintiff) claims that the Plaintiff (now Defendant) obtained his title by mistake /fraud and the same ought to be cancelled. He claims that he has been in open uninterrupted and adverse possession of 6 acres of the suit land for more than 12 years and he ought to be registered as the owner thereof by virtue of adverse possession. He therefore prays for a declaration that he is the lawful proprietor of 6 acres of the suit land an order that he be registered as the proprietor of 6 acres of land parcel number KERICHO/KIPSONOI S.S/977.

**Background**

4. This is essentially a boundary dispute. The plaintiff and defendant share a common boundary as the Defendant is the owner of L.R.NO.KERICHO/KIPSONO S.S/561 which borders the Plaintiff's parcel of land. The portion in dispute measures about 5 acres with each of the parties laying claim to it. Before the suit was set down for hearing, the parties agreed that the District Surveyor Bomet visits the suit land for purposes of ascertaining the beacons and determining the boundaries of land parcel number KERICHO/KIPSONOI S.S/977 and land parcel number KERICHO/KIPSONOI S.S/ 561 and files his report in court.

5. The District Surveyor Bomet, visited the suit land in December 2015 but despite both parties having been notified to attend with their advocates, only the defendant and his advocates attended. The report was then filed in court.

6. The matter was eventually set down for hearing and the plaintiff testified and called the District Surveyor Bomet as his witness. The court then visited, the suit land in the presence of the surveyor and the parties after which the surveyor presented his report in court.

**Plaintiff's Case:**

7. The Plaintiff testified that he is the registered owner of land parcel no. KERICHO/KIPSONOI S.S/977 measuring 10.99 hectares. He produced the title deed as Plaintiff's exhibit 1. He stated that he inherited the suit land from his late father. He testified that the defendant is his neighbour and their land is separated by a stream. He stated that the defendant has encroached on his land and is doing some farming

thereon. He stated that the boundary was fixed during the adjudication process in 1964 and even though there was window period for anyone who was dissatisfied to complain, the defendant did not lodge any complaint. He said that the defendant had encroached onto about 5 acres of the plaintiff's land.

8. Upon cross-examination he stated that the suit land originally belonged to his late father Philip Kibii Langat and it was first registered as land parcel number KERICHO/KIPSONOI S.S/361 measuring 45.46 hectares. It was subsequently sub-divided in 2008 thereby giving rise to land parcel number 977, 978, 979 and 980. He said that the defendant's land measures 43 hectares. He stated that he was not present when the surveyor visited the suit land in 2015 and accused the defendant of sneaking behind his back to have the land surveyed.

9. He said that he was aware that his late father had filed against the defendant vide Kericho RMCC No. 134 of 1987 in respect of the suit land but the plaintiff's father died before the case was decided. He stated that he was not aware that there was an error in the Registry Index Map. He testified that there was a bush between his land and the defendant's land but it had since been cleared. He stated they had planted some trees along the river in the 60s and 70s. He acknowledged that surveys had been conducted over the suit land but he was not present during any of the survey exercises. He said he would be surprised if it was found that he had encroached on the defendant's land as he has been occupying the suit land for more than 40 years.

10. In re-examination he clarified that he was issued with a title deed in 2008. He stated the defendant's land did not traverse the stream. He said they had planted trees along the stream on their side of the suit land. He said that the defendant started claiming the suit land in the 90s whereas the land had been adjudicated in the 60s. He stated that if there was any error on the title, it ought to be corrected

11. The plaintiff called Samwel Langat, the District Surveyor, Bomet as PW2. He testified that he had been issued with witness summons in September 2015 to visit the suit land and establish if there was encroachment by either of the parties, and if so, the extent of the such encroachment. He visited the suit land and drew a sketch plan showing that the defendant's land went beyond the stream. He stated that he only took the measurements of the land parcel in dispute measuring about 6 acres.

12. The witness was then stood down for cross-examination. In the meantime, the court visited the suit land in the presence of the District Surveyor Bomet, the parties and their advocates so as to get a clear picture of the suit land. The surveyor took the measurements of the plaintiff's land as well as the defendant's land and prepared a report based on his findings on the ground vis a vis the title documents.

13. The Surveyor's report was adopted and produced as Plaintiff's exhibit 4. PW2 testified that the disputed portion measures 2.036 hectares. He stated that Land parcel number KERICHO/KIPSONOIS.S/361 measures 43 hectares on the title while the ground area is 42.913 hectares. The defendant's parcel title number KERICHO/KIPSONOIS.S/561 is 23.1 hectares on the title while on the ground it measures 20.38 hectares. He stated that according to his findings the disputed portion of 2.06 hectares belongs to the defendant.

14. At the close of the plaintiff's case the defendant opted not to tender any evidence. Counsel for both parties also opted not to file any submissions.

#### **Issues for determination:**

15. Having considered the pleadings and evidence on record the following issues arise for determination:

- i) Whether the Plaintiff is the registered proprietor of the suit property
- ii) Whether the defendant has trespassed onto a portion of the suit property measuring 5 acres or thereabouts
- iii) Whether the plaintiff is entitled to the reliefs sought in the Plaintiff
- iv) Whether the defendant is entitled to the reliefs sought in the counterclaim

#### **Analysis and determination**

16. It is not in dispute that the plaintiff is the registered owner of land parcel no. KERICHO/KIPSONOI S.S/977. The plaintiff produced a copy of the title in his name. However, what is in dispute is whether the said parcel of land measures 10.99 hectares as indicated on the title deed. This is what has given rise to the plaintiff's claim that the defendant has trespassed on his land.

17. This leads me to the second issue which is whether the defendant has trespassed onto the plaintiff's land.

18. Clerk & Lindsell on Torts 18<sup>th</sup> Edition at paragraph 18-01 defines trespass as follows:

***“Any unjustifiable intrusion by one person upon land in possession of another.” ....Trespass is actionable at the instance of the person in possession and that proof of ownership is prima facie proof of possession”***

19. From the evidence on record it is clear that the plaintiff and defendant who share a common boundary have differed over where the said boundary lies. Whereas the plaintiff claims that the plaintiff's and defendant's land is separated by a stream, the defendant claims that the stream is on his land. The evidence of the Samuel Langat, the District Surveyor, Bomet who testified as PW1 and presented a report after taking the measurements of the suit land in relation to the defendant's land is crucial in determining where the boundary is. He stated as follows:

*“The disputed section measures 2.036 hectares. I have the records for KERICHO/KIPSONOI S.S/361. It measures 43 hectares but the ground area is 42.913 hectares. Land parcel no. KERICHO/KIPSONOI S.S/561 is 23.1 hectares while on the ground it is 20.38 hectares. According to my findings, if the disputed section is given to land parcel no. 361, it will have encroached on parcel number 561. Even if the disputed area is added to parcel number 561, it will be 22.416 which is still less than what is on the title. The disputed parcel belongs to parcel number 561.”*

20. From the foregoing, it is clear that the defendant has not trespassed onto the plaintiff’s land. Consequently, the plaintiff is not entitled to the prayers sought in the plaint as he has failed to prove his case on a balance of probabilities.

21. Turning to the Counterclaim, the defendant did not lead any evidence to prove that the plaintiff obtained his title by fraud. It is possible that the same may have resulted from a mistake when land parcel number KERICHO/KIPSONOI S.S/361 was sub-divided into KERICHO/KIPSONOI S.S/977, 978, 979 and 980 after which the plaintiff was given land parcel no. KERICHO/KIPSONOI S.S /977. PW2 was categorical that the disputed portion measuring 2.036 hectares belongs to the Defendant. I therefore find and hold that the defendant is the lawful proprietor of the 2.036 hectares currently registered in the plaintiff’s title number KERICHO/KIPSONOI S.S /977. Consequently, it is my finding that the defendant is entitled to have the said portion registered in his name and I invoke my discretion under section 80 (1) of the Land Registration Act, 2012 and direct that the register in respect of the suit land be amended accordingly. The said Section provides as follows:

Section 80 (1)

*“Subject to subsection (2) the Court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained made or omitted by fraud or mistake”*

22. In arriving at the said decision, I am guided by the case of **Mary Ruguni Njoroge V John Samuel Gachuma Mbugua & 4 Others (2014)eKLR Onguto J held as follows:**

*“ In my view the mistake referred to in section 80(1) includes both a slip like a typographical error and a substantive mistake like the registration of a wrong or erroneous name. In short the court wields powers equivalent to the registrar under section 79 of the Land Registration Act. A party seeking rectification may elect to attend before the land registrar or before the court and prompt the process of rectification of a title or register”*

23. In the instant case what the defendant seeks is in effect a rectification of the plaintiff’s title to reflect the correct acreage and I am persuaded that on the basis of the evidence on record the plaintiff’s title deed ought to be amended.

24. The upshot is that the plaintiff’s suit is dismissed with costs to the Defendant and judgment is entered for the defendant on the Counterclaim as follows:

- a) A declaration is hereby issued that the defendant is the lawful proprietor of 2.036 hectares comprised in land parcel number KERICHO/KIPSONOI S.S /977.
- b) The register in respect of land parcel number KERICHO/KIPSONOI S.S/977 be rectified to accord with (a) above).
- c) The Land Registrar, Bomet is hereby ordered to amend the title in respect of parcel no. KERICHO/KIPSONOI S.S/977 to reflect correct acreage within 120 days.
- d) The costs of the Counterclaim shall be borne by the plaintiff.

**Dated, signed and delivered at Kericho this 29<sup>th</sup> day of January, 2019.**

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**J.M ONYANGO**

**JUDGE**

**In the presence of:**

1. Mr. Nyadimo for Mr. Motanya for the Defendant
2. No appearance for the Plaintiff
3. Court Assistant - Makori