



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC NO. 449 OF 2017

(FORMERLY NAKURU ELC NO 214 OF 2014)

JOSEPH KAMAU KAHUNGU.....PLAINTIFF

VERSUS

JOHN KUNYIHA KAMAU.....1st DEFENDANT

KIMANI KUNYIHA2nd DEFENDANT

THE REGISTERED TRUSTEES, KENYA ASSEMBLIES

OF GOD CHURCH3rd DEFENDANT

DISTRICT LAND REGISTRAR-NYANDARUA.....4th DEFENDANT

COUNTY GOVERNMENT OF NYANDARUA5th DEFENDANT

JUDGEMENT

1. Before me for determination is a matter that was originally filed at the High Court of Kenya in Nakuru on the 23rd July 2014 as ELC Case No. 214 of 2014. Along with the Complaint, the Plaintiff also filed an application dated the 23rd July 2014 seeking for injunctive orders against the Defendants to restrain them from interfering with the suit parcels herein. Vide an order dated the 13th August 2014, interim orders were granted pending the hearing of the Application inter partes.

2. In the meantime, the 5th Defendant entered their appearance and defence on the 7th August 2014, the 1st and 2nd Defendants entered their appearance and defence on the 21st August 2014, while the 4th Defendant entered their appearance on the 1st October 2014 and their defence on the 19th January 2015.

3. Interim orders were extended on several occasions until the file was transferred to this court on the 15th May 2017 wherein on 3rd October 2017, by consent, counsel for the parties proposed that the case goes to full hearing on merits and that the status quo on the ground be maintained until the case is decided, an application that was accepted by the court which directed that parties do comply with the provisions of Order 11 of the Civil procedure Rules.

4. In the present case, the Plaintiff has sought for the following orders;

i. That an Eviction order to remove the 1st, 2nd and, 3rd, Defendants from land parcel No. Nyandarua/Ol Kalou Salient/2739, 3637, 3638, 3639, 3640, 3641, 3642, 3643, 3644 and 3645 through the auctioneers and/ or court Bailiffs.

ii. An order of permanent injunction restraining the 1st, 2nd, and 3rd Defendants from entering, remaining onto, dealing with or in any manner interfering with the Plaintiff's parcels of land No. Nyandarua/Ol Kalou Salient/2739, 3637, 3638, 3639, 3640, 3641, 3642, 3643, 3644 and 3645.

iii. An order lifting/removing/raising the restrictions placed on the Plaintiff's parcels of land No. Nyandarua/Ol Kalou Salient/2739, 3637, 3638, 3639, 3640, 3641, 3642, 3643, 3644 and 3645

iv. Cost of this suit

5. The matter was certified ready for hearing on the 14th May 2018 wherein it proceeded with the Plaintiff's case on the 5th December 2018.
6. PW1, Joseph Kamau Kahungi testified to the effect that by virtue of a title deed he was issued on the 28th August 2009, he was the proprietor of the parcel of land No. Nyandarua/Olkalou salient/2739 measuring 3.38 hectares. The Copy of title was produced as Pf exhibit 1, the original having been surrendered after sub -division of the parcel of land.
7. He testified that upon procuring the suit land, and since he did not live there, he had built a house thereon and employed a caretaker to take care of the parcel of land upon which he farmed and kept animals.
8. That subsequently, in January 2014, after following the required procedure, he had sub-divided Nyandarua/Olkalou salient/2739 into 9(nine) parcels of land wherein he was issued the titles, in his name by the Land Registrar Nyandarua. He produced the titles as evidence in the following chronological manner:
 - i. Nyandarua/Olkalou salient/3640 PF Exhibit 2
 - ii. Nyandarua/Olkalou salient/3641 PF Exhibit 3
 - iii. Nyandarua/Olkalou salient/3642 PF Exhibit 4
 - iv. Nyandarua/Olkalou salient/3643 PF Exhibit 5
 - v. Nyandarua/Olkalou salient/3644 PF Exhibit 6
 - vi. Nyandarua/Olkalou salient/3645 PF Exhibit 7
 - vii. Nyandarua/Olkalou salient/3637 PF Exhibit 8
 - viii. Nyandarua/Olkalou salient/3638 PF Exhibit 9
 - ix. Nyandarua/Olkalou salient/3639 PF Exhibit 10
9. He testified that during the week of 14th July 2014- 21st July 2014, he had been called by his care taker who had informed him that his neighbors, the 1st and 2nd Defendants herein, had destroyed his fence and cut down the trees he had planted on the suit land, wherein they had proceeded to build their houses.
10. That he had later established that the Defendants had taken about 1 acre of land, uprooted the crops he had planted thereon, without permission or notice and that why he had filed suit seeking an order from the court restraining the Defendants from interfering with his land.
11. He was referred to photographs in item No 10 on his list of documents wherein he testified that the photographs showed how the 1st and 2nd Defendants, who were his neighbors, had trespassed on his land and built houses thereon. The photographs were produced as Pf exhibit 11 (a – l)
12. He further testified that both the Defendants did not show him any documents that had given them the right to invade his land.
13. He testified that the Defendants had been his neighbors for about 5 years before they invaded his land. That after an order of injunction had been issued by the court, they had vacated from the suit land leaving behind their structure standing.
14. That he now uses the 1 acre to farm and the fence is still intact. That there was a big tree that shows the boundary between his land and the Defendant's land and that they had never had any boundary dispute with the Defendants herein and neither had he been summoned by any surveyor to sort any boundary issues nor had he been sued in court by the either of the Defendants.
15. That all he sought for from the court was an order of injunction to issue to both the 1st and 2nd Defendants injunctioning them from interfering with his land and further that they be evicted from his land as well as they be ordered to pay costs for this suit. That he also sought for orders that the structures left on his land be removed from thereon at the Defendants' cost.
16. When referred to item No 11 on their list of documents, the Plaintiff testified that he recognized it as the area map which was signed by District Surveyor. That the same showed the original land No. 2739, and also parcel No 2740 which has a separate title. That he had not received any map that amended the acreage on his land. He produced the map be as Pf exhibit No 12.
17. He also identified item No 12 on their list of documents as a mutation form which showed that his land was 3.38 hectares. He produced the same as Pf exhibit 13.
18. The witness was referred to paragraph 6 of the 2nd Defendant's statement of defence, to which I shall produce for the benefit of this judgment.

‘That the surveyors erroneously indicated in the mutation dated the 3rd April 2009 that the remaining portion (Nyandarua/Olkalou Salient/2739) which was sold to the Plaintiff was to measure 8.3 acres (3.3 hectares) instead of 3.195 hectares (7.895 acres). The surveyor’s arithmetic error therefore is to blame for the controversy herein.’

19. He testified that the Defendant had not sued the District surveyor and that if the issue was with the surveyor, it was not right for him to invade his land.

20. He testified that the 3rd Defendant had also trespassed on his land because he had built a church on his land. Further, that he had no lease agreement with the church to which effect he sought that the building the 3rd Defendant had put on his land be removed thereon.

21. That the 3rd Defendant had not filed their defence in this matter meaning that they had not disputed his claim. That he had sued the 4th and 5th Defendants because they had placed a restriction on two of his parcels of land.

22. That as regards parcels No 3638 and 3637, restrictions had been placed on title on 19th March 2014 by the 4th Defendant pursuant to a letter dated the 6th March 2014 from the 5th Defendant directing them to do so. That neither notice nor the said letter was served upon him despite the fact that it was incumbent on 5th Defendant to inform him why they had placed the restrictions and yet he had no dispute with them. He produced the official search as Pf exhibit 13 and Pf exhibit 14 respectively.

23. That despite placing the said restrictions, the 5th Defendant did not communicate to him of their intention to repossess the two parcels of land and neither have they sued him nor tried to repossess the land. He sought for orders to issue to the 4th Defendant to remove the said restrictions and to pay costs for the suit.

24. On Cross examination by the 1st Defendant, the Plaintiff responded that he knew him through identification because he often saw him from a distance

25. On Cross examination by the 2nd Defendant, it was the Plaintiff’s response that the land that they had invaded was his. That according to the mutation, it clearly showed that the land was his and that he had the title to the 1 acre.

26. When Cross examined by the 4th Defendant, the Plaintiff testified that he had come to learn about the restriction after somebody had sought him out so as to purchase the plot. He had thus conducted a search on the plot wherein upon the discovery of the restriction, he had filed the present case after consulting with his Counsel. That the Land Registrar had no right to place a restriction on his land without informing him.

27. On re-examination, the Plaintiff was categorical that the 1 (one) acre was compressed in the original title. That the 1st and 2nd Defendant’s house had been built on the 1 acre. That when the restriction was placed on his land, he was not given prior notice as is expected. That the restriction could not stay on his title forever. The letter seeking for the placement of the restriction had been drawn by the Country Government the 5th Defendant herein.

28. The Plaintiff thus closed his case wherein Counsel sought to replace the original titles with copies. The court obliged him and after comparing the original title deeds with copies, returned the original titles to the Plaintiff for safe keeping

Defence case

29. DW 1, John Kunyiha Kamau in his defence, testified that he did not know why the Plaintiff had filed suit against him. That he had no relation with the Plaintiff for he had his own land being Parcel No. 2740 measuring 1 acre and that he had not invaded anybody’s land. He sought for costs from the Plaintiff claiming that he had sued him on a matter he was not aware of. He also asked that the court decides the case based on the truth and to show him the boundary between his land and the Plaintiff’s land so as to avoid misunderstanding. That the Plaintiff had been using his 1 acre of land for 5 years for which reason he sought for costs.

30. Upon being cross examined, the 1st Defendant stated that his parcel of land was No. 2740, land which he had lived on since purchasing it on a date he could not remember. That John Ndirangu was a neighbor on his right and his land was between Ndirangu’s land and the Plaintiff’s land.

31. He confirmed that a surveyor had showed him the piece of land where he had built the house depicted in the photograph produced as an exhibit by the Plaintiff. That further, he had not informed the Plaintiff before calling the surveyor. He also stated that the said Ndirangu had not asked him to move from where he used to live, onto the Plaintiff’s land.

32. When examined by court, the Defendant stated that when the surveyor was summoned, he had gone on the suit land to solve a boundary dispute. That the Plaintiff had not responded to a letter written by the surveyor summoning him to attend the meeting. He confirmed that he did not have a copy of the letter so mentioned. He informed the court that he now lived in Molo while his neighbor lived on the suit land.

33. The 2nd Defendant, DW2, David Kimani Kunyiha testified that he used to live in Molo with his father before his father bought the suit land herein. That he had subsequently build the house depicted in the photographs produced by the Plaintiff as exhibits, wherein he had moved there with his family.

34. That later their neighbor had informed them that they had trespassed on his land. Parties had then gone to the District officer’s office in

Olkalou where they had been advised to get a surveyor to go and inspect the boundaries. They had done as directed wherein they had gone to the site accompanied by the District Officer and surveyor who then measured the land.

35. That their neighbor Mr. Ndirangu, as well as the person who had sold the land were present when they visited the land where the surveyor had showed them their 1 (one) acre of land upon which he had built their house and settled thereon with his family.

36. Shortly, after building his house, he had been served with a letter and informed that he was on somebody's land. Subsequently, a case had been filed in court wherein he was evicted from the land through a court order. He thus sought that the court rescinds the said orders to enable him go back to the land parcel No. 2740.

37. The 2nd Defendant was cross examined wherein he confirmed that indeed he had built the house depicted in the photograph but that he had not removed the fence. That upon arrival from Molo, after his father bought the land, he had engaged himself with casual work wherein he had leased a house from another neighbor who was not Mr. Ndirangu.

38. That it had been Mr. Ndirangu who had informed them that they had built on his land wherein they had engaged a surveyor. That they had not lived on the suit land for a long time.

39. That there had been no boundary dispute between them and Mr. Ndirangu. That when they left Mr. Ndirangu's land, they had built on the suit land which was not the Plaintiff's land. That after being evicted by the court, he moved to Kapten. He also confirmed that the trees planted on the fence still existed.

40. The witness remained silent when asked if he had any document to show the amendment of the map. He stated that he had also no document to show that the parcel of land was visited by the surveyor or any government official.

41. The Hon Attorney General elected not to call any witness which thus marked the defence case as closed.

42. Counsel for the parties submitted that by consent, since this matter involved laymen, they would not be filing their submission but take a date for the court to render its judgment.

Analysis and Determination.

43. I have considered the evidence on record as well as the evidence adduced in court. From the Plaintiff's evidence, land parcel No. Nyandarua/Olkalou salient/2739 measuring 3.38 Hectares, was registered in his name on the 28th August 2009 wherein he subdivided the said parcel of land into nine (9) portions resulting into parcels No. 3640-3645, and 3637-3639 and was issued with the titles to the resultant plots on the 24th January 2014.

44. That sometime in the year 2014, he had been informed that the 1st and 2nd Defendants had taken possession of 1 acre of his land wherein they had built a house thereon. That apart from trespass by the 1st and 2nd Defendant, the 3rd Defendant had also built a Church on his land whereas the 4th Defendant, through a directive by the 5th Defendant, had placed a restriction on two of his parcels of land being No. 3637 and 3638.

45. The evidence of the 1st and 2nd Defendants, who were father and son was to the effect that the 1st Defendant had bought parcel of land No 2740 on date he could not remember, wherein both he and the 2nd Defendant had taken actual possession up until when they were served with a court order evicting them. That wherein the 1st Defendant had gone back to Molo, the 2nd Defendant had re-allocated to Kapten.

46. That before this matter was escalated to court, they had had a boundary dispute wherein the surveyor had shown them their land, land which the Plaintiff now claimed formed part of his land.

47. The 3rd -5th Defendants offered no evidence in court although they had entered their respective defences.

48. The issues for determination herein thus flow as follows;

i. Whether the Defendants have illegally entered into the parcel of land owned by the Plaintiff (No. Nyandarua/Ol Kalou Salient 2739, 3637, 3638, 3639, 3640, 3641, 3642, 3643, 3644 and 3645) and denied the Plaintiff the exclusive rights and use thereof.

ii. Whether the Plaintiff deserves the orders of eviction against the 1st -3rd Defendants to remove them from the parcel of land known as No. Nyandarua/Ol Kalou Salient 2739, 3637, 3638, 3639, 3640, 3641, 3642, 3643, 3644 and 3645

iii. Whether the restrictions placed on the Plaintiff's parcels of land No. Nyandarua/Ol Kalou Salient/2739, 3637, 3638, 3639, 3640, 3641, 3642, 3643, 3644 and 3645 should be lifted/removed and or raised.

49. After hearing the evidence from both sides, I have agonized over why the Defendants who claimed to have been shown their land by a surveyor, would eventually end up on the Plaintiff's parcel of land.

50. I also considered the fact that both the Defendants herein are lay persons. That whereas the 1st Defendant filed his pleadings in person, the 2nd Defendant's pleadings were filed by Counsel. Subsequently, both Defendants represented themselves in court. At the hearing of the

case, the court noted that they were persons of poor means who could not articulate issues in their pleadings eloquently as there was no counsel to lead them. The result that their testimony was in summary form wherein they left out vital information.

51. To this effect therefore I have taken the effort try and juxtapose their pleadings as against their evidence so as to understand the matter better.

52. According to the court's record, on the 18th November 2014, my brother, Sila Munyao Judge observed that the two parcels of land herein being No. 2739 and 2740 had a combined acreage of 3.7847 hectares which was more than the 3.6 Hectares of the parent title No. 118. The court informed the parties of his observation to which by consent, they agreed to have both the Land Registrar Nyandarua and the surveyor, visit the suit land to establish the situation on the ground.

53. Since there was what looked like a conflict of boundaries, the court made orders and rightly so, to the effect that the two officers do visit the suit land with the purpose of identifying parcel No. 2470 on the ground and also to establish from the ground, the acreage occupied by the previous title No. 2739 (now subdivided.). Thereafter, they were to measure the acreage of the same and submit their report in court, giving an explanation why there was a difference in the acreage.

54. Because general boundaries are identifiable by using the existing physical features, and by interviewing the owners of the adjacent plots, the law requires disputes relating to such boundaries to be handled by the Land Registrar. Section 18 of the Land Registration Act states as follows:

“(1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel land have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.

(2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.

(3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary:

Provided that where all the boundaries are defined under section 19(3), the determination of the position of any uncertain boundary shall be done as stipulated in the Survey Act, (Cap. 299).

55. Section 20 of the same Act requires every proprietor of land to maintain in good order the fences, hedges, stones, pillars, beacons, walls and other features that demarcate the boundaries.

56. A report dated the 16th June 2015, was filed in court on the same date. On the 2nd November 2015, Counsel for the Plaintiff prayed for time to get a second opinion from a private surveyor. The court obliged him and directed that the said report be filed within 60 days from the date therein.

57. By 3rd October 2017, when this matter came before me, there had been no 2nd report filed. Counsel for the Plaintiff instead sought for the matter to proceed for hearing of the main suit and parties maintain the status quo (at this time the 1st and 2nd defendants had already left the suit land.) The matter proceeded for hearing. The report dated 16th June 2015 thus remained on record as uncontested.

58. I have considered the Land Registrar's report dated the 16th June 2015 as well as the attachment by the Land surveyor. The report was to the effect that:

‘The owners of Plot No. Nyandarua/Olkalou Salient/2739 and Nyandarua/Olkalou salient/2740 should adopt the area of their plots as shown in the surveyor's report.

The original owner of Plot No. 118 encroached into Plot No 117 when fencing his plot and hence subdividing a bigger area than the area of his plot No. 118’

59. As stated earlier, what is in contention, is how the 1st -2nd Defendants came into possession of the suit land. Whereas the Plaintiff states on one hand that the Defendants are not legally in occupation of 1 acre of the suit land and therefore ought to be evicted from therein, on the other hand, both the 1st and 2nd Defendants have laid claim to 1 acre of the suit land stating that they are legally in occupation of the same by virtue of having purchased it and having been issued with a title deed to the same.

60. Since the Defendants here, being laymen, could not express themselves clearly, by virtue of the provisions of Section 1A of the Civil Procedure Act, I have perused through their defence and the attachments therein.

61. It is clear from the 1st Defendant's defence and the Plaintiff's exhibit No. 13 that parcel No. 2739 measuring 3.195 hectares (7.8950 acre) and parcel No 2740 measuring 0.4047 hectares (1 acre) respectively, were subdivisions of Plot No 118 which measured 3.6 hectares (8.89 acres), the proprietor having been one Barnaba Yusuf Kipgeny.

62. It is further clear that the 1st Defendant subsequently bought parcel No. 2740 measuring 0.4047 hectares approximately 1 Acre on the 7th

November 2008 from its registered owner Yusuf Kipngeny Barnaba and took possession of the same.

63. Vide the Plaintiff's evidence, he acquired parcel No. 2739 which he sub divided into 9(nine) plots giving rise to plots No. 3637, 3638, 3639, 3640, 3641, 3642, 3643, 3644 and 3645 to which he has lay claim that the Defendants have encroached.

64. Going by the copies of title deeds that the Plaintiff produced, there is no dispute that he is the registered proprietor of land parcel No. Nyandarua/Olkalou Salient/2739 which he sub divided into 9(nine) plots giving rise to plots No. 3637, 3638, 3639, 3640, 3641, 3642, 3643, 3644 and 3645.

65. It is also not in dispute that the 1st Defendant herein is the registered proprietor of land parcel No. Nyandarua/Olkalou Salient/2740 having been issued with his title on the 30th December 2013 as per the annexed documents to his defence.

66. I have however considered the fact that after the court ordered for the visit to the suit land, Counsel for the Plaintiff was served with the boundary dispute's summons as per the affidavit of service dated the 9th June 2015 but failed to attend the said meeting. His absence which was also noted in the Registrar's report dated the 16th June 2015 and confirmed by the 1st and 2nd Defendants' testimony in evidence.

67. Pursuant to the said site visit, and the remarks made by the Land Registrar to the effect that owners of Plot No. Nyandarua/Olkalou Salient/2739 and Nyandarua/Olkalou salient/2740 should adopt the area of their plots as shown in the surveyor's report and further that the original owner of plot No. 118 encroached into plot No. 117 when fencing his plot hence subdividing a bigger area than the area of his plot Number 118. I have also gained sight of the said surveyor's report which was framed as follows;

Having established the above boundaries, it was revealed that the fencing of parcel No. Nyandarua/Olkalou Salient/2739 had covered almost the entire parcel No. Nyandarua/Olkalou Salient/2740 as per the sketch map.

The area of parcel No. Nyandarua/Olkalou salient/2739 as fenced on the ground was also bigger than the registered area which area was summarized via tabulation to wit contrary to the acreage registered as 3.38.hectares the area covered on the ground was 3.69 hectares thus exceeding its acreage by 0.31 hectares.

68. Needless to say therefore that contrary to the statement by the Plaintiff that the 1st -2nd Defendants had encroached on his land, it was actually he who had encroached on their parcel of land, a fact which he concealed when he testified.

69. The land Registrar, having prepared his report pursuant to the provisions of *Sections 18 and 19 of the Land Registration Act*, which empowered him to fix boundaries, and thereby having sorted out the dispute between the Plaintiff, the 1st and 2nd Defendants, the Plaintiff ought to have acted as by the recommendation in the report dated the 16th June 2015.

70. The Plaintiff never sought to review or reverse the findings of the District Land Registrar Mr J. W Karanja, who was/is legally mandated to handle issues of boundary disputes.

71. Once the Land Registrar had made his decision and filed a report with the Court, the only way that decision could be challenged was through *Section 86 (1) of the Land Registration Act 2012 (or Section 149 of the repealed Registered Land Act.)*

Section 86 (1) of the Land Registration Act 2012 is wide in scope in that apart from the Registrar, it also allows "any aggrieved person" to seek the opinion of the Court. It reads:

"If any question arises with regard to the exercise of any power or the performance of any duty conferred or imposed on the by this Act, the Registrar or any aggrieved person shall state a case for the opinion of the Court and thereupon the Court shall give its opinion, which shall be binding upon the parties"

72. The review of the decision of the Land Registrar could therefore only be considered by this Court. There having been no review of the decision filed, The Land Registrar's decision and finding in his report dated the 16th June 2015 therefore still stands.

73. I find that the Plaintiffs' case is also caught up by the equitable maxim that he who comes with into equity must come with clean hands. The Plaintiff seeks for equity before the court yet he has not demonstrated that his past record in dealing with the Defendant's parcel of land had been clean. He cannot therefore be entitled to the reliefs so sought.

74. I am satisfied the land registrar and the surveyor duly exercised their mandate under the provisions of the Land Registration Act, 2012. Their report is well supported and I accept their finding that they confirmed the existing boundaries of land parcels **2739** and **2740** on the ground and that there was no encroachment by the Defendants on the Plaintiff's land parcel on the contrary the encroachment was by the Plaintiff. I accordingly adopt the land registrar's and surveyor's report dated 16th June, 2015 as judgment of the court.

75. In the circumstances, I find that the Plaintiff has not established on a balance of probabilities that he deserves the orders sought, the court having found that the fencing of parcel No. Nyandarua/Olkalou Salient/2739 had covered almost the entire parcel No. Nyandarua/Olkalou Salient/2740, and further that the area of parcel No. Nyandarua/Olkalou salient/2739 as fenced on the ground was also bigger than the registered area, it therefore follows that the titles that the Plaintiff holds do not tally with the acreage of his land on the ground and as such the same needs to be amended. To this effect, I direct as follows;

76. That since there is a fixed boundary between the original parcels of land No. Nyandarua/Olkalou Salient/2739 and No.

Nyandarua/Olkalou Salient/2740 as per the said report, the District Land Register- Nyandarua is herein directed to cancel the Plaintiff's title No. Nyandarua/Olkalou Salient/2739 alongside the resulting titles upon subdivision being titles No. Nyandarua/Ol Kalou Salient/ 3637, 3638, 3639, 3640, 3641, 3642, 3643, 3644 and 3645 all inclusive and held by the Plaintiff, within the next 30 days. Thereafter, he shall re-issue him with fresh titles depicting the proper acreage of his parcel of land.

77. The Plaintiff's Plaint dated 23rd July, 2014 is dismissed with costs.

Dated and delivered at Nyahururu this 28th day of January 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE