



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 202 OF 2015

JOYCE AJWANG AGONYO.....PLAINTIFF

VERSUS

PITALIS OINDO.....DEFENDANT

JUDGEMENT

1. Joyce Ajwang Agonyo, the Plaintiff, sued Pitalis Oindo, the Defendant, through the plaint dated 30th July 2015, seeking for the following prayers;

i. "Permanent injunction compelling the Defendant, his agents, heirs, servants and/or employees to vacate the Plaintiff's land Registration No. Kisumu/Karateng/662 and permanently restrain the Defendant, his agents, heirs, servants and/or employees from trespassing into Land Registration No. Kisumu/Karateng/662 whatsoever.

ii. Costs of the suit.

iii. Interest on (ii) and (iii) above."

The Plaintiff avers that she has been the sole registered proprietor of Land Parcel No. Kisumu/Karateng/662, the suit property, measuring 1.7 hectares at all material times, while the Defendant is the sole registered proprietor of Kisumu/Karateng/678 that borders her land to the north. That the Defendant has without her consent forcefully taken and cultivated the upper part of her land, and cut down mature trees thereon. That the Defendant's action amounts to infringing on her constitutional right to property and has denied her the use of her property to earn income. That the numerous interventions by the County Administrators and District Surveyor have been met with violent reaction by the Defendant and hence this suit.

2. The Defendant opposed the Plaintiff's claim through his statement of defence dated the 11th September 2015, and filed on the 2nd December 2015, in which he among others, and in the alternative, averred that the dispute between him and the Plaintiff had been resolved by the District Land Surveyor Kisumu during the site visit on the 23rd April 2013.

3. The Plaintiff testified as PW1. She produced a copy of the title deed for Kisumu/Karateng/662, issued on the 24th September 2007, in her name as exhibit. She also produced Survey Diagram No. 11 of Karateng Registration Section as exhibit. The diagram shows the position of the Plaintiff's parcel, Kisumu/Karateng/662, and that of the Defendant, Kisumu/Karateng/678, to the north and the marked disputed portion. The Plaintiff testified that when the Defendant trespassed onto her land, she reported to the District Surveyor who came to confirm the two parcels' boundaries, but the Defendant and his son caused chaos. The Surveyor prepared a report dated 26th April 2013, which the Plaintiff produced as exhibit. The Plaintiff prayed for an order for the Surveyor to confirm the boundaries and acreage of encroachment plus costs. Answering questions, the Plaintiff stated that the Defendant had removed the boundary marks between their parcels and started using a portion of her land. That the Defendant cut the trees that were on the boundary and burnt charcoal. That she does not know the acreage of the portion of her land that the Defendant has encroached onto, but it could be about two acres.

4. The Defendant testified as DW1. He produced a copy of a certificate of search as exhibit, showing that Kisumu/Karateng/678 that measures 0.8 hectares, was registered in his name on 20th April 1977. He confirmed that Kisumu/Karateng/662 that borders his, belongs to the Plaintiff. That he did not have a boundary dispute with the Plaintiff's late father, but has one with the Plaintiff and that Surveyor had come and taken measurements and made the report that PW1 produced. That his land is 0.8 hectares and has not encroached onto the Plaintiff's land and therefore the Plaintiff's suit should be dismissed with costs. In cross-examination, DW1 stated that the Surveyor report confirmed that the portion of the land the Plaintiff claimed to be hers, was part of his land. He denied encroaching onto the Plaintiff's land after the demise of her brother in 2005. That the finding of the Surveyor was that there was no boundary dispute but a claim for land by the Plaintiff.

5. The learned Counsel for the Plaintiff and the Defendant field their written submissions dated the 29th October 2018 and 27th March 2017

respectively.

6. The following are the issues for the court's determinations;

- a) Whether the Plaintiff has presented sufficient evidence to show that the Defendant had encroached onto her land and by what acreage.**
- b) Whether eviction and injunction orders should issue against the Defendant.**
- c) Who pays the costs.**

7. The Court has carefully considered the pleadings by both parties, oral and documentary evidence by PW1 and DW2, written submissions by both counsel and come to the following determinations;

- a) That there is no dispute that the Plaintiff has been the registered proprietor of Kisumu/Karateng/662 since the 24th September 2007, while the Defendant has been the registered proprietor of Kisumu/Karateng/678 since the 20th April 1977.
- b) That there is also no dispute that the two parcels, Kisumu/Karateng/662 and 678, border each other with the latter positioned on the upper part.
- c) That there is also no doubts that the Plaintiff had lodged a boundary dispute against the Defendant in respect of the two parcels to the District Surveyor, who prepared his report dated the 26th April 2013, which the Plaintiff produced as exhibit 3. That it is however strange that the Plaintiff claimed not to know the contents of the report that she went on to produce as exhibit, while she has counsel on record who definitely could have briefed her on its contents. That the said Surveyor's report contains two findings as reproduced herein below-

1. "The Proprietor of parcel 662 is claiming part of parcel 678 which is a land claim and not a dispute.

2. The correct location of the ground was shown to the residents. The exercise was concluded satisfactorily."

d) That from the findings by the Surveyor in the report produced as exhibit 3 by PW1 as shown above, the Plaintiff was claiming a portion of land, which according to the Surveyor fell onto the Defendant's land. That the Plaintiff has also produced the survey diagram No. 11 for Karateng Registration Section, on which she has marked a portion of her land which she claims the Defendant has encroached onto. That as the Surveyor's Report does not disclose whether the Land Registrar was involved in the exercise leading to the said report, it is only fair that before the court issues its final determination, the matter be referred to the County Land Registrar and Surveyor to visit the two parcels and confirm their acreage on the ground; the correct boundary position between the two parcels; whether any of the parcels has encroached onto the other, and if so, by what acreage. That thereafter, the report be filed with the Court before final orders can be issued. The Court therefore finds that the Plaintiff has established the existence of a boundary dispute between her parcel and that of the Defendant. That the dispute could have been resolved by the Land Registrar had the matter been referred there by the parties. That it is only fair and just that the matter of the boundary position be resolved by the Land Registrar.

8. That accordingly, and in view of the findings above, the Court orders that before the final orders of the Court can be issued, the County Land Registrar and Surveyor do visit land parcels Kisumu/Karateng/662 and 678 and do the following;

- i. Establish the correct ground boundary between the two parcels, indicating whether any of the parcels has encroached onto the other, and by what acreage.**
- ii. Confirm the ground acreage of each of the two parcels.**
- iii. File their report with the Court in sixty (60) days.**
- iv. That both parties share equally the County Land Registrar's and Surveyor's fees.**
- v. Each party be at liberty to be present and or be represented by a private surveyor.**

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 27TH DAY OF FEBRUARY 2019

In the presence of:

Plaintiff 224Present

Defendant Absent

Counsel Mr. Otieno D for Anyumba for Plaintiff

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE