



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT KERICHO

E. L.C CASE NO.151 OF 2015

**GLADYS KOSKEY (The administrator of the estate of
Elijah Kimalael Koskey- deceased).....PLAINTIFF**

VERSUS

BENJAMIN MUTAI T/A MYLON PETROL STATION.....DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff has instituted this suit in her capacity as the widow and administrator of the estate of Elijah Kimalael -deceased. In her Plaint dated 11th August 2010 she claims that the Defendant has trespassed on her property known as L.R No.21880 situate at Kapkatet Market, Kericho. As a result of the alleged trespass she seeks the following reliefs;

1. *An injunction restraining the defendant, his servants, workmen and/or agents from entering on and/or erecting or causing to be erected thereon any structures or in any way interfering with the plaintiffs use and enjoyment of the plaintiff's property L.R. 21880 at Kapkatet Market.*
2. *An order of eviction from the suit premises L. R. 21880 at Kapkatet market to be supervised by the Officer Commanding Litein Police Station.*
3. *Damages,*
4. *Interest*
5. *Costs and any other relief deemed fit.*

2. In his Defence dated 28th August 2010 the Defendant denies the Plaintiff's claim against him and prays that the Plaintiff's suit be dismissed with costs.

3. After disposing of some interlocutory applications, the suit was set down for hearing on 16.1.2018. The Plaintiff testified and closed her case. She however suggested that the court visits the suit property in the presence of the District Surveyor in order to ascertain the position on the ground. The defendant then testified after which the court visited the suit property. The surveyor then prepared a report of the site visit and produced it in court.

Plaintiff's case:

4. The Plaintiff testified that she was married to the late Elijah Kimalael Koskey. After his demise on 13.5.2005 she obtained a Grant of Letters of Administration on 9.10.2008. She produced a copy of the Certificate of Confirmation of Grant as Plaintiff's Exhibit 2. It was her testimony that before his demise, the late Elijah Kimalael Koskey had applied for a plot at Kapkatet Market with the intention of constructing a petrol station. He was issued with a letter by the Litein Urban Council indicating that the Council had no objection to the plot being issued to him. He was subsequently issued with an allotment letter date 1.9.94 with a Part Development Plan attached to it. After meeting the relevant conditions, a Certificate of Grant No. I.R N. 6155 also known as L.R No. 21880 was issued in the name of the deceased on 3.8.2005.

5. The Plaintiff testified that sometime in 2005 while awaiting the issuance of the certificate of title, she visited the suit property and

discovered that the Defendant had built a petrol station on the upper side of her plot. She reported the matter to the Litein Urban Council who in turn invited both parties to meet at the site but the Defendant did not show up. This is what prompted her to file this suit. She engaged the services of a private surveyor who confirmed to her that the Defendant had encroached on her plot. However, the surveyor did not indicate to what extent the Plaintiff's land had been encroached as he did not take any ground measurements.

6. Upon cross-examination the Plaintiff stated that she had complied with the necessary conditions including payment of annual ground rent. She stated that she was not aware that Litein Urban Council had altered its development plan. She said she was not aware that the Defendant had applied for the same plot as hers and received clearance from the Ministry of Lands. She confirmed that according to the Certificate of title her plot measures 0.1497 hectares.

Defendant's case

7. The Defendant testified that sometime in the year 2002 he applied for a plot from Litein Urban Council and he was issued with a letter of allotment for plot no. 260. He subsequently paid for the said plot, obtained approvals from the relevant authorities and constructed a petrol station called Mylon petrol Station which is in operation to date. He produced the letters from Litein Urban Council, an extract of the minutes of the Council showing that he was the allottee of plot No. 260, payment receipts and building approvals for the construction of a petrol station.

8. He testified that sometime in 2009, the Plaintiff accused him of encroaching on her land and stormed into his petrol station and broke some windows. This culminated into a criminal offence whereby the Plaintiff was charged with malicious damage to property. He stated that the dispute was brought to the attention of the Town Clerk who summoned the Plaintiff and defendant to his office to resolve the matter but the Plaintiff did not turn up. The Town clerk then instructed a surveyor to conduct a survey of the plot. The surveyor's report and sketch plan were then presented to the Town Planning Education and Social Services Committee. According to the minutes of the meeting of the said committee held on 21.6.2012 the committee which were produced as DEX 13, the meeting recommended that since the Mylon Petrol Station and the proposed Source petrol station existed on two different plots separated by a 14 metre public road their boundaries should be indicated. He denied that he had encroached on the Plaintiff's land as she is occupying more land than what is indicated on her title. He admitted that he did not have a title deed yet but the Permanent Secretary Ministry of Local Government had written a letter dated 19.11.2007 approving the issuance of a title deed for his plot.

9. After the Plaintiff and the Defendant had testified it was agreed by both parties that the court visits the site to confirm the situation on the ground. The site visit was conducted on 9.7.2018 in the presence of the District Surveyor, Bureti. The surveyor took the ground measurements of the suit land and prepared a report which he produced in court as DEX 14. The Surveyor, Patrick Mutai, who testified as DW2 stated that that no actual ground survey had been undertaken at the time of partitioning parcel no. LR 21880 as the survey was done graphically. As a result, the ground measurements do not tally with what is on the title or deed plan. Whereas the Plaintiff's title shows that L.R No. 21880 measures 0.1497 hectares which is approximately 0.370 of an acre, the ground measurements indicates that she is occupying 0.238 hectares which is approximately 0.6 acres. On the other hand, the letter of allotment shows that she was allocated 0.2876 hectares or 0.711 acres. Therefore, the Plaintiff's property on the ground exceeds what is on her title by 0.0883 hectares or 0.2 acres. He stated that plaintiff's land and Mylon Petrol station are distinct and are separated by a 14 metre and 12 metre public road. According to his findings the letter of allotment did not take into account the existing structures namely the stadium, Post office and a public road yet these were included in the plan attached to the allotment letter and title deed. He concluded that there was no encroachment as the land occupied by the Plaintiff is larger than what is on her title.

Issues for Determination.

10. From the pleadings and evidence on record, the following issues emerge for determination:

- a) Whether the parcel of land known as L.R No. 21880 is the same as plot no. 260 Kapkatet market.
- b) Whether the Defendant has trespassed on the Plaintiff's property known as L.R No. 21880
- c) Whether the Plaintiff is entitled to the reliefs sought.

Analysis and Determination

11. It is not in dispute that L.R No. 21880 is registered in the name of Elijah Kimalal Koskey. What is in dispute is whether this parcel of land is the same as plot No. 260, Kapkatet market.

12. Learned counsel for the Plaintiff has correctly submitted that the Defendant did not raise the issue of allotment of his plot in his defence nor did he file a counterclaim to challenge or nullify the Plaintiff's title. However, the issue of whether the L.R No.21880 is the same as plot no. 260 is critical in determining whether or not the Defendant has trespass onto the Plaintiff's land.

13. It is trite law that parties are bound by their pleadings but where parties have canvassed an issue and left it to the court, the court can pronounce judgment on it although it was not pleaded. This was so held in the case of **Odd Jobs V Mubia 1970 EA 476** where the court stated as follows:

“A court may base its decision on an un-pleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision”

14. In the instant case, although counsel for the Plaintiff objected to the production of the Defendant's letter of allotment for plot No.260, the

Defendant produced other documents to justify his occupation of the said plot and he was cross-examined on them. Furthermore, the Plaintiff was the first one to suggest that the court visits the suit property to confirm the situation on the ground. This entailed taking the measurements of the Plaintiff's plot as well as the plot occupied by Mylon Petrol Station which belongs to the defendant. Counsel for the Plaintiff also cross-examined the surveyor on the report he prepared after the site visit. It was therefore left to the court to determine if the two plots were separate and if so, whether the defendant had encroached on the Plaintiff's property.

15. The Plaintiff produced a certificate of title Grant No. IRN 6155 also known as L.R No.21880 measuring 0.1497 hectares. On the other hand, the Defendant claims to be the owner of plot no.260 Kapkatet market on which he has constructed a petrol station known as Mylon Petrol station. Both parcels were allocated by the Town Council of Litein. Even though the Defendant did not produce his letter of allotment, he claims to have been allocated plot no. 260 and he produced a letter from Litein Town Council dated 22.3. 2003 showing that the plot had been allocated to him. He also produced a letter from the Permanent Secretary Ministry of Local Government requesting the Commissioner of Lands to issue him with a title deed for the said plot. The minutes of the Litein Council's Town Planning Education and Social Services Committee meeting held on 21.6.2012 (DEX13) recommended that since the two plots are separate the boundaries should be fixed.

16. From the evidence on record it is my finding that L.R No.21880 and plot no. 260 Kapkatet market are different.

17. The second question is whether the Defendant has trespassed on the Plaintiff's land.

18. Clerk & Lindsell on Torts 18th 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. The Plaintiff's title indicates that L.R No. 21880 measures 0.1497 hectares which is approximately 0.37 acres. However, from the site visit it emerged that the area described in the deed plan and title are at variance. The area in the deed plan is described in the surveyor's report as:

“all that part of the land from the open field, the road and Mylon Petrol Station as shown in Fig 1B The total acreage would be approximately 0.1727 hectares”

20. According to the surveyor's report, the Plaintiff is occupying about 0.238 hectares which is fenced using concrete poles as shown on the sketch map (Fig 2) attached to DEX 14. This area exceeds the registered area by 0.0883 hectares. Mylon petrol station occupies a smaller portion measuring 0.069 hectares which is separated from the Plaintiff's property by a 14 metre road. If the portion occupied by Mylon Petrol station is added to the Plaintiff's property it would add up to 0.307 hectares which is way in excess of the acreage stated in the Plaintiff's title. In her testimony the Plaintiff stated that her property measures 0.1497 hectares and not 0.1727 hectares as reflected on the deed plan. The Plaintiff's claim of trespass is therefore based on the erroneous assumption that she is entitled to the entire area of 0.2876 hectares indicated on the letter of allotment or 0.1727 hectares as per the deed plan attached to the title yet the acreage on her title deed reads 0.1497hectares. Upholding the Plaintiff's claim of trespass against the Defendant based on a wrong deed plan would lead to an absurd and unjust outcome. It is therefore my finding that the Plaintiff's claim of trespass is unfounded.

21. Regarding the reliefs sought by the Plaintiff, the Plaintiff seeks an order of injunction to restrain the Defendant from interfering with the suit property, she also seeks an order of eviction and damages for trespass. Flowing from my finding that the Defendant has not trespassed on the Plaintiff's land she is not entitled to the orders sought.

22. The upshot is that the Plaintiff has failed to prove her case on a balance of probabilities and I therefore dismiss it with costs.

Dated, signed and delivered at Kericho this 22nd day of February, 2019.

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J.M ONYANGO

JUDGE

In the presence of:

1. Miss Wilby for Mr. Rombo for the Plaintiff
2. Defendant present in person
3. Court Assistant - Rotich