



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 123 OF 2011

NOLLY K. MUSANGO..... PLAINTIFF

VERSUS

PETER ODANGA 1ST DEFENDANT

THE ATTORNEY GENERAL (Sued As The Legal Representative Of

The District Land Registrar Kwale)..... 2ND DEFENDANT

JUDGEMENT

By a plaint dated 21st October 2011, the plaintiff averred that he was and still is the owner in possession pending registration of the parcel of land known as Ukunda/Kwale, a sub plot of Plot No. Ukunda/Kwale/367 measuring 0.079 hectares or thereabout together with all the developments thereon. The plaintiff states that the said plot was purchased from one, Rashid Ali Gaito who was the registered owner thereof and a transfer of the said land was initiated to the plaintiff's benefit upon payment of the purchase price. The plaintiff states that the 1st defendant initiated a survey to identify boundaries through the offices of the District Land Registrar, Kwale vide a letter dated 5/11/2010 which exercise was not impartial and heavily favoured the 1st defendant. The plaintiff states that the 1st defendant has unlawfully and without any colour of right hived off a portion of the plaintiff's land with the sole intention of depriving the plaintiff of it and continues to intimidate and or harass the plaintiff with regard to demolition of the developments thereon. The plaintiff states that by the aforesaid acts and or omissions the 1st defendant has wrongfully entered upon the plaintiff's land which acts and or omissions amount to trespass. By reason of the matters aforesaid, the plaintiff has been deprived of the use and enjoyment of the said land and its developments and has thereby suffered loss and damage. The plaintiff states that the 1st defendant threatens and intends, unless restricted by this honourable court by way of injunction and a directive to the district Land Registrar, Kwale to repeat the boundary identification exercise impartially, to continue and remain in wrongful occupation of the said land and trespass thereon and or demolish the developments thereon to the plaintiff's detriment. The plaintiff prays that judgment be entered against the defendants jointly and/or severally for;

- a. A declaration that the 1st defendant has encroached on the plaintiff's land parcel reference No. Ukunda/Kwale/4054.
- b. A declaration that the identification done on the boundaries was biased and a directive do issue directing the District Land Registrar, Kwale to repeat the exercise.
- c. A mandatory injunction do issue compelling the 1st defendant by himself, his agents, servants, representatives to forthwith vacate the plaintiff's parcel reference No. Ukunda/Kwale/4054.
- d. A permanent injunction do issue restraining the 1st defendant by himself, his agents, servants, representatives from trespassing and or in any manner whatsoever interfering with the plaintiff's peaceful and derivative enjoyment of the plaintiff's parcel reference No. Ukunda/Kwale/4054.
- e. General damages for trespass.
- f. Costs and interest.
- g. Any other relief the honourable court may deem fit and just to grant.

The 1st defendant testified that he is the registered owner of property Kwale/Ukunda/2882 measuring 0.34 HA together with all the developments thereon being within the fixed boundary of the parcel as demarcated by a wall. The defendant initiated a survey to identify

boundaries through the offices of the district Land Registrar Kwale. The 1st defendant avers that the boundaries of plot No. Kwale/Ukunda/2882 and the adjacent/adjoining parcels of land have been procedurally and lawfully ascertained and fixed by the District Land Registrar, Kwale. The 1st defendant further avers that the District Land Registrar notified all the owners of the adjoining parcels who with the assistance of the District Surveyor ascertained and fixed boundaries in the area. The 1st defendant avers that the plaintiff owner of parcel Kwale/Ukunda/4054 and parcel number Kwale/Ukunda/4053 were found to have entered, remained and interfered with the 1st defendant's parcel of land. The defendant avers that the plaintiff has come to court with unclean hands having knowingly put up structures and trespassed on the 1st defendant's property. The plaintiff has refused and or neglected to demolish the construction on the 1st defendant's property. By virtue of section 21 (4) of the Cap 300 this honourable court has no jurisdiction to entertain any action or other proceedings relating to dispute of boundaries of registered land nor to address itself, hear and or determine issues of boundaries and consequently the question of trespass herein. The 2nd defendant in their statement of defence stated that this suit was not merited and should be dismissed.

This court has carefully considered the evidence and submissions therein. The Land Registration Act is very clear on issues of ownership of land and Section 24(a) of the Land Registration Act provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

Section 26 (1) of the Land Registration Act states as follows:

“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

The law is clear that, the Certificate of Title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

This court in considering this matter referred to the case of Elijah Makeri Nyangw'ra –vs- Stephen Mungai Njuguna & Another (2013) eKLR where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. Hon Justice Munyao Sila in the case while considering the application of section 26(1) (a) and (b) of the Land Registration Act rendered himself as follows:-

“-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”

It is not disputed that, the plaintiff was and still is the owner in possession pending registration of the parcel of land known as Ukunda/Kwale, a sub plot of Plot No. Ukunda/Kwale/367 measuring 0.079 hectares and the 1st defendant testified that he is the registered owner of property Kwale/Ukunda/2882 measuring 0.34 hectares. On the issue of jurisdiction of this court, the 1st defendant has submitted that, by virtue of section 21 (4) of the Cap 300 this honourable court has no jurisdiction to entertain any action or other proceedings relating to dispute of boundaries of registered land nor to address itself, hear and or determine issues of boundaries and consequently the question of trespass herein. The plaintiff has not denied that dispute is a boundary one. The law applicable is to be found under section 18 and 19 of the Land Registration Act. Section 18 (2) thereof provides that;

“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”.

In the instant case I find that the Registrar has determined the boundary of which the plaintiff is dissatisfied hence this present suit. This court therefore has jurisdiction to determine the matter.

Section 19 (1) provides that:

“If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries”.

While section 19 (2) provides that:

“The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in

the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel”.

In the present case it has come out in evidence that, the plaintiff was invited for the identification of the boundaries schedule on 17th November 2010 at 10am (DEx10) and he was represented by Rashid Gaito (as per the minutes and ruling of the Land Registrar DEx 11). The exercise was conducted and the Land Registrar in his ruling and /report (marked DEx 11) found that the plaintiff owner of parcel number Kwale/Ukunda/4054 and parcel number Kwale/Ukunda/4053 were found to have encroached on the 1st Defendant’s parcel number Kwale/Ukunda/2882. The plaintiff testified he did not see any surveyor and does not agree with the boundaries fixed by the Land Registrar because he was not given time to talk.

In the case of **Andrew Marigwa vs Josphat Ondieki Kebati ELC Kisii No. 1163 of 2016** the Judge stated that:

“Recognizing the instant suit related to a boundary dispute which definitely the court lacked the technical ability to deal with, the court made a reference of the matter to the Land Registrar and the County Surveyor who are the persons mandated under the Act to deal with disputes relating to boundary. 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”. The court further stated that “From the observations and findings by the Land Registrar and the Surveyor there is in fact a need for the Registry Index Map to be amended to reflect the correct status as appears on the ground. The applicant by his application seeks an order that the Land Registrar’s and the Surveyor’s report be disregarded and the matter fixed for hearing. What would the court proceed to hear? The dispute would still remain a boundary dispute which the court cannot entertain under the provisions of Section 18(2) of the Land Registration Act, 2012. My view is that the Land Registrar’s reports have finally disposed of this matter. I hereby endorse the reports as judgment of the court and direct that the same be implemented”.

In the present case also, the court does not have the technical knowledge to determine the dispute and/or boundary. Section 18 and 19 of the Land Registration Act is clear that the resolution of boundary disputes has always been in the purview of the Land Registrar. It is only the Registrar who is mandated to do so and not the Surveyor. The Surveyor is only mandated to fix the boundaries and the Land Registrar makes a determination of the boundary dispute. Land Registrar’s Report dated 17th November 2010, is accepted and has dealt conclusively with the boundary dispute in question. I find no evidence of bias against the plaintiff by the Land Registrar. I find that the plaintiff has failed to prove his case on a balance of probabilities and I dismiss it with costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MOMBASA IN OPEN COURT THIS 29TH DAY OF MARCH 2019.

N.A. MATHEKA

JUDGE