



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 894 OF 2012

JACOB MWANZA INYUMBA.....PLAINTIFF

VERSUS

ELLAM NYAMBOKA ONDORE.....DEFENDANT

JUDGMENT

The matter was instituted by way of plaint. The plaintiff is the registered owner of land *parcel KAKAMEGA/LUMAKANDA/2061* measuring 2.05 Ha and the defendant is the registered owner of land *parcel No. KAKAMEGA/LUMAKANDA/2007*. These parcels lie next to each other and the plaintiff claims that the defendant has encroached on his land by fixing a new boundary. The plaintiff sought orders that the court declare the plaintiff the absolute proprietor of the land parcel known as KAKAMEGA/LUMAKANDA/2061 and issue a permanent injunction against the defendant.

The defendant filed a defence and counterclaim which was later amended. In the amended counterclaim the defendant/plaintiff averred that it was the plaintiff/defendant who had trespassed onto his parcel of land and altered the register at the lands office to defeat the record of the suit land. He sought an order for rectification of records and that the land registrar and land surveyor visit the parcels of land and ascertain the actual boundary between the two parcels.

The court ordered that the Kakamega District Land Surveyor visit the suit land and demarcate the boundaries between the parcels and submit the report to the court. This was as a result of the application dated 3rd July 2012.

The district surveyor visited the site on 20th March 2013 and filed the report on 22nd March 2013. The plaintiff and the defendant were present for the field visit. The findings of the report were that the owner of parcel no. 2061 (the plaintiff) had encroached onto *parcel No. KAKAMEGA/LUMAKANDA/2007*

On 5th November 2014, the court ordered that the District Surveyor and Land Registrar Kakamega proceed to the parcels and identify and re-establish the boundaries between the two parcels and further place beacons at the boundary points. The officers were also to draw a sketch showing the encroachment by the parties. The site visits were made on 28th October and 25th November 2015. The report was filed on 30th November 2015. The findings were that the owner of land parcel no. KAKAMEGA/LUMAKANDA/2061 had encroached on land parcel no. KAKAMEGA/LUMAKANDA/2007.

Upon perusal of the court record, there are documents filed as exhibits which give a history of the properties. More specifically, there was a title deed and transfer of land between William Kulova Mumani and Ellam Nyamboka Ondore of a parcel of land parcel no. KAKAMEGA/LUMAKANDA/2007 measuring 2.0 Hectares. There is also a title deed and transfer of land that evidence the fact that the Plaintiff was sold the land parcel no. KAKAMEGA/LUMAKANDA/2061 measuring 2.05 hectares.

It is apparent, from the reports by the registrar and surveyor, that the plaintiff encroached onto the defendants' property. The reports dated 20th March 2013, and 30th November 2015 both found that the land parcel no. KAKAMEGA/LUMAKANDA/2061 had encroached on land parcel no. KAKAMEGA/LUMAKANDA/2007.

The reports are enough evidence that the plaintiffs claim is unfounded and the plaintiff has encroached on the defendants' property. The encroached piece of land which has been hived off is clearly shown in the sketch maps provided with the reports.

With regards to the prayer for mesne profits, the Court of Appeal in the case of **Peter Mwangi Mbutia & Another v Samow Edin Osman [2014]**, **eKLR** was of the opinion that it was upon a party to place evidence before the court upon which an order of mesne profits could be made. The court stated as follows: -

“We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established.”

The defendant has not put forward any evidence upon which an order of mesne profits could be made and therefore the court should not award any mesne profits.

That the defendant’s claim against the plaintiff is therefore, and the court does hereby grant a declaration that the defendant is the absolute proprietor of the whole of that parcel of land known as KAKAMEGA/LUMAKANDA/2007 of land measuring 2.02 hectares and a permanent injunction restraining the plaintiff, his agents or servants from interfering with the defendant’s quiet occupation and use of the suit land is hereby granted.

The court further orders that the County Surveyor, Kakamega and the County Land Registrar Kakamega, do visit the two parcels of land and place the beacons permanently. Costs of the suit to the defendant.

Dated and delivered at Eldoret this 30th day of May, 2019.

A. OMBWAYO

JUDGE