



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC CASE NO. 22 OF 2018**

**(Formerly Nairobi HCCC NO. 1918 of 1994 and Machakos ELC Case 171 of 2009)**

**JULIUS MBUTHIA MAINA.....1<sup>ST</sup> PLAINTIFF**

**ANDRINE WANGARI MBUTHIA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**JANE GATHONI WAHOME.....1<sup>ST</sup> DEFENDANT**

**JALAL MOHAMED TAYEB.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

By a Plaint dated the 28<sup>th</sup> May, 1994 the Plaintiffs seek for the following orders against the Defendants:

- a) An injunction do issue restraining the Defendants singular and plural by themselves, agents, servants and/or employees or whatsoever they may be described from alienating, selling, disposing, offering for sale and/or in any manner interfering with the Plaintiffs' peaceable and quiet enjoyment of the land parcel number L.R Kajiado/ Olchoro – Onyore/ 1165 situated in Kajiado District.
- b) An order that the Defendants, by any of them, be forcefully evicted from and be bound to deliver vacant possession of all that parcel of land known as LR No. Kajiado/ Olchoro Onyore/ 1165 forthwith.
- c) A declaration that the Plaintiffs are the lawful owners of the suit premises as against the Defendants or any person taking title from them.
- d) Damages.
- e) Mesne profits
- f) Costs and interest on prayers above at such rates as the court may deem fair and just.

The Defendants filed their Defence dated 4<sup>th</sup> July, 1994 where they explained that about April, 1984 the Land Registrar Kajiado at the request of the registered proprietor of land title number Kajiado/ Olchoro Onyore/ 63 subdivided it into land parcel number Kajiado / Olchoro Onyore/ 1164 measuring 17 hectares and Kajiado/ Olchoro Onyore/ 1165 measuring 2.42 hectares which was registered in the Plaintiffs' names on 23<sup>rd</sup> February, 1988. They confirmed there is a mutation dated the 18<sup>th</sup> May, 1988 to that effect. They explain that Kajiado / Olchoro Onyore/ 1164 was subdivided on different dates and the Defendants can trace their respective portions of land Kajiado / Olchoro Onyore/ 3608 and Kajiado / Olchoro Onyore/ 3609 from it. The 2<sup>nd</sup> Defendant was registered owner of Kajiado / Olchoro Onyore/ 3608 on 21<sup>st</sup> May, 1992 while the 1<sup>st</sup> Defendant as proprietor of Kajiado / Olchoro Onyore/ 3609 on 21<sup>st</sup> May, 1992 respectively. They denied trespassing on the Plaintiffs land. Both Defendants confirm they took possession of their respective portions of land and fenced them. They contend that the Plaintiffs have unlawfully and without any colour of right made claims on nearly half of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's land. Further, a boundary dispute was reported to the Land Registrar for determination. They dispute the damage and loss claimed by the Plaintiff.

**Evidence of the Plaintiffs**

The Plaintiffs are the registered proprietors of the suit land measuring about 6 acres, which they purchased from JOHN MALEGONYO

MORIO after which they were issued with a title deed on 23<sup>rd</sup> February, 1988. They confirmed having obtained the consent of the Land Control Board before the land was transferred to them. PW1 stated that they were shown the land by the Surveyor who fixed beacons and planted sisal as a boundary. It was his testimony that in October, 1992 they were informed that two people had fenced their land. They discovered it was the Defendants who had fenced their land and they refused to move out despite being requested to do so. PW1 testified that he was seeking damages from the Defendants. Further, that the Defendants bought land after him but proceeded to fence their land yet they had not sold it to anyone. PW1 referred to a report dated the 25<sup>th</sup> October, 2007 which was filed in Court. PW1 reiterated in cross examination that the Defendants wrongly fenced their land and refused to vacate despite being directed by the Chief to do so. Further, they have been on the suit land todate.

### Evidence of the Defendants

The 1<sup>st</sup> Defendant as DW1 stated that she is the proprietor of land parcel number Kajiado/ Ol choro Onyore/ 3609 measuring 2.06 hectares, which she bought from OLE KIPANA in November, 1991. She explained that the original title was Kajiado / Olchoro Onyore/ 1391, which was subdivided into Kajiado / Olchoro Onyore/ 3608 and Kajiado / Olchoro Onyore/ 3609 respectively. She confirmed fencing her land after getting the title on 21<sup>st</sup> May, 1992. She denied trespassing on anybody's land and insists she fenced her land as per the survey. She confirmed that a Surveyor had visited the suit land in 2007 but she was not present and insists her land was vacant when she purchased it. She further stated that the 2<sup>nd</sup> Defendant's land is no. Kajiado / Olchoro Onyore/ 3608 and it borders her land. She further stated that there is a church on her land but she has not transferred land to a third party. It was her testimony that they used a government surveyor before purchasing her land and averred that she has no knowledge if the vendor showed them a wrong parcel of land. She did not know the person who sold to the Plaintiffs' land. She denied that her land had overlapped with the Plaintiffs' land Kajiado / Olchoro Onyore/ 1165. She explained that even though the Plaintiffs' have title, they do not know where their land is.

DW2 who was the 2<sup>nd</sup> Defendant confirmed being the registered proprietor of land parcel number Kajiado / Olchoro Onyore/ 3608 which he purchased from TUPANA OLE KURERU in 1992. It was his testimony that at the time of purchase, the land was vacant and he confirmed from the neighbours' including the local chief that the Vendor owned the land. He referred to the Mutation Form and stated that the original land was Kajiado / Olchoro Onyore/ 1391. He insisted he fenced his land based on the mutation sketch, denied trespassing on the Plaintiffs' land and had a permanent house on his land. He confirmed that the Chief told him to vacate the land but he refused to do so since he had his title deed. Further, he was directed to remove posts from the land but he declined. He confirmed the surveyor visited land parcel numbers Kajiado / Olchoro Onyore/ 1165; Kajiado / Olchoro Onyore/ 3608; and Kajiado / Olchoro Onyore/ 3609 and made a report. He was allowed to build on the undisputed portion measuring 2.4 hectares of the land and that 1<sup>st</sup> Plaintiff claims almost 4 acres of his land. He explained that the 1<sup>st</sup> Plaintiff's land measures 2.42 hectares and their title was issued on 23<sup>rd</sup> February, 1988 while his title was issued on 21<sup>st</sup> May, 1992. He clarified during re examination that by the time the Chief told him to remove the posts from suit land, no survey had been undertaken.

Both parties filed their respective submissions that I have considered.

### Analysis and Determination

Upon consideration of the pleadings filed herein, exhibits produced, parties submissions as well as testimonies of the witnesses, the following are the issues for determination:

- Whether the Defendants have trespassed on the Plaintiffs' land.
- Whether the Plaintiffs are entitled to the orders sought in the Plaint.
- Who should bear the costs of the suit.

As to whether the Defendants have trespassed on the Plaintiffs' land.

It was the Plaintiffs' contention that the Defendants have trespassed on their land Kajiado / Olchoro Onyore/ 1165, which fact the Defendants dispute. The 1<sup>st</sup> Defendant is the owner of land parcel number Kajiado / Olchoro Onyore/ 3608 while the 2<sup>nd</sup> Defendant is the proprietor of land parcel number Kajiado / Olchoro Onyore/ 3609. They confirmed that the two parcels of land were resultant subdivisions of Kajiado / Olchoro Onyore/ 1391, which could be traced to Kajiado / Olchoro Onyore/ 1164. Both Kajiado/ Olchoro Onyore/ 1164 and Kajiado/ Olchoro Onyore/ 1165 were resultant subdivisions of Kajiado/ Olchoro Onyore/ 63. As per the Surveyor's report dated the 23<sup>rd</sup> July, 2007, which was adopted in court by consent, the Surveyor stated as follows: ' **In May 1984 Mr. John Malengenyo Morio subdivided his parcel of land KJD/ Olchoro Onyore/ 63 into two portions Nos. KJD/ Olchoro Onyore/ 1164 of 17.0 Ha should be 7.24 Ha and 1165 of 2.42 Ha, which is situated at the south eastern corner of the parcel.....Note that the area of parcel KJD/ Olchoro Onyore/ 1198 was not 12.95 Ha as indicated. The real ground area was 3.35 Ha. In August, 1987 parcel KJD/ Olchoro Onyore/ 1198 was subdivided into six portions see (mutation dated 24/8/1987) this is where the problem started because the surveyor encroached in to parcel KJD/ Olchoro Onyore/ 1165 (see diagram No. 2 the red inked portion is an encroachment of parcel KJD/ Olchoro Onyore/ 1391 into 1165. ....CONCLUSION: It shows that the surveyor who subdivided parcel KJD/ Olchoro Onyore / 1198 was shown the wrong boundaries by the initial owner. The original owner Mr. John Malengonyo Morio should give his allottees (Kurraru) an alternative piece of land since he ignored the first survey at the expense of the new one.**

From the mutation it is clear the Plaintiffs' land Kajiado / Olchoro Onyore/ 1165 was 2.42 hectares which has remained the same todate. From the Surveyor's report, it is evident that the Plaintiffs' land which has remained intact was encroached upon by the Defendants whose land was a resultant subdivision of Kajiado / Olchoro Onyore/ 1198. I opine that the surveyor's report actually resolves the puzzle herein since all the parties in the dispute hold their respective titles to land. The Defendants insist that the Plaintiffs should seek indemnity from the vendor who sold them land since they are already in occupation of their respective parcels of land. Section 148 (2) of the Registered Land Act (repealed) which was the existing regime when the parties herein purchased their parcels of land states thus: ' (2) **As between a**

proprietor and any person from or through whom he acquired the land, no claim to indemnity shall be maintainable on account of any surplus or deficiency in the area or measurement above or below that shown in any other survey or above or below the area or measurement shown in the register or on the registry map, after a period of six months from the date of registration of the instrument under which the proprietor acquired the land.’ This Section is similar to section 85(2) of the Land Registration Act that provides as follows:’ (2) As between a proprietor and any person from or through whom the proprietor acquired the land, no claim to indemnity shall be maintainable on account of any surplus or deficiency in the area or measurement above or below that shown in any other survey or above or below the area or measurement shown in the register or on the cadastral map, after a period of six months from the date of registration of the instrument under which the proprietor acquired the land.’

In the case of **Munyu Maina..Vs..Hiram Gathiha Maina, Civil Appeal No.239 of 2009**, where the Appeal Court held that:-

**“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”**

From a reading of the above cited legal provisions as well as the Court of Appeal decision above and relating the same to the case at hand, I note it is the Defendants land that was a resultant subdivision of a defective survey. This in essence means that the Defendants are estopped from claiming a portion of the Plaintiffs’ land as they are the ones that purchased defective land and not the Plaintiffs’ whose land has always remained intact. The Defendants’ recourse lies on the vendor who sold them land and not on claiming a portion of the Plaintiffs’ land, which is an easier target. In the circumstances, I find that the Defendants have indeed encroached on the Plaintiffs’ land.

As to whether the Plaintiff is entitled to the orders sought in the Plaintiff.

Since the Plaintiffs purchased their land before the Defendants did so. Further, since I have held that the Defendants have actually trespassed on the Plaintiffs’ land, I find that the Plaintiffs are indeed entitled to the orders sought in the Plaintiff. The Plaintiffs however did not demonstrate what damages they have suffered as a result of the Defendants’ acts of encroached. Further , PW1 never provided evidence on the mesne profits they were claiming due to the Defendants’ occupying their land. However, since I had already held that the Defendants’ indeed trespassed on the Plaintiff’s land, I wish to refer to the case of **Duncan Nderitu Ndegwa v. KP& LC Limited & Another (2013) eKLR** where **P. Nyamweya J.** held that:-

**“...once a trespass to land is established it is actionable *per se*, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff’s right to use and enjoy the suit property occasioned by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants’ trespass”**

In being persuaded with this decision as well as the evidence herein, I find that the Plaintiffs have suffered damages as a result of the Defendants’ acts of trespass. The Plaintiffs were registered proprietors of the suit land in 1988 while the Defendants encroached on their land in 1992 and as denied them usage of a portion of the said land from 1992 to date. In the circumstance, I will proceed and award the Plaintiffs’ Kshs. 500,000 as general damages.

Who should bear the costs of the suit.

Since the Plaintiffs have been inconvenienced with the Defendants’ acts, I will award them costs of the suit.

It is against the foregoing that I find the Plaintiffs have proved their case on a balance of probability and proceed to enter judgment in their favour and make the following final orders :-

- a) The Plaintiffs be and are hereby declared the lawful owners of land parcel number L. R. No KAJIADO/ OLCHORO ONYORE/ 1165 as against the Defendants or any person taking title from them.
- b) The Defendants either by themselves, their employees, servants and/or agents are hereby permanently restrained from trespassing on, continuing being in occupation, purporting to sell, erecting structures and/or in any other manner interfering with the Plaintiff’s quiet possession of L. R. No KAJIADO/ OLCHORO ONYORE/ 1165
- c) The Defendants be and are hereby directed to vacate the portion of the Plaintiffs land parcel number L. R. No KAJIADO/ OLCHORO ONYORE/ 1165 within 90 days from the date hereof, failure of which they shall be forcefully evicted.
- d) The Plaintiffs be and are hereby awarded the sum of Kshs. 500,000/= as general damages for trespass;
- e) The Costs of the suit are awarded to the Plaintiffs.

**Dated signed and delivered in open court at Kajiado this 28<sup>th</sup> day of May, 2019**

**CHRISTINE OCHIENG**

**JUDGE**