



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT NAIROBI

CASE NO. 1407 OF 2013

MISHECK KERE KIRUNGO PLAINTIFF

VERSUS

JAMES KAMAU NJOROGEDEFENDANT

R U L I N G

1. The instant suit was brought by the Plaintiff vide apparently an unsigned and undated plaint filed in court simultaneously with an application for an interlocutory injunction dated 19th November 2013. In the suit the Plaintiff averred he was the registered owner of land parcel **Lari/Bathi/819** while the defendant was the registered owner of land parcel **Lari/Bathi/820**. The Plaintiff's complaint was that the defendant had encroached onto his land and had constructed a house that extended over the common boundary. The Plaintiff stated that both land parcels **Lari/Bathi/819** and **820** resulted from a subdivision of land parcel **Lari/Bathi/61**.

2. The Plaintiff in the suit sought an injunction restraining the Defendant from trespassing and from permitting water from the roof of his (Defendant's) house from escaping onto his parcel of land and/or otherwise interfering with the Plaintiff's possession and use of the land parcel **Lari/Bathi/819**. The Plaintiff also prayed for general damages.

3. The Defendant filed a replying affidavit in opposition to the Plaintiff's interlocutory application dated 27th November 2013. He denied that he had in any manner encroached onto the Plaintiff's parcel of land. He stated that the survey beacons placed by the surveyor were still intact and had not been tampered with. He averred that his house is wholly on his parcel of land and no roof was overhanging into the Plaintiff's land. He denied that rain water from his house's roof pours onto the Plaintiff's land. He stated the boundary of their respective parcels of land had been fixed by the Surveyor but the Plaintiff persists in making unsubstantiated claims of trespass against him. He maintained the Plaintiff was being unreasonable in making claims of trespass against him. The Defendant sought for an order preserving the status quo and prayed for a court supervised boundary alignment in regard to their respective parcels of land to resolve the issue once and for all.

4. The Defendant filed a statement of defence on 28th January 2014 and reiterated that he had not trespassed onto the Plaintiff's land and put the Plaintiff to strict proof.

5. The court upon hearing the Plaintiff's application for injunction inter partes rendered a ruling on 12th May 2014 and inter alia at page 5 of the ruling made the following observations:-

“It is not disputed in the present application that both the Plaintiff and Defendant are registered owners of their respective parcels of land. What is in dispute is the location of the boundary between the two parcels of land, and whether the defendant has encroached onto the Plaintiff's land. This is not a dispute that can be resolved by the photographic evidence that has been submitted by the parties but a survey and report to the court on the survey findings. It is also not a dispute that can be determined at this stage, and the Plaintiff's application in the circumstances can only be resolved on the basis of a balance of convenience.”

6. The Court proceeded to make an order for maintenance and observance of the prevailing status quo pending the presentation of a report by the Surveyor. The court made an order of reference to the County Surveyor in the following terms:-

“The County Surveyor, Kiambu County is hereby ordered to undertake a survey of the joint boundary between the parcels of land known as Lari/Bathi/819 and Lari/Bathi/820, and to prepare a report on the location of the beacons on the said boundary, and structures and crops or vegetation on the said boundary and any encroachment by the Plaintiff's and Defendant's structures and crops in this respect.”

7. In compliance with the order of reference, the County Surveyor visited the site on 30th July 2014 and the parties and their representatives were present. The County Surveyor filed a detailed report dated 5th August 2014 together with a sketch diagram explaining and detailing the findings on the ground. The surveyor as per the sketch diagram established and fixed the common boundary between the two parcels of land. The County Surveyor's report explained that as per the disputed existing boundary each of the parties had encroached onto the other's parcel of land. The existing disputed boundary was not straight while as per the mutation form which subdivided the original parcel **Lari/Bathi/61** the boundary was a straight line "A-G" as per the sketch. This is the boundary that the County Surveyor reestablished.

8. The parties, following the filing of the County Surveyor's report were not agreed on how the matter should be disposed of in the light of the report. Though the parties were in agreement the report resolved the issue of encroachment as the boundary was fixed, the Defendant was insistent that the Plaintiff had no reason to drag him to Court and he should for that matter be ordered to pay costs to him. The Court having regard to the positions taken by the parties in regard to the Surveyor's report, invited the parties to make written comments/submissions respecting the report to enable the Court make a ruling on the matter.

9. The parties filed their respective comments and submissions on the report which I have duly considered. I have equally perused and considered the report dated 5th August 2014 filed by the County Surveyor. The background to this matter is that both the Plaintiff and the Defendant are brothers and their respective parcels of land **LR No. Lari/Bathi/819** and **820** respectively and resultant subdivisions were from land parcel **Lari/Bathi/61** which was owned by their father. The report by the Surveyor noted that points "A" and "G" which were at the extreme ends of the boundary separating the two parcels of land were in the correct position, they used these points to align the boundary which was straight as per the mutation which was used to amend the Registry Index Map (RIM). The boundary on the ground as per the report was not straight as illustrated in the sketch diagram.

10. The report has shown through the sketch diagram that the defendant had encroached onto the Plaintiff's parcel of land as per the area defined as "ABCA" on the sketch diagram. Likewise, the Plaintiff had encroached onto the Defendant's parcel of land as per the area defined on the sketch diagram as "CEFGC". Thus, each of the parties had encroached onto the other's parcel of land, the Defendant at point "B" on the sketch diagram by about 2.0feet and the Plaintiff at the point where the Defendant had constructed his house (Point "EF") on the sketch diagram by 2.0 - 2.5feet.

11. It is apparent therefore, the only reason the Plaintiff was complaining that the Defendant had encroached onto his land at the point the Defendant had constructed his house was because the Plaintiff had at that point encroached onto the Defendants land parcel **820** by between 2.0feet to 2.5feet. Both the Plaintiff and the Defendant agree that the straight boundary established by the Surveyor between points "A" and "G" marked in the sketch diagram represents the correct boundary of their parcels of land.

12. The report by the County Surveyor in my view resolved the contentious issue of where the correct boundary of land parcels **Lari/Bathi/819** and **820** lay. As it turned out, both the Plaintiff and the Defendant were each encroaching onto the other's land parcel. It was therefore not entirely correct that it was the Defendant who was encroaching onto the Plaintiff's land as alleged by the Plaintiff. The true position was that it was the Plaintiff who was encroaching onto the Defendant's land at the point where the Defendant had constructed his house. The Plaintiff in the circumstances would not be entitled to the order of injunction sought under prayer (i) of the Plaintiff and neither would general damages for trespass be awardable.

13. The Court in the premises would sanction the adoption of the County Surveyor's report as the judgment of the Court and make an order that the parties should honour and respect the boundary as established and fixed by the County Surveyor on the ground. The net result is that neither the Plaintiff nor the Defendant were absolved of blame by the report of the County Surveyor. There was transgression by either party against the other as both were adjudged to have encroached onto the other's land. Happily, the report by the County Surveyor finally settled the long standing boundary dispute between the parties. Each of the parties was a beneficiary of the services of the County Surveyor and in the circumstances, it would be inequitable to award any party costs against the other. The Court is mindful that the parties are blood brothers and hopes that through the instant suit they have learnt that not every dispute needs to be litigated. A simple agreement between the brothers to agree to a joint Surveyor to establish and mark the boundary would have saved them the several years of litigation and the associated costs.

14. I direct that the suit be marked as settled in terms of the County Surveyor's report whereby the boundary between land parcels **Lari/Bathi/819** and **820** remains as fixed by the County Surveyor on the ground.

15. Each party to bear their own costs of the suit. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MAY 2019.

J. M. MUTUNGI

JUDGE

In the presence of:

N/A for the Plaintiff

N/A for the Defendant

Musyoki Court assistant

J. M. MUTUNGI

JUDGE