



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT ELDORET**

**CIVIL SUIT NO. 77 OF 2015**

**TINGA KOBOT KABUNOT.....PLAINTIFF**

**-VERSUS-**

**KIPRUTO MUTAL.....DEFENDANT**

**JUDGMENT**

By a plaint dated 16<sup>th</sup> March 2015 and amended on 12<sup>th</sup> May 2015, the Plaintiff sued the defendant herein seeking for the following orders:

- a. An order that the District /County Surveyor Nandi County do survey parcel No. **NANDI/BARATON/1534** and fix beacons to mark the boundary and all boundary fixtures in respect thereof and in particular the boundary adjacent to the defendant's residence in particular land parcel No. **NANDI/BARATON/227**
- b. An order that upon ascertainment of the boundaries of land parcel No. **NANDI/BARATON/1534**, the County Surveyor or such Surveyor that the court may order do indicate the extent of encroachment into land parcel No. **NANDI/BARATON/1534**
- c. An order restraining the defendant from trespassing or continuing to trespass on land parcel No. **NANDI/BARATON/1534**. And the defendant do remove himself, his agents, his possessions, servants or assigns from the said land and in default of so doing be evicted
- d. Costs and interest.

The defendant filed a defence and amended defence and the matter was therefore slated for hearing.

**Plaintiff's case**

The plaintiff adopted her statement filed in court and stated that she is the registered owner of Nandi/Baraton/1534 which land parcel borders the Defendant's residence and that the defendant is the step son.

It was PW1's evidence that the defendant caused the boundaries between the suit parcels of land to be unclear by uprooting the boundaries and making it difficult to ascertain where the beacons are and further that the defendant has encroached upon the plaintiff's land by around 1.5 acres. PW1 further stated that the boundaries were settled pursuant to Sections 18 and 19 of the Land Registration Act but have been unsuccessful in getting a surveyor to mark out the boundaries as the defendant has been resistant and violent.

PW 1 produced a copy of the title registered in her name , a search certificate, and a copy of Registry index map as exhibits before the court. It was her evidence that the defendant got into the parcel of land after she had obtained the title deed and that it is not true that he has been staying on the suit land for 53 years.

It was further PW1's testimony that they had a case with the defendant in Kapsabet court in respect of plot No. 214 of which a judgment was delivered in her favour. That they got a title deed which they shared with the co-wife who was the defendant's mother who is now deceased. That the said parcels are adjacent to each other.

PW1 stated that the defendant has encroached on 1 ½ acres of her land of which she wants the court to declare that the land belongs to her. Further that the defendant demolished her fence which he did during the pendency of the case in Kapsabet court and that the Surveyor put beacons which the defendant removed. She therefore urged the court to grant orders as prayed in the plaint plus costs of the suit.

On cross examination by Counsel for the defendant, PW1 confirmed that they divided the land equally with her co - wife who is the defendant's mother. Further that she did not show the defendant where to build as they had already subdivided the land and that the defendant stays on his mother's parcel of land.

On re examination PW 1 confirmed that the tea was planted when they had already subdivided the land. The plaintiff therefore closed her case.

### **Defence Case**

The defendant adopted his statement filed in court and stated that he has not encroached on the plaintiff's parcel of land but he admitted that he is on the plaintiff's parcel as his father had asked him to go and live with the plaintiff .

It was DW1's evidence that he has planted 16,000 bushes of tea on the plaintiff's land and that he does not have any other parcel of land. He stated that there has been no case in respect of plot No. 1534. He urged the court to allow him to harvest his tea which he claimed to have planted on the plaintiff's land.

On cross examination by Counsel for the plaintiff, DW1 confirmed that he is using parcel No 227 which belonged to her late mother measuring 8 acres and that the suit land belongs to the plaintiff. That he filed a case for adverse possession which was dismissed by the court and that he would like to inherit the land.

On reexamination DW1 stated that he feels that he is entitled to the land because he has stayed with the plaintiff and that the plaintiff does not have any children of her own.

DW2 gave evidence and stated that he is the one who planted the tea bushes on the suit parcel of land but he could not remember the plot that the defendant's father planted the tea bushes. He added that if the plaintiff is to evict the defendant, then she should be prepared to compensate him for the work he has done and the improvements on the parcels of land and the tea bushes planted on the land Nandi/Baraton/1534 by the defendant. The defendant therefore closed his case.

### **Analysis and determination**

This matter has been in court since 2015 and it is unfortunate that the plaintiff has been in the court corridors seeking for justice either being dragged there by the defendant who is her step son or seeking for the implementation of a verdict by the Surveyor. The issue for determination is whether the court has jurisdiction to grant the orders sought by the plaintiff and whether the defendant is a trespasser on the suit land.

**Section 18(2) and 19(2)** of the Land Registration Act 2012 provides that

18(2) The court shall not entertain any action or other proceedings relating to dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.

19(2) 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.

It is clear from the evidence that this matter had been handled by the County Surveyor who put beacons which the plaintiff stated that the defendant interfered with by removing her fence and the beacons. The plaintiff produced the Registry index map and a copy of the title which indicates that the survey was already done and beacons put. What the plaintiff wants the court to do is to assist her get an order to re-establish the beacons which were interfered with. See the case of **BARNABAS NYAGAKA MOTARI vs. VIDELIS NYAGWARA NYABUTI & ANOR ELC NO. 1060 of 2016 (KISII)** where the court ordered that boundaries not marked by the surveyor be marked physically and upon marking it, the defendant ought to vacate the portion of land and deliver vacant possession.

I find that the plaintiff took the right steps by involving the surveyor and that it is within her right to ask the court to assist with the implementation of the order once and for all because the defendant has been filing many cases to frustrate the plaintiff but the law has always been on her side. The plaintiff further stated that the defendant has been violent making it difficult for the surveyors to re establish the boundaries.

On the 2<sup>nd</sup> issue as to whether the defendant has trespassed on the suit land, it is on record that the defendant admitted that he has been using the plaintiff's land as he has no any other land but when cross examined he stated that he has been using 8 acres which was his mother's portion which they shared after the subdivision with the plaintiff.

The defendant also shocked the court when he stated that he feels that he is entitled to inherit the suit land because he has been staying with the plaintiff for many years and that the plaintiff does not have children. What law or logic was he basing his claim to the land on? The plaintiff is still alive and has a right to bequeath the land to any one that she wishes. This line of argument is not tenable and proves that the defendant has been trespassing on the plaintiff's suit land to intimidate her to cede part of her land. The defendant on one breath stated that he entered the suit land with the permission of the plaintiff, he had also claimed adverse possession which was dismissed by the court and in another breath he stated that he has not trespassed on the suit land. Which version do we believe? This shows that he is not a truthful witness. He has frustrated the old woman whom he has dragged in court for many years. Let the defendant be satisfied with the portion that was left for him by his late mother and leave the plaintiff to enjoy her parcel of land.

I have considered the pleadings, the evidence adduced, the documents produced and the submissions of Counsel and I come to the conclusion that the plaintiff being a registered owner of the suit land has proved her case according to the required standard. I therefore enter judgment in favour of the plaintiff in the following terms:

- a. An order that the County Surveyor Nandi County do survey parcel No. NANDI/BARATON/1534 and fix beacons to mark the boundary and all boundary fixtures in respect thereof and in particular the boundary adjacent to the defendant's residence in particular land parcel No. NANDI/BARATON/227.
- b. An order restraining the defendant from trespassing or continuing to trespass on land parcel No. NANDI/BARATON/1534.
- c. The defendant to give vacant possession of the suit land within 30 days failure of which eviction order to issue.
- d. Defendant to pay costs of the suit.

**Dated and delivered at Eldoret on this 06<sup>th</sup> day of May, 2019.**

**M.A. ODENY**

**JUDGE**

**JUDGMENT READ** in open court in the presence of Mr. Kipkirui holding brief for both counsel for the Plaintiff and the Defendant.

Mr.Mwelem – Court Clerk