



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. 25 OF 2018

JOSEPH KIEMA KITUNGI.....PLAINTIFF

VERSUS

FRANCIS MUTUVI MUSYOKA.....DEFENDANT

J U D G M E N T

1. By his plaint dated 19th March, 2018 and filed in court on 23rd March, 2018, the plaintiff prays for judgment against the defendant for:-
 - (a) **An order of injunction restraining the Defendant, his agents, workers, servants or anybody howsoever claiming under them from trespassing remaining on, cultivating or in any other manner dealing with land parcel Kalawa/Kathulumbi/407.**
 - (b) **Eviction of the Defendants from the seven (7) encroached onto in land parcel Kalawa/Kathulumbi/407.**
 - (c) **Costs and interest.**
 - (d) **Any other relief which this Court deems fit and just to grant.**
2. The plaintiff's claim is denied by the defendant vide his defence dated 30th May, 2018 and filed in court on 31st May, 2018.
3. On the 18th July, 2018 parties herein agreed to have the County surveyor visit land parcels number Kalawa/Kathulumbi/407 and Kalawa/Kathulumbi/410 for purposes of pointing the boundary between the two land parcels.
4. By his report dated 14th September, 2018 the surveyor's findings were as follows:-

“The shaded areas on the attached diagram show the encroachments. The areas for the two pieces were called and found to be:

 1. *P/No.407-33 acres.*
 2. *P/No.410 – 24 acres.”*
5. The Court summoned the surveyor to appear in court to shed light on his report. The surveyor, (Gabriel Maingi) appeared in court on 13th December, 2018 where he indicated that from the rigorous measurements that he and one Raly Moi carried out, they found out that the proprietor of parcel number 40 had encroached into parcel number 407. He said that the area of encroachment is shown in part marked “B” which is 0.0932 hectares. That thereafter he and his colleague planted sisal plants along the boundary of the two parcels.
6. In his written submissions, the plaintiff's counsel urged the court to grant the orders sought by the plaintiff. the counsel cited the case of **Andrew Marita Kebaso & Another vs. Christopher Getumo Onkeo [2017]eKLR** where the Court held thus,

“The plaintiffs being the registered owners of land parcels 2262 and 2263 are in terms of Sections 24, 25 and 26 of the Land Registration Act, 2012 vested with absolute rights of ownership and are entitled to exclusive possession and right to use their said parcels of land without hindrance from anybody. The defendant has without any lawful authority encroached onto the plaintiffs said parcels of land as confirmed vide the report of the independent joint surveyor. Having found that the defendant's encroachment onto the plaintiffs' land parcels is unlawful and therefore constitutes trespass, I have no hesitation in answering issue number (ii) in the affirmative. The defendant should yield vacant possession of the portions of land parcels 2262 and 2263 that he is occupying unlawfully.

7. On the other hand, the counsel for the defendant submitted that what the surveyor told the court is not supported by his report. He therefore urged the court to disregard the surveyor's report.

8. It is clear to me that from what the surveyor's report that there's encroachment on the plaintiff's land by the defendant. Even though the Land Registrar ought to have been involved in sorting out the boundary issue herein as is envisaged under Section 18(3) of the Land Registration Act No.3 of 2012 it will serve no useful to disregard the surveyor's report. I also see no reason not to invoke the provisions of Section 18(2) of the same Act. In the circumstances, I hereby proceed to enter judgment for the plaintiff and against the defendant in the following terms.

(a)

(b) i.e. Eviction of the defendant from 0.097322 encroached into parcel Kalawa/Kathulumbi/407.

(c)

Signed, dated and delivered at Makueni this 03rd day of May, 2019.

MBOGO C. G.,

JUDGE.

In the presence of:-

Mr. Masaku for Mr. Mulei for the Defendant

Mr. Langalanga holding brief for Mr. Mutune for the Defendant

Ms. C. Nzioka – court assistant

MBOGO C.G, JUDGE,

03/05/2019.