



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC. CASE NO. 463 OF 2017

PETER MUCHAI NJUGUNA.....PLAINTIFF

VERSUS

JOHN MBURU KIBUNJA.....DEFENDANT

JUDGMENT

1. In the Plaintiff dated 20th December, 2012, the Plaintiff averred that at all material times, he was the registered proprietor of land known as Gatamaiyu/Kagaa/84 whereas the Defendant is registered as the owner of land known as Gatamaiyu/Kagaa/938.
2. According to the Plaintiff, the Defendant has unlawfully encroached on his parcel of land by taking an area measuring 12.5 meters and that he should be refrained from utilizing the said portion of land. The Plaintiff has sought for an order directing the Land Registrar and the Surveyor to re-align the boundary between the two parcels of land.
3. In his Defence, the Defendant averred that he has been registered as the proprietor of parcel number 938 since 28th May, 1993; that he has never annexed the Plaintiff's land measuring 12.5 meters or at all and that if it is true that he has encroached on a portion of land measuring 12.5 meters, then he is entitled to the said land by way of adverse possession. It is the Defendant's position that the Plaintiff's suit is time barred.
4. The Plaintiff, PW1, informed the court that he lives on parcel of land known as Gatamaiyu/Kagaa/84; that the Defendant's land known as Gatamaiyu/Kagaa/938 borders his land and that the Defendant has encroached on his land.
5. It was the evidence of PW1 that he reported the issue of the Defendant's encroachment on his land to the Kiambu Land Registrar who summoned the Defendant; that on 20th March, 2012, the Land Registrar visited the two parcels of land with a view of resolving the dispute and that in his Report, the Registrar confirmed that indeed the Defendant had encroached on his land.
6. PW1 informed the court that despite the Report by the Land Registrar, the Defendant has refused to move out of his land. PW1 produced the Report of the Land Registrar in evidence.
7. In cross-examination, PW1 stated that he bought the suit land in 1986; that the Defendant used to cultivate the encroached portion and that he never raised the issue of the encroached portion with the seller.
8. On his part, the Defendant, DW1, stated that the Plaintiff is his neighbour. According to DW1, it is the Plaintiff who bought his land which is next to his land and that he has been on his parcel of land number 938 since 1963. DW1 informed the court that his whole land has tea leaves bushes and that he has used it since 1963; that he has never moved the boundaries of his land since 1963 and that the Land Registrar never summoned him as alleged.
9. In his submissions, the Plaintiff's advocate submitted that the Registrar did confirm that the Defendant had encroached on the Plaintiff's plot by 12.5 meters along the river, and that the boundary as between the Plaintiff and the Defendant should be re-aligned.
10. On his part, the Defendant's advocate submitted that the Plaintiff became the registered owner of parcel number 84 on 9th September, 2011 while the Defendant was registered as the owner of parcel number 938 on 28th May, 1993. According to counsel, if there was any encroachment, then the same happened in 1993; that by the year 2011, the Defendant had been in possession of the land for more than twelve (12) years and that the Plaintiff's title in respect of the 12.5 meters has been extinguished by operation of the law.
11. The evidence by the Plaintiff was that he purchased parcel of land known as Gatamaiyu/Kagaa/84 and that he was issued with the first Title Deed for the said land in 1986 before the same title was re-issued to him in the year 2012. The Plaintiff produced in evidence the Title Deed in respect of the suit land.

12. The Title Deed produced by the Plaintiff confirms the assertion by the Plaintiff that parcel of land known as Gatamaiyu/Kagaa/84 was registered in his favour on 22nd August, 1986. However, it was not until 9th September, 2011 that A Title Deed was issued in his favour. The register for the said land was opened on 25th September, 1958.

13. It is not in dispute that the Defendant was registered as the owner of the neighbouring parcel of land known as Gatamaiyu/Kagaa/993 in 1993. Even before the said registration, the Defendant had occupied his portion of land since 1963.

14. The Plaintiff has relied on the Report of the Muranga District Registrar to prove that the Defendant has encroached on parcel number 84 by 12.5 meters. The Registrar, who was accompanied by the Surveyor while preparing the report noted as follows:

“We also measured the width of parcel 938 along the river (stream) and discovered that it has 29M on the ground while according to the Mutation, it is supposed to have 16.5M. The width of the parcel 84 along the river is 30.5M on the ground while according to the RIM, it is about 43M. Consequently, parcel 938 was noted to have encroached into parcel 84 by about 12.5M along the river.”

15. The Land Registrar also observed that the Defendant had planted tea bushes on the lower side of the homestead and the bushes were mature. According to the Report of the Registrar, the dispute was not about the boundary, but a land claim, and that the situation has been like that *“for quite a long time.”*

16. The Report of the Land Registrar therefore confirmed that the Defendant had encroached on the Plaintiff’s land by 12.5 meters. However, the Registrar further confirmed that the situation had been like that for a long period, and that the disputed portion of land has mature tea leaves bushes.

17. The Plaintiff has not denied that the Defendant has been utilizing the disputed area since 1986 when he (*the Plaintiff*) purchased the suit land. Indeed, the Plaintiff has not controverted the Defendant’s oral evidence that he has been utilizing the disputed portion of land by planting tea leaves bushes since 1963, when he acquired the land and continued using as from 1993 when the land was registered in his favour.

18. Considering that the Defendant has been utilizing the disputed portion of land since parcel number 84 was registered in favour of the Plaintiff in 1986, the Plaintiff’s cause of action is time barred. Section 7 of the Limitation of Actions Act provides as follows:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

19. To the extent that the Defendant has used the disputed portion of land since 1986 when the land was registered in favour of the Plaintiff openly, continuously and without the permission of the Plaintiff for over twelve (12) years, I find and hold that the Plaintiff’s cause of action is time barred.

20. On that ground alone, I dismiss the Plaintiff’s Plaint dated 20th December, 2012 but with no order as to costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 19TH DAY OF JULY, 2019.

O.A. ANGOTE

JUDGE