



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 864 OF 2017

(Nairobi ELC 1556 of 2014)

MASAGU OLE KOITALEL NAUMO.....PLAINTIFF

VERSUS

MOLOI OLE LEKISHON.....DEFENDANT

JUDGMENT

By a Plaint dated the 17th December, 2014, the Plaintiff prays for judgment against the Defendant for:

- 1) An order of eviction against the Defendant, his servants or agents from the Plaintiff's piece of land Kajiado/ Olchoro – Onyore/ 111 as determined by the Kajiado District Land Surveyor.
- 2) A permanent injunction restraining the Defendant, his servants or agents from trespassing, dealing or otherwise interfering with the Plaintiff's possession and use of his land parcel Kajiado/ Olchoro Onyore/ 111 as constituted on the ground and as determined by the Kajiado District Land Surveyor.
- 3) Costs
- 4) Any other order that the Honourable Court may deem fit and just to grant.

The Defendant filed his statement of Defence dated the 19th October, 2018 where he confirmed being the registered proprietor of land parcel number Kajiado/ Ol choro Onyore/ 112. He denied trespassing on the Plaintiff's land parcel number Kajiado/ Olchoro Onyore/111 in 2010 or at any time. He contended that the Kajiado North Land Disputes Tribunal adjudicated on the boundary dispute in Tribunal Case No. 40/01/010 and made a determination. The Magistrate's Court ordered the District Land Surveyor to amend the map to correspond with the ground as per the Mutation for land reference Kajiado/ Olchoro Onyore/ 5162 and 5163 respectively. Further, the determination was found to be null as well as void including the order to the Land Surveyor. He insisted the Order obtained by the Plaintiff in the Senior Resident Magistrates Civil Case No. 159 of 2010 was made without jurisdiction and is of no legal consequence. He denied being served with a quit notice and being in occupation of the Plaintiff's land. He stated that this suit is res judicata, vexatious, frivolous and bad at law.

The Plaintiff filed a Reply to Defence dated the 14th November, 2018 where he insisted the Defendant trespassed on his land. He explained that a complaint at the Kajiado North Land Disputes Tribunal was filed by the Defendant. Further, that Justice GV Odunga in the judgment dated the 18th June, 2014 quashed the ruling of the Kajiado Senior Resident Magistrate's Court dated the 14th August, 2013 confirming the Award of the Kajiado North Land Disputes Tribunal Case No. 25 of 2010. He reiterated that the Resident Magistrates Court had jurisdiction to issue orders in Civil Case No. 159 of 2010. Further, the said suit was filed by the Defendant and he therefore cannot claim that the orders issued by the same court had no legal consequences. He averred that despite numerous requests to the Defendant to cease his acts of trespass on his land, he has refused, failed, neglected to heed to the said requests and continued to encroach on the Plaintiff's land and even attacked him.

Evidence of Plaintiff

The Plaintiff as PW2 stated that he is the owner of land parcel number Kajiado/ Olchoro Onyore/ 111. He claimed the Defendant had encroached on his land and is very hostile. Further, that the Defendant had constructed on his land and continued to graze thereon. He claimed that whenever he tries to graze on his land, the Defendant stops him. He reported matter to the Police and Chief. He testified that the Defendant attempted to kill him using a bow and arrow. Further, that the Defendant had taken around 100 acres of his land and wanted him evicted therefrom. He insisted the District Surveyor came in the presence of the Defendant and undertook measurements of the disputed area as per the Court Order, after which the District Land Registrar prepared a report. He reiterated that he wanted to enjoy his property. He produced the Court Order dated the 25th March, 2013 and the proceedings from the Judicial Review Application as his exhibits. In cross

examination, he confirmed that the Defendant had encroached on around 200 acres of his land. Further that the Defendant's son had put up a permanent house on the encroached area. He clarified that there was a Court Order directing the Defendant to move out of his land but he did not know why he had not been evicted therefrom. He denied subdividing his land to his family. He confirmed reporting the threats from the Defendant to the Police.

PW1 David Ndegwa Ndungo testified that in 2012 and 2013, he was the District Surveyor, Kajiado. He confirmed that there was an Court Order dated the 28th January, 2011 from the Kajiado Senior Resident Magistrate's Civil Case No. 159 of 2010 where the District Surveyor and District Land Registrar were supposed to survey land parcel numbers Kajiado/ Olchoro Onyore/ 111 and Kajiado/ Olchoro Onyore/ 112 respectively. He stated that the two parcels of land have a classified class D road between them. He explained that on 27th February, 2013 they proceeded to the disputed site together with the Land Registrar Kajiado, in the presence of the Plaintiff, Defendant including Assistant Chief Ibrahim Njomo Sankaire. He clarified that they undertook measurements of land parcel number Kajiado/ Olchoro Onyore/ 111 and found it to be 159.5 hectares while Kajiado/ Olchoro Onyore/ 112 to be 109.5 hectares. Further, that they had a mutation showing that owner of parcel number Kajiado/ Olchoro Onyore/ 112 had encroached on land parcel numbers Kajiado/ Olchoro Onyore/ 111 within an area of 133.34 hectares and left the owner with only 26.16 hectares. He produced a copy of his report; Plan showing encroachment and Certified Copy of the Registry Index Map for Olchoro Onyore Adjudication Section as his exhibits. Further, that in doing the measurement, he had a GPS and read the coordinates of all the beacons. In cross-examination he confirmed having retired as a government surveyor in 2014 but did not have an official letter from the government to come and testify in court but was summoned. It was his testimony that he purchased the Registry Index Map from the Survey Office in Kajiado. Further, that they received a letter at the Survey Office Kajiado, authorizing them to proceed and measure the disputed area. He denied knowledge of the parties in this suit but the Plaintiff herein paid for the survey exercise and was issued with an official receipt. He contended that the Assistant Chief Ibrahim Njomo Sankaire introduced them to the parties but the Defendant was very hostile during the exercise. Further, that they had the Survey Maps of the area as they undertook the exercise. He stated that the Registry Index Map was produced in 1980 after subdivision of the adjudication section and did not show subdivision of land parcel numbers Kajiado/ Olchoro Onyore/ 111 and Kajiado/ Olchoro Onyore/ 112 respectively. It was his testimony that he did calculation on the ground but not on the map and that all beacons for land parcel numbers Kajiado/ Olchoro Onyore/ 111 including Kajiado/ Olchoro Onyore/ 112 were present on the ground. Further, that he used the measurement to compute the area and after checking records in the Land Registry, he confirmed encroachment. He averred that the new parcels curved out of land parcel number Kajiado/ Olchoro Onyore/ 111 are 5162; 5163; 5164 and 5165. Further, that the mutations for land parcel number Kajiado/ Olchoro Onyore/ 111 are in the Survey Office. He further contended that his report shows the owner of land parcel number Kajiado/ Olchoro Onyore/ 112 encroached on Kajiado/ Olchoro Onyore/ 111 and subdivided it. Further, that owner of land parcel number Kajiado/ Olchoro Onyore/ 112 has built a house on part of land parcel number Kajiado/ Olchoro Onyore/ 111. He however did not know the particular place where the house had been constructed on and when subdivisions were done including who they were sold to. He did not find out if there were subdivisions of land parcel number Kajiado/ Olchoro Onyore/ 112 as this was not in the Court Order. In reexamination, he explained that the shaded area in the part plan was the encroached area which had a temporary house thereon. Further, that he confirmed beacons were in place as per the adjudication. The Plaintiff produced various documents including Kajiado North Land Dispute Tribunal Award dated 25th March, 2010; Pleadings in Kajiado PMCC No. 159 of 2010; Court Order dated 28th January 2011 in Kajiado PMCC No. 159 of 2010; Kajiado North District Department of Surveyor's report and Photographs showing the Defendant's encroachment on land parcel number Kajiado/ Olchoro Onyore/ 111 as exhibits.

Evidence of Defendant

DW1 MOLOI OLE LEKISHON testified that the Plaintiff had sued him because of a map. He confirmed that the Plaintiff's land bordered his land and there is a river in between the two parcels of land. He stated that there are beacons in between the two parcels of land. He denied interfering with the beacons and explained that they had a boundary dispute from 2010. He averred that the demarcation had been done in 1973 and from the said year upto 2010; they were neighbours with the Plaintiff. It was his testimony that they went to the District Land Disputes Tribunal in 2010 to deliberate on the boundary dispute. Further, that the Tribunal visited the land and after seeing the boundaries, ordered for the Plaintiff to leave his land. He explained that the Award of the Tribunal was adopted by the Kajiado Magistrate's Court but the Plaintiff lodged an Appeal culminating in the Tribunal's decision being overturned. He further confirmed that the District Surveyor came to visit the disputed site but he chased him away using a spear as he did not have an official letter. He however did not know the position of Plaintiff's land and denied being issued with the Surveyor's findings. He denied being served with a Court Order to confirm he had encroached on the Plaintiff's land and he should move out. He denied occupying the Plaintiff's land and insisted that from 1973, he had resided on his land. In cross examination, he confirmed his land neighbours the Plaintiff's land and they are separated by a stream. He insisted each grazes animals on his own portion of land. It was his testimony that the Surveyor visited the disputed portion of the land but he chased him away with a spear, as he did not have a Court Order. He further confirmed that Judy Pareno Advocate had filed Kajiado PMCC No. 159 of 2010 on his behalf but insisted he had not been served by an Order for the Surveyor to visit disputed land. He contended that he instructed Morara Advocate to institute Machakos Civil Appeal No. 13 of 2011 on his behalf. He claimed the Surveyor never visited the land but only made a report. He averred that he subdivided his land in 2010 and distributed to his family. He denied encroaching on the Plaintiff's land. Further, that the sons built on the land before this suit was instituted. He further testified that, he gave one of his son his mother's portion of the land and he had finished putting up a permanent house thereon. He was not aware that Judicial Review No. 370 of 2013 quashed the Tribunal's decision. In reexamination, he clarified that one of his sons had built on the land but had not been sued. He recalled advising his lawyer to withdraw the Kajiado PMCC No. 159 of 2010. He reiterated that there was no road separating his land and the Plaintiff's land. He denied encroaching on the Plaintiff's land and explained that he used to own Kajiado/ Olchoro Onyore/ 112. He further denied subdividing Plaintiff's land. He did not know why Machakos High Court dismissed his Appeal. He disputed that there was a meeting held by the Surveyor and claimed he saw him at the Plaintiff's homestead. He reiterated that the map the surveyor was referring to in his letter dated the 12th March, 2013, made him lodge a complaint at the Tribunal. He further insisted that the Surveyor had not indicated the extent of his encroachment into the Plaintiff's land. The Defendant produced various documents including Kajiado North Land Disputes Tribunal Case No. TC 140/01/01 dated 25th March, 2010; Kajiado Law Courts Land Disputes Tribunal Case No. 25 of 2010; Nairobi HC Misc Application No. 370 of 2013; Kajiado SRMC Civil Case No. 159 of 2010; Machakos HC Civil Appeal No. 13 of 2011; Kajiado North District Department of Survey Report dated 12th March, 2013; and the Olchoro Onyore Group Ranch Area List as his exhibits.

Both the Plaintiff and Defendant filed their respective submissions, which I have considered.

Analysis and Determination

Upon consideration of the Pleadings filed herein, including witness testimonies, exhibits and submissions, the following are the issues for consideration:

- Whether the Plaintiff is entitled to the orders sought in the Plaintiff.
- Who should bear the costs of the suit.

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

The Plaintiff sought for orders of eviction against the Defendant, his servants or agents from his piece of land Kajiado/ Olchoro – Onyore/ 111 as determined by the Kajiado District Land Surveyor. Further, that a permanent injunction to issue restraining the Defendant, his servants or agents from trespassing, dealing or otherwise interfering with his possession and use of his land parcel Kajiado/ Olchoro Onyore/ 111 as constituted on the ground and as determined by the Kajiado District Land Surveyor. It is not in dispute that the Plaintiff and the Defendant were owners of land parcel numbers Kajiado/ Olchoro Onyore/ 111 and Kajiado/ Olchoro Onyore/ 112 respectively. Further, it is not in dispute that the two parcels of land border each other. What is in dispute is the Plaintiff's claim that the Defendant has encroached on his land. The Defendant denies this claim and insists he was allocated the land in 1973 and the Plaintiff never lodged a complaint until 2010. In his submissions the Plaintiff has relied on **section 25, 26 and 103 (1) (a) & (b) of the Land Registration Act** as well as the cases **Mbirav Gachuhi 2002 1EA Page 38; Shadrack Kuria Kimani V Stephen Gitau Nganga & Another (2017) eKLR; Willy Kipsongok Morogo V Albert K. Morogo (2017) eKLR; and Makula International Limited V His Eminence Cardinal Nsubuga and Another (1982) HCB 11** to support his claim. The Defendant in opposition to this suit submitted that the Plaintiff did not tender any evidence to support the encroachment. He urged the Court to make a finding that he had acquired the land through adverse possession. He relied on sections 25 and 26 of the Land Registration Act as well as the cases of **Wambugu V Njuguna (1983) KLR 173; Mtana Lewa V Kahindi Ngala Mwangandi (2005) eKLR; Wabala V Okumu (1997) LLR 609; Bayete Co. Ltd V Kosgey (1998) LLR 813; Gitway Investment Limited V Tajmal Limited & 3 Others HCCC No. 1114 of 2002** to buttress his arguments. PW2 claimed that the Defendant had encroached on his land and blocked him from grazing his animals thereon. It was his testimony that the Defendant is very hostile and when the District Surveyor attempted to access the land in compliance with an Order of the Court, the Defendant chased him away using a spear. The Defendant as DW1 severally denied encroaching on the Plaintiff's land and insisted he was allocated the said land in 1973 and had lived thereon to date. Further, that he had subdivided the land and distributed to his children. PW1 who was the District Surveyor confirmed in Court that he had undertaken measurements in respect of the level of encroachment by using GPS as well as the beacons on the ground and discovered that the Defendant had indeed encroached on the Plaintiff's land. DW1 insisted that the Kajiado North Land Disputes Tribunal in their finding in 2010 had confirmed the land belonged to him and the Plaintiff was ordered to move from it. I note the proceedings in the Kajiado North Land Disputes Tribunal which were adopted by the SRM 's Court vide Kajiado Law Courts Land Disputes Tribunal Case No. 25 of 2010 as well as the Award from the said Tribunal were quashed vide the Nairobi HC Misc Application No. 370 of 2013. It emerged in Court that the Defendant had also filed a suit Kajiado PMCC No. 159 of 2010 seeking to claim part of the Plaintiff's land as upheld by the Land Disputes Tribunal and on 28th January, 2011 the Court directed the Land Registrar to survey the disputed boundary between 111 and 112 for purposes of settling the dispute. Further, the Court directed that the said Surveyor's report be held in court for purposes of determining the issue of the boundary herein. The Defendant proceeded to lodge an Appeal vide Machakos High Court Civil Appeal No. 13 of 2011 against the Magistrate's decision but the said Appeal was dismissed on 24th April, 2012. This in essence means that the Order issued by the Magistrate on 28th January, 2011 is still valid. This Order culminated in the District Land Registrar, Kajiado North's report dated the 19th March, 2013 that was produced as an exhibit which excerpt I have quoted hereunder: **' the survey team which was presented by D N Ndungo from the District Survey Office – Kajiado was taken around the plots to identify the boundary and took up measurements to determine the extent of the matter in issue. Basing on the observations and findings from the survey team, it was established that the Plaintiff had sold off the whole of Kajiado/ Olchoro Onyore/ 112 which was originally his and encroached into his neighbour land which is Kajiado/ Olchoro Onyore/ 111 which is owned by Masagu Koitelet Naumo.While it is clearly indicated that Moloi Ole Lekishon is the original owner of Kajiado/ Olchoro Onyore/ 112 on the ground he has encroached on Kajiado/ Olchoro Onyore/ 111 which is owned by one Masagu Ole Koitere Naumo'**.

I note the Land Registration Act gives the Land Registrar in collaboration with the District Surveyor the mandate to resolve a boundary dispute and I opine that since the Appeal was dismissed, the report dated 19th March, 2013 is still valid. DW1 contended that the boundary between the two parcels of land was a stream and not a road as claimed by the PW1 who was a Surveyor. PW1 further confirmed that the owner of Kajiado/ Olchoro Onyore/ 112 had encroached on Kajiado/ Olchoro Onyore/ 111 and even built a house thereon. The Defendant as DW1 confirmed that he had subdivided his land and distributed to his family. He further testified that the son had built on the land before the suit herein but never stated the exact date or year.

PW1 was clear that he also relied on the Registry Index Map (RIM) from the Survey Office as well as the part plan while undertaking the measurements on the ground. Based on the evidence of PW1 who was a Surveyor and the Report from the Land Registrar as well as testimonies of the witnesses, I find that the Defendant indeed encroached on the Plaintiff's land as per the measurements in the Part Plan contained within the Surveyor's report.

On the issue as to whether the Defendant should be evicted from the Plaintiff's land. I note the Defendant insisted that the Plaintiff failed to demonstrate the extent of his encroachment. However, I beg to differ as PW1 actually explained in Court using a Map and Part Plan that the owner of Kajiado/ Olchoro Onyore/112 had actually encroached on Kajiado/ Olchoro Onyore/111 with about 133.34 hectares. I opine that perhaps that is why the Defendant attempted to use the legal avenues and when it failed, he became hostile and even chased the District Surveyor away with a Spear to deny him access to disputed area.

Section 26(1) of the Land Registration Act which provides that: **'The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except -**

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. '

In the current scenario, the Plaintiff was the registered proprietor of land parcel number Kajiado/ Olchoro Onyore/ 111. Further, the extent and size of land was confirmed by the District Surveyor who visited the land and confirmed that the beacons were in place. Both Surveyor and Land Registrar also established the level of encroachment as per the measurement on the ground as well as relying on the Registry Index Map. Based on the evidence before me, I find that the Plaintiff is indeed entitled to evict the Defendant from his land that he had encroached upon.

As to whether the Defendant, his agents or servants should be permanently restrained from encroaching on the Plaintiff's land. DW1 admitted that he chased away the District Surveyor from suit land. PW2 contended that he had been unable to enjoy the benefits of his land since the Defendant interfered with his peaceful occupation of the same. In a letter dated the 12th March, 2013 which was part of the report produced by PW1 who was the District Surveyor that undertook the exercise as directed by the Court in Civil Case No. 159 of 2010, he concluded as follows: ' **The Plaintiff should vacate the encroached part of 111 and maintain his boundary as shown on the RIM Sheet 148/3, 4 & 161/1,2. Note that the two parcels neighbour one another by a road.**'

Section 24 (a) of the Land Registration Act further stipulates as follows: ' **subject to this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.....'**

Further, in the case of **WILLY KIPSONGOK MOROGO v ALBERT K. MOROGO (2017) eKLR** where the Court held as follows: ' **the evidence on record shows that the suit parcel of land is registered in the names of the Plaintiff and therefore is entitled to the protection under sections 24, 25 and 26 of the Land Registration Act.**' In associating myself with this decision as well as the analysis above, I find that since the Plaintiff is the registered proprietor of the suit land as well as the resultant subdivisions therefrom, he is indeed entitled to protection of the law. In the circumstance, I hold that a permanent injunction should issue restraining the Defendant, his servants or agents from trespassing, dealing or otherwise interfering with the Plaintiff's possession and use of his land parcel Kajiado/ Olchoro Onyore/ 111 or any resultant subdivision as constituted on the ground and as determined by the Kajiado District Land Surveyor.

The Defendant submitted that he is entitled to the land by adverse possession. I note he never pleaded the same in his Defence but introduced the issue in submissions. In the case of **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR** which cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002** where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

"....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded....."

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

Further in the case of **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR** the Supreme Court held thus: -

"In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings....."

In associating myself with these two decisions, I find that since the Defendant did not claim adverse possession in his Statement of Defence, he is estopped from seeking the said orders in his submissions and I will disregard the authorities he has cited in his submissions. In the circumstance, I decline to grant this prayer.

On the issue of costs, I note the Plaintiff has been inconvenienced by the acts of the Defendant and I will proceed to award him the costs of the suit.

In the circumstances, I find that the Plaintiff has proved his case on a balance of probability and proceed to enter judgment in his favour as follows:

- a) An order of eviction be and is hereby issued against the Defendant, his servants or agents from the Plaintiff's piece of land Kajiado/ Olchoro – Onyore/ 111 and the resultant subdivisions therefrom, as determined by the Kajiado District Land Surveyor, after a period of 90 days from the date hereof;
- b) A permanent injunction be and hereby issued restraining the Defendant, his servants or agents from trespassing, dealing or otherwise interfering with the Plaintiff's possession and use of his land parcel Kajiado/ Olchoro Onyore/ 111 and the resultant subdivisions therefrom as constituted on the ground and as determined by the Kajiado District Land Surveyor.
- c) Costs of the suit is awarded to the Plaintiff

Dated signed and delivered in open court at Kajiado this 29th day of October, 2019.

CHRISTINE OCHIENG

JUDGE

IN THE PRESENCE OF:

Ojwang Agina for Defendant

Mbuvi for Plaintiff.

Court Assistant- Mpoye