



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 95 OF 2016**

**JAMES MURAGE GICHANGI.....PLAINTIFF**

**VERSUS**

**FREDRICK MUNENE MUTHIL.....DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

The plaintiff filed this suit against the defendant seeking an order that he vacates/removes part of his house which stands on land parcel No. MUTIRA/KIRUNDA/2594 and give quiet vacant possession to the plaintiff. In addition, the plaintiff sought an order that the OCS Kerugoya Police Station do enforce the said order. In a statement of defence and counter-claim dated 27<sup>th</sup> July 2016, the defendant denied the plaintiff's claim and by way of a counter-claim sought to have the plaintiff vacate from his land parcel No. MUTIRA/KIRUNDA/1567. He also sought an order requiring the County Land Registrar Kerugoya to reinstate the boundary between L.R. No. MUTIRA/KIRUNDA/1567 (originally L.R. No. MUTIRA/KIRUNDA/144) and L.R. No. MUTIRA/KIRUNDA/2594 (originally L.R. No. MUTIRA/KIRUNDA/535) to correspond with the Original Registry Index Map (RIM).

**PLAINTIFF'S CASE**

The plaintiff stated that he is the registered owner of land number MUTIRA/KIRUNDA/2594 but the defendant without any colour of right on an unknown date entered into the said land and constructed a stone house part of which protrudes into his land. The plaintiff further stated that the original land No. MUTIRA/KIRUNDA/110 belonged to his mother Wagatwe Murage, which she later sub-divided into MUTIRA/KIRUNDA/2593 – 2595. He stated that the mother of the defendant started claiming a portion of the land and his mother sued her vide HCCC No. 249 of 1983 (Nyeri) of which she was successful in claiming the said portion. After her demise, they shared the portion which she retained being L.R. No. MUTIRA/KIRUNDA/535 as follows: MUTIRA/KIRUNDA/2593 – 2595.

Thereafter, the defendant built a house that extended to his land No. MUTIRA/KIRUNDA/2595 which the plaintiff acquired from the Estate of his mother. The plaintiff further contends that the Land Registrar has visited the site on two (2) occasions and decided the correct boundary between L.R. No. MUTIRA/KIRUNDA/535 belonging to the plaintiff and MUTIRA/KIRUNDA/144 belonging to the defendant. He therefore seeks an order to remove part of his house that protrudes into MUTIRA/KIRUNDA/2595.

**DEFENDANT'S CASE**

The defendant on his part stated that MUTIRA/KIRUNDA/144 was registered in his father's name during the demarcation period in 1959. He stated that the land borders L.R. No. MUTIRA/KIRUNDA/535 and that a stream passes the common boundary. He stated that in November 2001, land parcel No. MUTIRA/KIRUNDA/144 was sub-divided into four (4) portions and shared between his siblings and his portion was registered as MUTIRA/KIRUNDA/1567. He stated that Wagatwe Murage and Benson Murage sued him in SRMCC No. 282 of 2004 (Kerugoya) claiming that he had trespassed onto their land whereby judgment was entered against him in which the Court ordered rectification of the boundary. He further stated that the consequence of the said rectification is that L.R. No. MUTIRA/KIRUNDA/535 crossed the river into his land and part of his land became part of L.R. No. MUTIRA/KIRUNDA/535.

He was dissatisfied with the findings of the Court and he appealed to the appellate Court in ELC No. 45 of 2013 (Kerugoya) which was successful. The defendant filed a defence and raised a counter-claim against the plaintiff claiming that he is the registered proprietor of L.R. No. MUTIRA/KIRUNDA/1567 since 4<sup>th</sup> November 2001. The defendant also sought an order for restoration of the original boundaries between L.R. No. MUTIRA/KIRUNDA/1567 and MUTIRA/KIRUNDA/535.

**ANALYSIS AND DECISION**

I have considered the pleadings, the evidence by the parties and the applicable law. The dispute between the plaintiff and the defendant in this case relate to boundaries between L.R. No. MUTIRA/KIRUNDA/1567 and MUTIRA/KIRUNDA/2594 (originally

MUTIRA/KIRUNDA/144). Each of the two protagonists in the plaint and the counter-claim are seeking for a portion of the other's land. The same decision was held in HCCC No. 249 of 1983 (Nyeri) and ELCA No. 45 of 2013 (Kerugoya) regarding the same parcels of land.

Disputes relating to boundary are captured in **Sections 16, 18 and 19 (2) of the Land Registration Act** as follows:

**“16. The officer or authority responsible for the survey of land may rectify the line or position of any boundary shown on the cadastral map based on an approved sub-division plan, and such correction shall not be effected except on the instructions of the Registrar, in writing, in the prescribed form, and in accordance with any law relating to sub-division of land that is for the time being in force.**

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

**18 (3) Except where it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary;**

**Provided that where all the boundaries are defined under Section 19 (3), the determination of the position of any uncertain boundary shall be done as stipulated in the survey Act, (Cap 299).**

**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 parcels”.**

In the case of *Wiltis Ocholla Vs Mary Ndege (2016) e K.L.R*, the Court in deciding an issue relating to a boundary dispute held as follows:

**“That in terms of Section 18 (2) of the Land Registration Act, proprietors of registered land with a boundary dispute are obligated to first seek redress or solution from the Land Registrar before moving or escalating the dispute to this Court. That where such a party fails to do so, and comes to Court without first seeking redress from the Land Registrar, the Court being a Court of law, has to remind such a party that he/she has moved the Court pre-maturely. That the provisions of Section 18 (2) of the Land Registration Act shows clearly that the Court is without jurisdiction on boundary disputes of registered land until after the Land Registrar's determination on the same has been rendered”.**

Again in *Amos Mpeshe & 3 others Vs Salau Ole Sokon Modo (2015) e K.L.R*, the Court held:

**“The point however is that, the Land Registration Act 2012 clearly provides the procedure for dealing with land boundary disputes and parties are obliged to ensure that procedure is exhausted before they can resort to Court for any redress. The provision of the Act is explicit that no Court should entertain any action of proceedings relating to a boundary dispute unless the procedure under the Act has been complied with. Under Section 86 of the Land Registration Act, any party aggrieved by or with the decision or by the exercise of any power by the Registrar can apply for review of the Registrar's decision by way of a case slated for the Court's opinion”.**

The claim by the plaintiff in this suit is disguised as claim for removal/eviction while the same is clearly a boundary dispute. A dispute of such a nature should first be reported to the Land Registrar before any aggrieved party can seek redress before this Court. The procedure employed by the plaintiff is definitely a false start. This suit must therefore fail for want of jurisdiction. The appropriate order to make is that this suit is hereby struck out with costs to the defendant. The defendant's statement of defence and counter-claim is equally struck out with no order as to costs.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 4<sup>th</sup> day of October, 2019.

**E.C. CHERONO**

**ELC JUDGE**

**4<sup>TH</sup> OCTOBER, 2019**

In the presence of:

1. Mr. Asiimwe holding brief for A.P. Kariithi for Plaintiff
2. Defendant/Advocate – absent