



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 305 OF 2012**

**JOSEPH NJUGUNA.....PLAINTIFF**

**VERSUS**

**ELIZABETH MUKUHI NGANGA.....1<sup>ST</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL**

**( On behalf of the Registrar of Lands Kiambu.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

By a Plaint dated the 29<sup>th</sup> May, 2012, the Plaintiff prays for judgment against the Defendants jointly and severally as follows:

- a. An order of permanent injunction restraining the 1<sup>st</sup> Defendant/Respondent whether by herself, her servants, employees or agents or otherwise howsoever from trespassing, occupying, harassing, or in any other way whatsoever interfering with the Plaintiff's quiet enjoyment and use of the suit land/premises Title No. Kiambaa/ Karuri T. 204 'A'.
- b. A mandatory injunction do issue to the 2<sup>nd</sup> Defendant to enforce the demarcations and boundary beacons on the suit property as reflected in the survey map.
- c. Costs and Interest of the suit.
- d. Any other or further relief that this Honourable Court may deem just and fit to grant in the circumstances of the suit.

The 1<sup>st</sup> Defendant filed her Statement of Defence and Counterclaim dated the 7<sup>th</sup> November, 2012 where she denied the averments in the Plaint save for the descriptive of parties including properties. She contended that the Plaintiff had trespassed on her land by constructing a toilet across the boundary of her land and his land. She averred that the live hedge that forms the boundary between her land and the Plaintiff's land existed a long time ago before and after the land had been transferred to the Plaintiff. She explained that her father bought LR No. Kiambaa/ Karuri/ 204'B' in 1959 from Kihungi Kamau and later transferred the same to her in 1982 with the existing boundaries. She claimed the Plaintiff moved into his land sometime in 2001 and only raised a complaint over the boundary in 2010 prompting the Registrar of Lands Kiambu to intervene. She filed a Counterclaim praying that the Plaintiff's suit be dismissed with costs and judgment entered against him for:

- i. An order of permanent injunction restraining the Plaintiff from interfering with the present physical boundary.
- ii. An order compelling the Plaintiff to sign the mutation form to facilitate the amendment of the Registry Index Map to correspond to the Physical boundaries of the two parcels of land.
- iii. An order that the Registrar of Lands, Kiambu does ensure that the Registry Index Map is amended to correspond to the physical boundaries of the suit properties.
- iv. In the alternative to (i) and (ii) above, the Plaintiff be ordered to compensate the 1<sup>st</sup> Defendant for the cost of constructing her house at market rates if the present physical boundaries is to be interfered with.
- v. Costs of this suit.
- vi. Any other relief that this Honourable Court may deem fit to grant

The 2<sup>nd</sup> Defendant filed his Statement of Defence dated the 10<sup>th</sup> June, 2013 where he denied the averments in the Plaintiff save for the descriptive. The 2<sup>nd</sup> Defendant explained that the Plaintiff sought the intervention of the Land Registrar, Kiambu to provide directions as to the demarcation of the property but denied any fraudulent distortions of the same. The 2<sup>nd</sup> Defendant denied making any illegal alterations or conclusions about the subject matter as alleged by the Plaintiff. He contended that the orientation of the common boundary between Plot No. Kiambaa/ Karuri T. 204 'A' belonging to the Plaintiff and Plot No. Kiambaa/ Karuri T. 204 'B' belonging to the 1<sup>st</sup> Defendant and the reflection on the ` (RIM) differ. He insisted the Registry Index Map (RIM) should be a reflection of the situation on the ground. He averred that it had executed its statutory duty by advising the parties to consent to a mutation to allow amendment of the Registry Index Map (Rim) to reflect situation on the ground.

The Plaintiff filed a Reply to Defence and Counterclaim where he reiterated the contents in his Plaintiff and denied the entire allegations in the Counterclaim. He insisted the toilet is rightfully constructed within the boundaries of his title as demarcated by the map.

### **Evidence of the Plaintiff**

The Plaintiff as PW1 stated that he purchased the suit property title No. Kiambaa/ Karuri T. 204 'A' measuring 0.044 hectares via a public auction on the 10<sup>th</sup> December, 2002. He testified that after purchase, he was issued with a title deed, which clearly indicated the boundaries as contained in the survey map. He claimed to have been in occupation of the suit property from the time of purchase and that the 1<sup>st</sup> Defendant had trespassed thereon. He insisted his access to the main road was blocked by the 1<sup>st</sup> Defendant's plot. Further, that his plot has diminished in value. He sought the intervention of the Land Registrar, Kiambu who visited the disputed boundary and confirmed that the said boundary on the ground differed from the one indicated on the Registry Index Map (Rim)). He however ruled that parties should adopt the boundary on the ground and sign mutation form to reflect this position. He disagreed with the Land Registrar's findings and sought for the boundary to be maintained as per the Registry Index Map (Rim) and not on the ground. He insisted that what was referred to as a drainage was actually a road that serves several plots, although it was yet to be developed. Further, that the Land Registrar also confirmed that it is a four (4) metre road. He confirmed finding the 1<sup>st</sup> Defendant residing on her land at the time he purchased his. He also confirmed that he was never shown his beacons when he took possession of his parcel of land in 2001. The Plaintiff produced the following documents as exhibits: Title Deed for Kiambaa/ Karuri T 204 ' B'; Certificate of Sale; Copy of Advertisement; Survey Map; Summons and Survey report as exhibits.

### **Evidence of the Defendants**

The 1<sup>st</sup> Defendant as DW1 confirmed being the proprietor of Plot No. Kiambaa/ Karuri T. 204 'B'. She testified that she had resided thereon from 1989 and constructed a permanent house. Further, that there was a live hedge including barbed wire separating her land with the Plaintiff's. She contended that the alleged five metre road was actually a drainage with murky water. She explained that her land had neighbored the Plaintiff's land for many years with different occupant's thereon who had never raised a complaint about the boundary. Further, that if the boundary is changed as per the Plaintiff's demand, part of her house will be demolished. She denied trespassing on the Plaintiff's land. She insisted the Plaintiff had a road that they had been using and the same should be left as it is. She denied that there is a road being constructed as claimed by the Plaintiff. Further, that the Plaintiff took possession of his plot in 2001 and only started complaining in 2010. She wanted the Court to maintain the boundaries as they had been from 1959. She confirmed that the Land Registrar had resolved the boundary dispute and directed parties to maintain the said boundaries as per the reflection on the ground and not on the Registry Index Map (RIM). She explained that the first owner of the land had planted the original hedge to demarcate her land and the plaintiff's. DW2 confirmed being a neighbor to the Plaintiff and 1<sup>st</sup> Defendant. It was his testimony that he had never heard of any dispute in respect of the boundary between Plaintiff and 1<sup>st</sup> Defendant, prior to the Plaintiff taking possession of his land. He had no idea if a road was being constructed. The 1<sup>st</sup> Defendant produced the following documents as exhibits: title deed for LR No. Kiambaa/ Karuri T. 204 'B'; Green Card of LR . No. Kiambaa/ Karuri T. 204 'B'; Certificate of Official Search for LR. No. Kiambaa/ Karuri T. 204 'B' and Registrar's Report dated the 16<sup>th</sup> April, 2012 as exhibits.

The 2<sup>nd</sup> Defendant never called a witness but relied on the report dated 16<sup>th</sup> April 2012 as its evidence.

The Plaintiff and 1<sup>st</sup> Defendant filed their respective submissions that I have considered.

### **Analysis and Determination**

Upon perusal of the pleadings filed herein including exhibits and upon hearing the testimonies of the witnesses as well as considering submissions from the parties, the following are the issues for determination;

- Whether the 1<sup>st</sup> Defendant has trespassed on the Plaintiff's land.
- Whether the Plaintiff is entitled to the orders sought in the Plaintiff.
- Whether the Registry Index Map in respect of boundary to land parcel numbers Kiambaa/ Karuri/ 204'A' Kiambaa/ Karuri/ 204'B' should be amended to reflect the situation on the ground.
- Whether the 1<sup>st</sup> Defendant is entitled to the Orders sought in the Counterclaim.
- Who should bear the costs of the suit.

As to whether the 1<sup>st</sup> Defendant has trespassed on the Plaintiff's land. The Plaintiff sought for orders of permanent injunction against the 1<sup>st</sup> Defendant from interfering with his land and for the 2<sup>nd</sup> Defendant to be compelled to enforce the demarcations and boundary between his property and 1<sup>st</sup> defendant's land as reflected in the Registry Index Map (RIM). He contended that the 1<sup>st</sup> Defendant had trespassed on his land by interfering with the boundary between them. The 1<sup>st</sup> Defendant opposed these averments and insisted that the boundary between the

two parcels of land which were a resultant subdivision of one had been maintained from 1959. Further, the Plaintiff took possession of his land in 2001 after she had constructed permanent structures on her land. The Plaintiff insisted the boundary had to be changed to be in accordance with the Registry Index Map and not to reflect the situation on the ground. However, the 1<sup>st</sup> Defendant contended that the amendment of the boundary in accordance with the Registry Index Map would culminate in a portion of her permanent house being demolished. The Plaintiff in his submissions relied on the decisions of **Sangale Ole Langas V Stehpen Mishish & Another (2018) eKLR and Republic V Senior Land Registration Officer Kajiado North Land Registry & 3 others Ex parte Arnold Wabili China Wafula (2017) eKLR** to support his argument that a permanent injunction should issue against the 1<sup>st</sup> Defendant for having trespassed on his land. The 1<sup>st</sup> Defendant in opposing this suit submitted that she had not trespassed on the Plaintiff's land; the live hedge fence had formed the boundary between the two parcels of land and that there is indeed an error in the drawing of the plots as they appear in the map and the same can be rectified as confirmed by the Land Registrar. She relied on the cases of **Samuel Wanjau V Attorney General & 2 Others (2009) eKLR; Abdalla Mohamed Salim & Another V Omar Mahmud Shallo & Another (2014) eKLR and Azzuri Limited V Pink Properties Limited (2017) eKLR** to buttress her arguments.

It is not in dispute that the Plaintiff and the 1<sup>st</sup> Defendant each own their respective portions of land which were a resultant subdivision from one parcel and share a common boundary with each other. It is further not in dispute that the Land Registrar and the District Surveyor made a determination on the boundary between the two parcels of land. Further, they confirmed that the boundary on the ground differed with the one in the Registry Index Map (RIM). What is in dispute is the Plaintiff's claim that the 1<sup>st</sup> Defendant has encroached on his land and the 2<sup>nd</sup> Defendant had directed that parties maintain the said boundaries as per the ground. The Plaintiff insists the boundary on the ground which differs with the one in the Registry Index Map has interfered with his land. The Plaintiff as PW1 admitted that he took possession of the suit land in 2001 and found a live hedge between his land and the 1<sup>st</sup> Defendant's. He contends that the said boundary had interfered with the value of his land. He further maintains that there exists a 5 metre road which on the Registry Index Map (RIM) shows it touches both plots to the North. In the Land Registrar's report dated the 16<sup>th</sup> April, 2012, he observed as follows: **' Upon reaching the site, we noted that the orientation of the common boundary for the plots in question on the ground and on the Registry Index Map (Rim) differ. The situation on the ground is that the common boundary fronts a four-metre access road while the situation on the Registry Index Map (Rim) is that the same boundary fronts to four-metre wide drainage meant for storm water.'**

Section 18 and 19 of the Land Registration Act provides that: **' (1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel. (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. (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. (1) If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries. (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.**

**(3) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section.'**

In the case of **Azzuri Limited v Pink Properties Limited [2017] eKLR**, Justice Angote while making a decision relating to general boundaries had this to say: **' In his paper, "The Role of the Registry Index Map (Registry Index Map (Rim)) in Land Management in Kenya", Peter K. Wanyoike has stated that the Registered Index Map is a very useful document in registration and management of land in Kenya within the context of "General Boundaries" or "approximate boundaries."**

The paper defines **"General Boundaries"** as follows:

***"A boundary of which the precise line is undetermined in relation to the physical features which demarcate it ... However, it is clear on the ground where the parcel is situated and where the boundaries are, for they are clearly visible and unmistakable physical features, though they do not indicate the exact location of the line within the breadth which such physical features necessary process."***

In the case of **Ali Mohamed Salim vs Faisal Hassan Ali (2014) eKLR**, this court held as follows:

***"The type of survey that generated the Registry Index Map is what was known as "general boundaries" which has been defined in Section 18(1) of the Land Registration Act, 2012 to mean "the approximate boundaries and the approximate situation only of the parcel." Indeed, most of the titles under the repealed Registered Land Act were issued on the basis of the general boundaries, meaning that such parcel of land had no fixed beacons. On the other hand, land registered under the Registration of Titles Act required a cadastral survey to be prepared, which is based on a fixed boundary principle. Such a survey has an accurate linear and angular measurements to aid the registration of a title of a plot. The boundaries of land registered under the Registration of Titles Act can easily be identified by any surveyor because of the fixed nature of its beacons."***

In the current scenario, boundaries between the Plaintiff and the 1<sup>st</sup> Defendant's parcels of land was not fixed. The provisions of section 18 and 19 of the Land Registration Act are clear that in instances where the boundaries are not fixed, it is the Land Registrar mandated to fix the same. However, the owners of the adjoining parcels of land in question have to be notified. In this case, the Land Registrar in the presence of all parties undertook his legal mandate and proceeded to determine and fix the boundary between the two parcels of land in accordance with the existing demarcations thereon, which included live hedges, barbed wire and cider posts. I note the Plaintiff never sought to quash the proceedings and findings of the Land Registrar dated the 16<sup>th</sup> April, 2012. Further, in the said proceedings there was no indication that there were presence of beacons. It emerged in evidence that the Court further sent the Deputy Registrar who undertook a site visit and from his report, it indicated that there were no beacons and the boundary was just a live fence. From the evidence of the two parties, they admitted that the Land Registrar with assistance from the District Surveyor determined the boundary between the two parcels of land and relied on the physical features existing on the ground including hedges and fences whereupon he directed the parties to maintain the said boundaries as they are. He further advised the parties to Change the Mutations so that the Registry Index Map (Rim) could be amended. Which fact the Plaintiff disputed and declined to sign the changed mutation. It is trite law that general boundaries are identifiable by using the existing physical features, and by interviewing the owners of the adjacent plots. From the evidence presented by DW1 and DW2, the boundaries between the two parcels of land have existed for a long time prior to the Plaintiff purchasing his land. Further, DW1 confirmed in court that her father purchased her land in 1959 and maintained the existing boundary which had been placed by the owner who had sold land to her father. Further, that the two previous owners of the Plaintiff's land never challenged the existing boundaries and even the Plaintiff only disputed the same in 2010 yet he took possession in 2001. The Plaintiff as PW1 disputes the determination of the Land Registration and insists the boundary should have been determined as per the Registry Index Map and not situation on the ground. However, I note in 2001, at the time the Plaintiff purchased his land, the 1<sup>st</sup> Defendant's fence was in place, and so were all the boundary features. The repealed Registered Land Act also provided that Registry Index Map (RIM) contained an approximation.

Based on my findings above, and relying on the legal provisions I have cited, as well as associating myself with the quoted decisions, I find that since the boundaries in dispute herein had not been fixed and the parties were simply using the general ones, it was proper for the Land Registrar to go beyond the Registry Index Map (RIM) in solving the boundary dispute herein. In the circumstance, I find that the boundaries as determined by the Land Registrar Kiambu was proper and proceed to uphold it. The Plaintiff in his submissions had relied on two decisions from this Court. In the case of **Sangale Ole Langas V Stephen Mishish & Another (2018) eKLR**, I find the facts therein differ from the dispute at hand. As for the case of **Republic V Senior Land Registration Officer Kajiado North Land Registry & 3 others Ex parte Arnold Wabili China Wafula (2017) eKLR**, the facts therein which differ with the case at hand concerned the process the Land Registrar adhered to in the determination of a boundary dispute.

In line with the evidence as presented, I further find that the 1<sup>st</sup> Defendant has not trespassed on the Plaintiff's land as claimed and the Plaintiff is hence not entitled to the orders sought in the Plaintiff.

As to whether the Registry Index Map in respect of boundary to land parcel numbers Kiambaa/ Karuri/ 204'A' Kiambaa/ Karuri/ 204'B' should be amended to reflect the situation on the ground. The Land Registrar in his report stated that **'The two plots have been developed with permanent houses for the respective proprietors. We also noted that the common boundary between the plots in question comprising of live hedge, barbed wire and some cider posts has been in the current situation for quite a long time.'**

In the case of **Azzuri Limited v Pink Properties Limited [2018] eKLR**, where the Court of Appeal while dismissing an Appeal emanating from a Judgement in a case that a Judge had dealt with an issue of General Boundaries, stated as follows: **'We find it impossible to depart from the above findings by the Judge. We have also taken note of the evidence that when the appellant purchased the suit plot, the respondent's fence was in place, and so were all the features. The appellant did not raise an issue of encroachment with the neighbors or the Land Registrar so that the boundaries could be fixed. One can deduce from appellant's conduct that it was happy to buy the plot "as is" and turning later to involve the County Commissioner and to file suit prematurely contrary to the statute in a case where the Judge found inadequate evidence of encroachment, the orders made cannot be faulted.'**

Since it was evident that the physical boundary had been in place for a long time with the owners acquiescing to the same, and in relying on the Land Registrar's report including the Court of Appeal decision, I find that the Registry Index Map indeed should be amended to reflect the situation of the boundaries on the ground as recommended by the Land Registrar.

As to whether the 1<sup>st</sup> Defendant is entitled to the Orders sought in the Counterclaim. The 1<sup>st</sup> Defendant in her counterclaim sought for a permanent injunction restraining the Plaintiff from interfering with the present physical boundary; An order compelling the Plaintiff to sign the mutation form to facilitate the amendment of the Registry Index Map to correspond to the Physical boundaries of the two parcels of land; An order that the Registrar of Lands, Kiambu does ensure that the Registry Index Map is amended to correspond to the physical boundaries of the suit properties; and order that the Plaintiff do compensate the 1st Defendant for the cost of constructing her house at market rates if the present physical boundaries is to be interfered with. I note I have already made a determination above in respect to the boundary. It was DW1's testimony that the Plaintiff had declined to sign the mutation form to facilitate the amendment of the Registry Index Map (RIM) to correspond with the physical boundaries of the two parcels. From the evidence of the Plaintiff as PW1, he did not give an indication on whether the amendment to the Registry Index Map (RIM) would reduce the acreage of his land. His only contention was that the land would decrease in value since it was not facing the five-metre road. However, he did not furnish court with any valuation report to determine how the implementation of the Land Registrar's findings would devalue his property. From the facts as presented, I do not see the reason why the Plaintiff has declined to implement the recommendation of the Land Registrar dated 16<sup>th</sup> April, 2012. In the circumstance, I direct that the Plaintiff do sign the mutation form to facilitate the amendment of the Registry Index Map to correspond with the Physical boundaries of the two parcels of land. Upon the Plaintiff and 1<sup>st</sup> Defendant signing the said Mutation Form, the Land Registrar, Kiambu should ensure that the Registry Index Map is amended to correspond to the physical boundaries. On the 1<sup>st</sup> Defendant's prayer for compensation for constructing a house, I decline to grant the said order.

As to who should bear the costs of the suit. I note the fulcrum of this suit emanated from a boundary dispute which was determined by the Land Registrar. Further, the Plaintiff having been dissatisfied with the said findings, proceeded to institute this suit against the two Defendants. Since both parties are in their respective parcels of land and despite the Land Registrar's findings, no one has interfered with the other parties occupation of the same. I direct that each party do bear their own costs.

It is against the foregoing that I find that the Plaintiff has failed to establish his case on a balance of probability and will proceed to dismiss it with costs. I enter judgment for the 1<sup>st</sup> Defendant in the counterclaim and make the following final orders:

- 1) The Plaintiff be and is hereby directed to sign the mutation form to facilitate the amendment of the Registry Index Map to correspond to the Physical boundaries of land parcel numbers Kiambaa/ Karuri T. 204 'A' and Kiambaa/ Karuri T. 204 'B' respectively within 30 days from the date hereof.
- 2) Upon the signing of the Mutation Forms, the Registrar of Lands, Kiambu be and is hereby directed to ensure that the Registry Index Map is amended to correspond to the physical boundaries of the suit properties within 60 days from the said date.
- 3) The Plaintiff be and is hereby permanently restrained from interfering with the present physical boundary of land parcel numbers Kiambaa/ Karuri T. 204 'A' and Kiambaa/ Karuri T. 204 'B' respectively.
- 4) Each party do bear his own costs.

**Dated signed and delivered in open court at Kajiado this 18th Day of November, 2019**

**CHRISTINE OCHIENG**

**JUDGE**