



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MAKUENI**

**ELC NO. 220 OF 2017**

**FORMERLY MACHAKOS ELC. NO. 414 OF 2012**

**SAMSON HENRY KIMILU.....1<sup>ST</sup> PLAINTIFF**

**JOHNSON MULINGE KIMILU.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**DAVID KIAMBA KITHOME.....1<sup>ST</sup> DEFENDANT**

**AIMI MA KILUNGU LTD.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By his plaint dated 09<sup>th</sup> October, 2012 and filed in court on the 05<sup>th</sup> November, 2012, the plaintiff prays for judgment against the first defendant for:-

***a. An order that parties do jointly engage a surveyor to put up the boundary beacons between the said plot Nos.1021 and 1023 situated with the area known as Aimi Ma Kilungu.***

***b. In default of the defendant complying with prayer No.(a)hereinbefore and/or no co-operating with the plaintiffs to comply with it, the plaintiffs be at liberty to engage a surveyor to put up the boundary beacons and the defendants be permanently restrained from interfering with the said beacons once put in place by the surveyor.***

***c. Costs and interest of the suit.***

2. The first defendant never entered appearance nor did he file his defence after he was served with summons on the 24<sup>th</sup> January, 2013 as demonstrated by the affidavit of service dated 25<sup>th</sup> January, 2013 and filed in court on 11<sup>th</sup> April, 2013.

3. Although the second defendant filed its defence on 20<sup>th</sup> December, 2012 the same being dated 17<sup>th</sup> December, 2012, it is important to note that on the 23<sup>rd</sup> October, 2017, the suit against it was withdrawn by consent with no orders as to costs. Of importance to note is that the Deputy Registrar had directed on a date that is not indicated in the file that the matter against the first defendant do proceed to formal proof.

4. The matter was essentially heard by Justice Kariuki on the 26<sup>th</sup> January, 2015. In his evidence in chief, the plaintiff told the court that the first defendant is his neighbour in Makueni where he bought a plot for the sum of Kshs.20,000/= from the members of Aimi Ma Kilungu Limited in the year 2011. He went on to say that the seller showed him the land that had three beacons while another one was missing. That when he started fencing the suit plot, he was informed by a stranger that he (the plaintiff) was fencing the stranger's land. The plaintiff added that he suggested that the two do hire a surveyor to confirm the ground position. He pointed out that the surveyor went to the ground and confirmed that two beacons were missing and that the first defendant had fenced part of the plaintiff's plot. That when the defendant was informed that he had trespassed into the plaintiff's land, he denied the same as a result of which the plaintiff sought assistance from the second defendant who never responded. The plaintiff said that he was forced to seek assistance from the DC. That when the DC sought the assistance of the surveyor, the first defendant refused to attend and hence this suit. The plaintiff added that when the first defendant was served with a demand letter, he suggested that they could solve the matter without going to court. He and the first defendant agreed to contribute fees for the surveyor who proceeded to establish the boundaries as well as the encroachment by the defendant.

5. The plaintiff produced the sale agreement, letter of allotment number 001346, receipt of payment of transfer fees, share certificate number 2911, allotment card for plot number 1023, membership card number 1805 issued by Aimi Ma Kilungu limited, letter from the office of the

President, provincial administration and internal security, letter to the chairman of Aimi Ma Kilungu limited, letter dated 03/09/2011 to the District Commissioner Mukaa District, letter to the chairman of Aimi Ma Kilungu limited dated 07/07/12, demand letters dated 28/02/12 and 21/05/12, reply to demand letter dated 29/05/12 by Nzei and Co. Advocates and letter dated 17/09/12 addressed to Nzei and company Advocates as P.exhibit Nos.1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 respectively.

6. His evidence in cross-examination by Ms. Ngatia for the second defendant was that the dispute herein is between him and the first defendant.

7. The plaintiff was thereafter stood down to avail the surveyor's report. The latter report was filed in court on the 25<sup>th</sup> September, 2015.

8. The plaintiff's counsel in his written submissions dated 30<sup>th</sup> October, 2017 and filed in court on 12<sup>th</sup> November, 2017 submitted that from the testimony and the evidence brought forth by the plaintiff, it is clear that the first defendant has refused, neglected and ignored all attempts to settle the issue of boundary between them amicably and out of court forcing the plaintiff to seek redress in this court. The counsel added that it is clear that the plaintiff claim is genuine and deserves to be upheld by this court. The counsel urged the court to consider the case of **Walter Nyagul –vs Chairman of Board of Governor Okok Mixed Secondary School in Kisumu ELC case number 71 of 2012** which also involved a boundary dispute. Indeed I am in agreement with the plaintiff's counsel that the authority in question is relevant to the case before me.

9. In his report, the District Surveyor Makueni County Lands Office has indicated that he visited plot numbers 1023 and 1021 to establish the boundary and fencing on the ground. The surveyor has further indicated that in order to carry out the exercise, he used sheet number 5 of Konza South/Konza South Block 4 (Aimi Ma Kilungu) map and that his conclusion was that the owner of plot number 1021 (2013) has encroached into parcel number 1023 (2014) by 121.13 metres, on the boundary with parcel 2111 as per the diagram which he attached to his report. The surveyor's report vindicates the plaintiff.

10. As correctly submitted by the plaintiff's counsel, the surveyor has already discharged his duty in compliance with the courts order of 26<sup>th</sup> January, 2015.

11. Arising from the evidence on record, I am satisfied that the plaintiff has on a balance of probabilities satisfied this court that he has a course of action against the first defendant. In the circumstances, **I hereby proceed to enter judgment for the plaintiff and against the first defendant in terms of prayers (b) and (c) of the plaint. It is so ordered.**

**Signed, Dated and Delivered on this 18<sup>th</sup> Day of January, 2018.**

**MBOGO C.G.,**

**JUDGE.**

**In the presence of:**

Mr. Kwemboi – Court Assistant

No representation from the parties and their advocates

**MBOGO C.G.,**

**JUDGE.**