



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 81 OF 2017

JANE GATAVI MWANGI.....PLAINTIFF

VERSUS

PATRICIA GITIRI NTHIGA.....DEFENDANT

RULING

1. The Plaintiff filed this suit against the Defendant on 25th April 2017 seeking the following reliefs;

a. An order that the common boundary between land parcels GATURI/GITHIMU/9667 and 75 be restored by the Land Registrar Embu and the Defendant be permanently restrained from encroaching into land parcel No. Gaturi/Githimu/9667.

b. Costs of this suit.

c. Any other or further relief that this honourable court deems fit to grant.

2. It was pleaded in the plaint that the Plaintiff was the registered proprietor of Title No. GATURI/GITHIMU/9667 (hereinafter called “parcel No. 9667”) whereas the Defendant was said to be the beneficial owner of Title No GATURI/GITHIMU/75 (hereinafter called “parcel No. 75”) which was registered in the name of Ignatius Nthiga Kiminje (deceased).

3. The Plaintiff further pleaded that the Defendant had wrongfully encroached upon her parcel No. 9667, interfered with the common boundary and refused to co-operate with the Embu Land Registrar and Surveyor in their bid to determine and restore the boundary between those two parcels of land.

4. The Defendant entered an appearance and filed a defence making a general denial of all the allegations in the plaint. She further pleaded that she had been improperly joined as a party to the suit and threatened to apply for her name to be struck out at the opportune time.

5. The Defendant’s counsel, therefore, took up the issue of her client’s joinder as a preliminary objection and sought to have the suit struck out for misjoinder by filing a notice of preliminary objection dated 2nd June 2017. The parties appear to have agreed to canvass the said preliminary objection through written submissions. The Defendant’s submissions were filed on 27th September 2017 whereas the Plaintiff’s submissions were filed on 13th October 2017.

6. The main issue raised by the Defendant’s counsel in objecting to the suit is that the Defendant was improperly joined to the suit since she was not the registered proprietor of parcel No. 75. Without admitting or denying that the Defendant was a beneficial owner, the Defendant’s counsel submitted that the Plaintiff was just on a fishing expedition and that the suit ought to be struck out.

7. The Defendant relied on the provisions of Order 1 Rule 10 (2) of the Civil Procedure Rules which empower the court to strike out the name of any party who may have been improperly joined and to order the joinder of a party who ought to have been joined. The Defendant also relied on the cases of **Moses Kinaichu Mugenyi & 2 Others Vs Margaret Wandia Nguru & Another [2016] eKLR and Skair Associates Architects Vs Evangelical Lutheran Church of Kenya & 4 Others [2015] eKLR** in support of his submissions.

8. The Plaintiff submitted that although the Defendant was not the registered proprietor of parcel No. 75, it was her wrongful actions of encroachment and interference with the common boundary which have been called into question. It was submitted that it was not the deceased owner who had encroached into the Plaintiff’s said parcel of land. It was, therefore, denied that the instant suit was bad in law.

9. The court has considered the pleadings and the submissions of the parties herein. The Defendant has been described as a “beneficial owner” of parcel No. 97. She has not been sued as an administrator of the registered owner who is admittedly deceased. She has been sued by reason of her occupation and alleged encroachment onto the Plaintiff’s parcel of land No. 9667.

10. In those circumstances, the Defendant would be directly answerable for her alleged encroachment and interference with the common boundary. In my view, it was not mandatory for her to have been sued as an administrator of the estate of the deceased even though that may have been in order.

11. The court, therefore, finds that the facts of this case are distinguishable from the cases cited by the Defendant's counsel. On the basis of the facts pleaded in the plaint alone, the Plaintiff appears to have a cause of action directly against the Defendant. It cannot be invalidated merely because the Plaintiff could have sued her in another, or probably a better, capacity.

12. Consequently, the court finds no merit in the Defendant's preliminary objection as to her joinder in the suit and the notice of preliminary objection dated 2nd June 2017 is consequently dismissed with costs to the Plaintiff.

13. Since the value of the subject matter appears to fall within the pecuniary jurisdiction of the Chief Magistrate's Court at Embu, this suit is hereby transferred to the Chief Magistrate's court at Embu for trial and disposal.

14. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 17TH day of MAY, 2018

In the presence of Mr Kamunda holding brief for Mr Mugendi for the Defendant and in the absence of the Plaintiff.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

17.05.18