



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 181 OF 2013

CHRISTOPHER NDERITU WAITHERI.....PLAINTIFF

-VERSUS-

JOSEPH WANGAI THUMBI.....DEFENDANT

JUDGMENT

1. On 5th September, 2013 the plaintiff herein, Christopher Nderitu Waitheri, filed the suit herein seeking judgment against the defendant, Joseph Wangai Thumi, for:

(a) A declaration that the occupation and use by the defendant of part of Othaya/ Itemeni/1072 (the suit property) is unlawful; an order compelling the defendant to grant him vacant possession of the portion of the suit property he unlawfully occupies and in default an order for forcible eviction of the defendant from the portion of the suit property he unlawfully occupies.

(b) Mesne profits on account of the unlawful occupation of the suit property from 2010 to the date vacant possession is granted.

(c) Costs of the suit.

2. The plaintiff's suit is premised on the ground that he is the administrator of the estate of Jacob Waitheri Kahonge (deceased) which includes the suit property herein. The plaintiff accuses the defendant of having unlawfully encroached and trespassed into part of the suit property causing him great loss and damage.

3. Vide his statement of defence filed on 16th December 2013, the defendant denies the allegations leveled against him and contends that the suit is *res judicata* Nyeri CMCC No.192 of 2010.

4. On 9th May, 2016 parties to this suit entered into a consent whose terms are as follows:-

“(a). That a government appointed surveyor does conduct a survey over land Othaya/ Itemeni/1072 and determine its extent, occupation and use as between the plaintiff and the defendant;

(b). The government appointed surveyor to file the survey report in court within sixty days.

(c). The parties to share the survey fees equally.

(d). Matter to be mentioned on 11th July, 2016 to confirm filing of report.”

5. On 11th July 2017, the consent order referred to in paragraph (4) above, was amended to include the County Land Registrar, Nyeri.

6. Pursuant to the consent order referred to in paragraphs (4) and (5) above, the County Land Registrar and the County Surveyor, Nyeri, visited the suit property and filed the following reports:

County Land Registrar's report-

“Report on implementation of Court Order ELC Case No. 181 of 2013- Christopher Nderitu Waitheri (suing as co-administrator of the estate of Jacob Waitheri Kabonge Plaintiff/Applicant

-vs-

Joseph Wangai Thumbi ... Defendant/Applicant

Present:

1. J.M. Mwambia Land Registrar
2. Nelson Mureithi Land Surveyor
3. John Nderitu Land Surveyor
4. Henry NgaruiyaLand Surveyor
5. Antony KangetheLand Surveyor
6. Christopher NderituWaitheriPlaintiff(Parcel No. 1072)
7. Joseph Wangai Thumbi Defendant (Parcel No. 1015)
8. Agnes Wanjiru GatunduArea Assistant Chief
9. Francis Wahome Police Officer
10. Kiprono Yator Police Officer
11. Stephen WahomeArea Chief
12. Neighbours.

Introduction:

The County Land Registrar and the County Surveyor were ordered to conduct survey over land parcel No.Othaya/Itemeini/1072 and determine its extent and occupation and use of the same as between the plaintiff and the defendant.

The defendant’s land is Othaya/Itemeini/1015.

A site visit was done on 1st February, 2017 in presence of all parties.

Observations and findings

Land parcel No. Othaya/Itemeini/1072 is registered under Jacob Waitheri Kahonge and measures 0.87 Hectares while land parcel No.Othaya/Itemeini/ 1015 is registered under Joseph Wangai Thumbi. It measures 0.866ha.

When we visited the site, the plaintiff showed us a portion of land which he claimed belonged to him but was occupied by the defendant. Upon taking measurements, it was noted that the plaintiff occupies 0.85 hectares on the ground.

According to the registry index map, a portion of his land measuring 0.03 hectares is occupied by the defendant. This means that the plaintiff occupied lesser area on the ground than what is provided on the Registry Index Map (RIM) and the title deed. I have attached the surveyor’s report and a sketch map to support this report.”

7. The report of the County Surveyor is as follows:

“Re: surveyor’s report on implementation of court order- ELC Case No.181 of 2013

The site was visited on the 1st day of February, 2017, measurements for respective parcels of land i.e Othaya/Itemeini/1072 were taken and its extent determined.

In that regard the following were the observations:-

(i) The portion of land occupied by the plaintiff measures 0.85 hectares;

(ii) A portion of parcel No. Othaya/Itemini/ 1072 measuring 0.03 hectares is occupied by the defendant.

For more verification see the sketch attached herewith.”

8. On 23rd November, 2017 the parties to this dispute recorded a consent adopting the report by the County Land Registrar and Surveyor.

Analysis and determination

9. As pointed out above, the plaintiff instituted this suit claiming that the defendant has unlawfully encroached on the suit property and seeking the orders enumerated herein above against the defendant.

10. The defendant denied having encroached on the plaintiff's property and put him to strict proof of that fact.

11. To establish the true position concerning the dispute which is the subject matter of this case, the parties to the dispute agreed to have the Land Registrar and the Land Surveyor, Nyeri visit the suit properties and establish what the position on the ground is.

12. As pointed out herein above, the reports of the Land Registrar and Surveyor established that the defendant had encroached into the plaintiff's land by 0.03 acres.

13. There being no other evidence controverting the finding of the County Land Registrar, Nyeri and the County Land Surveyor, I find and hold that the plaintiff has made up a case for a declaration that the defendant occupies a portion of his land measuring 0.03 hectares and for an order compelling the defendant to forthwith vacate from the plaintiff's portion of land he was found to have encroached, failing which he shall be forcibly evicted therefrom.

14. Being of the view that the dispute between the plaintiff and the defendant was more or less a boundary dispute and there being no evidence that the boundaries to the suit property had been fixed before the parties filed this suit, I decline to grant the prayer for general damages for trespass, and the order for costs.

15. The upshot of the foregoing is that the plaintiff's suit succeeds to the extent contemplated in this judgment.

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 14th day of May, 2018.

L N WAITHAKA

JUDGE

Coram:

Mr. Ombongi h/b for Mr. Muhoho for the plaintiff

N/A for the defendant

Court assistant - Esther