



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC 351/2017

RICHARD KAUSYA NZIMBI.....PLAINTIF

VERSUS

PETER NDELEVA NZIMBI.....1ST DEFENDANT

WAITA NDELEVA.....2ND DEFENDANT

JUDGEMENT

1) By his plaint dated 17th October, 2017 and filed in court on the 18th October, 2017, Richard Kausya Nzimbi (*hereafter referred to as the Plaintiff*) prays for judgement against the Defendants jointly and severally for :-

a) Orders of permanent and mandatory injunction against the defendants either by themselves, their agents, servants and/or employees from interfering, invading, intruding, alienating, trespassing or in any way dealing with the Plaintiff's parcel of land known as UKIA/UTAATI/1179.

b) An order that the defendants be evicted from parcel of land known as UKIA/UTAATI/1179.

c) The officer commanding Makindu Division do enforce the orders of this Honourable Court and the implementation of the District Land Surveyor report dated 17th August, 2016.

d) General damages for trespass and loss of user.

e) Cost and interest of this suit.

2) The matter proceeded as undefended suit after the defendants failed to enter appearance and to file their defence within the prescribed period after being served with summons on the 24th and 25th October, 2017 respectively as can be seen from the affidavit sworn at Wote by Peter Maundu Mwilu, a process server, on 25th October, 2017 and filed in court on the 17th November, 2017.

3) The matter came up for hearing on the 5th March, 2018 wherein the plaintiff and his witness, Kilimo Matingo Makau (PW1) testified.

4) During the hearing, the plaintiff adopted his witness statement dated 17th October, 2017 and filed in court on the 18th October, 2017 as his evidence. He said that he was the registered proprietor land title number Ukia/Utaati/1179 measuring 4.0 hectares as can be seen from a copy of the title deed produced in evidence as PEX no. 1. He went on to say prior to his registration as the proprietor of the suit land, it was an ancestral land registered as number 550 in the names of Musava Waita and Nzimbi Waita. He disclosed that in the early 1980s land number 550 was subdivided into four (4) portions. One Musava Waita Nyika remained with the original title number 550 while the plaintiff's father, Nzimbi Waita Nyika, was allocated parcel number 1179. This was the land that was later transferred to the plaintiff. The plaintiff went on to say that parcel number 1080 was allocated Ndeleva Nzimbi (*the first defendant herein*) while the late Cosmas Nzinga Nzimbi got parcel number 1180.

5) It was the plaintiff's further evidence that in early 1980s, there was a boundary dispute concerning land parcel number 1179 and 1181. He said that as a result of the dispute, he registered a complaint with the Surveyor who in the company of the Land Registrar visited the area and showed the parties their respective boundaries. He said that the Surveyor visited the area again in 2015 and 2016 but he was obstructed by the first defendant from doing his work. He revealed that in July, 2016 the Land Registrar while in the company of the police visited the area again and all the parties were shown their boundaries and sisal plants were planted. He said that the first defendant uprooted the sisal plants and reverted to the old boundary. The plaintiff termed the first defendant's action as trespass which he said had caused him loss and damage as he is not in a position to develop his land for gainful use.

6) The plaintiff produced the Surveyor's report concerning the survey on boundary re-establishment on parcels number Ukia/Utaati/1179/1180/1181 dated 17th August, 2016 and dated 17th August, 2016 and demand letter as PEX Nos. 2 and 3 respectively.

7) Kilimo Matingo Makau (PW1) adopted his undated statement filed in court on 1st March, 2018 as his evidence. He said that he works for the plaintiff. He revealed that the plaintiff showed him the boundaries for plot number 1180 owned by the first defendant and plot number 1181 owned by Cosmas Nzingu Nzimbi. He said that plot number 1181 had encroached into the plaintiff's plot. He revealed between 10th August, 2017 and 18th August, 2017 he was stopped by the second defendant from digging holes for posts along the disputed boundary.

8) Upon resting the plaintiff's case, his counsel filed written submissions on the 3rd April, 2008 the same being dated 28th March, 2018.

9) The counsel submitted that under section 16 of the Land Registration Act no. 3 of 2012, the Office of Survey is empowered to rectify a boundary where it deems fit. He went on to submit that the County Surveyor summoned all the parties and marked the boundary in their presence but the defendants later interfered with it.

10) The counsel further submitted that the plaintiff produced a copy of title deed and added that under section 26 of the aforementioned Land Registration Act, a certificate is prove that the proprietor named in the title deed is the absolute and indefeasible owner and that there being no contention as to the ownership of land title Ukia/Utaati/1179, the said land belongs to the plaintiff.

11) The counsel cited the cases of APPOLINARUS BOSIRE NYAMARI VS JOANNES ODERA OKWANYO & ANOTHER [2006]eKLR, JOHN NDUNGA KAGUIYA VS DANIEL GICHELA [2015] eKLR and OXIX OIL (KENYA) LTD VS PAUL KABEO & 2 OTHERS (2014) eKLR in support of his submissions.

12) Section 16(1) of the Land Registration Act provides as follows:-

“ The office 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 subdivision of land that is for the time being in force”

13) The plaintiff has averred in paragraph 6 of his plaint that Ukia /Utaati/1179 was subjected to a boundary dispute after subdivision and that the Land Registrar conducted a fresh boundary survey which essentially confirmed the boundaries and upheld the plaintiff's claim. In his evidence, the plaintiff produced title deed number Ukia/Utaati/1179 as PEX no. 1. The title shows that he is the registered proprietor of the suit land. Under section 26 of the Land Registration Act, 2012 certificate of title is conclusive evidence of proprietorship. There being evidence that the boundary between land parcels number 1179 and 1180 was confirmed and upheld Registrar in favour of the plaintiff, the defendants have no right to occupy a portion of the plaintiff's land. The plaintiff will be at liberty to apply for an order of eviction should the defendants decline to voluntarily move out of the portion of land parcel number Ukia/Utaati/1179 that they currently occupy.

14) From the above, it is clear that the plaintiff is entitled to damages . **Halsbury's Laws of England , 4th ed, vol 45, at para 26, 1503** provides

15) as follows;

a. If the plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss.

b. If the trespass has caused the plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.

c. Where the defendant has made use of the plaintiffs' land, the plaintiff is entitled to receive by way of damages such a sum as would reasonably be paid for that use.

d. Where there is an oppressive, arbitrary or unconstitutional trespass by a government official or where the defendant cynically disregards the rights or the plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded.

e. If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased.

16) It is clear that the defendants have made use of the portion of the plaintiff's land thereby making him unable to graze or tether his cows on that particular portion of land. In my view Kshs. 150,000 would be reasonable damages under the circumstances.

17) From the evidence on record, I am satisfied that the plaintiff has on a balance of probabilities a cause of action against the defendants. In the circumstances, I hereby proceed to enter judgment for the plaintiff and against the defendants jointly and severally as hereunder:-

a) Orders of permanent and mandatory injunction against the defendants either by themselves, their agents, servants and/or employees from interfering, invading, intruding, alienating, trespassing or in any way dealing with the Plaintiff's parcel of land known as UKIA/UTAATI/1179.

b) An order that the defendants be evicted from parcel of land known as UKIA/UTAATI/1179.

c) Kshs. 150,000 being general damages.

d) The officer commanding Makindu Division do enforce the orders of this Honourable Court and the implementation of the District Land Surveyor report dated 17th August, 2016.

Signed, dated and delivered at Makueni this 14th day of May, 2018

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MBOGO C.G

JUDGE

IN THE PRESENCE OF:

Mr. Hassan for the Plaintiff

Mr. Kwemboi Court Assistant

MBOGO C.G JUDGE

14/5/2018