



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT EMBU

E.L.C. CASE NO. 45 OF 2016

NYAGA MURIUKI.....PLAINTIFF

VERSUS

ROSE WANJA NJAGI.....DEFENDANT

JUDGEMENT

1. By an undated plaint filed on 27th June 2016, the Plaintiff sought the following reliefs against the Defendant;

a. An order directing the District Surveyor and District Registrar to determine the boundaries of land parcel number Kagaari/Nduuri/T.51 and Kagaari/Nduuri/T.52.

b. Costs of this suit.

c. Any other relief this court deems fit to grant.

2. It was pleaded in the plaint that the Plaintiff was the registered proprietor of *Title No. Kagaari/Nduuri/T.51* (hereinafter described as parcel No. T. 51) whereas the Defendant was the registered proprietor of *Title No. Kagaari/Nduuri/T.52* (hereinafter described as parcel No. T.52). The two parcels were said to share a common boundary and it was alleged that the Defendant had encroached upon the Plaintiff's said parcel of land by constructing a house on part thereof.

3. The main relief which the Plaintiff sought was, therefore, for the District Surveyor and the District Land Registrar to be ordered to visit the two parcels of land the subject of the dispute and determine the respective boundaries of parcel Nos T.51 and T.52.

4. The Defendant filed a written statement of defence dated 11th July 2016 in which she admitted the descriptive parts of the plaint. She also admitted being the registered proprietor of parcel No. T.52. She, however denied having encroached upon any part of the Plaintiff's parcel of land No. T.51.

5. The Defendant further pleaded that the boundary dispute had been reported to the District Land Registrar who had given a date for a site visit in November 2016 for the purpose of resolving the dispute. She, therefore, prayed for the Plaintiff's suit to be dismissed with costs.

6. On 14th November 2016, the Plaintiff filed an application of even date seeking an order for the District Land Registrar and District Surveyor to determine the boundaries of the two parcels of land i.e T.51 and T.52. When the said application came up for hearing on 6th March 2017, it was allowed since it was not opposed by the Defendant. She also desired to have the boundary dispute resolved.

7. The District Land Registrar, Embu visited the two properties on 28th March 2017 in the presence of the Plaintiff but in the absence of the Defendant. He filed his written report on 1st November 2017 indicating that when measurements of the two plots were taken by the District Surveyor it was revealed that parcel No. T.52 had no excess acreage although parcel No. T.51 had a deficit of about 4 meters. It was further noted that the deficit was not in respect of the Plaintiff's parcel No. T.51 alone but all the other parcels along the same line. It was the opinion of the Land Registrar that the deficit in the Plaintiff's parcel of land could not be recovered from adjoining plots.

8. The said report was circulated to the parties before the hearing of the suit. The Plaintiff informed the court on 20th September 2017 that he was not satisfied with the report of the District Land Registrar. The Defendant, on the other hand, informed the court that she was satisfied with the report.

9. When the suit was scheduled for hearing on 7th December 2017, the Plaintiff testified on his own behalf and closed his case. He informed

the court that the title deed for his parcel No. T.51 indicated that its acreage was 0.05 Ha and wondered how it could be any lesser on the ground. He testified that sometime in April 2015, he discovered that the Defendant had erected a house which had encroached on his parcel No. T.51.

10. Upon inquiry by the court the Plaintiff stated that he bought his said parcel of land in 2013 he did not secure the services of a surveyor to ascertain its acreage at the material time.

11. The Defendant called two witnesses at the trial and closed her case. She maintained that her parcel No. T.52 measured about 50 x 100 feet and there was no encroachment onto the Plaintiff's parcel No. T. 51 whatsoever. The second witness was Peter Ndwiga Njagi who testified that he was the Assistant Chief and resident of Kiambogo village in Nduuri sub location. He testified that he knew both the Plaintiff and the Defendant in this suit. He confirmed that they shared a common boundary and that their parcels measured about 50 x 100 feet respectively. He was also aware of the boundary dispute between the parties.

12. Upon conclusion of the hearing, the parties were given the opportunity to file and exchange written submissions within 45 days. At the time of preparation of this judgement, however, none of the parties had filed submissions. The court, nonetheless, decided to determine the suit.

13. In my opinion, there is only one issue for determination in this suit. That issue is whether or not the Defendant had encroached upon the Plaintiff's parcel of land No. T.51.

14. The court has considered the evidence on record in this matter together with the evidence of the parties herein. It is evident that the Plaintiff's parcel No. T.51 and the Defendant's parcel No. T.52 should measure about 50 x 100 feet or 0.05 acres. That acreage is however, proximate acreage only under section 18 of the Land Registration Act, 2012 except where the boundary is fixed.

15. The report prepared and filed by the District Land Registrar indicates that upon taking measurements of the 2 plots, there was a deficit in the Plaintiff's parcel but no excess in the Defendant's parcel of land. In his opinion, the deficit in the Plaintiff's parcel could not be recovered from the Defendant's parcel. It was recommended that the parties should maintain the current boundaries and the Plaintiff should live with the deficit since he did not conduct due diligence at the time of purchase.

16. On the basis of the evidence on record, the court finds no evidence that the Defendant has in any way encroached upon the Plaintiff's plot as alleged by the Plaintiff. The report of the District Land Registrar Embu supports this position. It was the Plaintiff who was all along mistaken as to the actual size of his parcel of land. He simply relied on the acreage shown in the title documents at the time of purchase without verifying that acreage on the ground.

17. In those circumstances, the court finds, and holds, that the Plaintiff has failed to prove his case on a balance of probabilities as required by law. The consequence of this is that the Plaintiff's suit is hereby dismissed with costs to the Defendant.

18. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 14th day of JUNE, 2018.

In the presence of the Plaintiff in person and the Defendant in person.

Court clerk Mr Muinde.

Y.M. ANGIMA

JUDGE

14.06.18