



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 881 OF 2017

(Formerly Nairobi ELC No 389 of 2014)

SANGALE OLE LANGAS.....PLAINTIFF

VERSUS

STEPHEN MISHISH.....1ST DEFENDANT

GEORGE MISHISH.....2ND DEFENDANT

JUDGMENT

By a Plaint amended on 16th April, 2014, the Plaintiff prays for judgment against the 1st and 2nd Defendant as follows:

- a) A permanent injunction restraining the 1st and 2nd Defendant/ Respondents, from trespassing, interfering into land parcel number KAJIADO/OLCHORO – ONYORE/ 9183 and quiet and peaceful possession of the suit property by the Plaintiff.
- b) Any other relief this Honourable Court may deem fit to grant.
- c) Any order directing the 1st and 2nd Defendants/ Respondents to demolish and remove the alleged fence.
- d) Costs of the suit with interest.

The Defendants filed a joint Defence where they denied the Plaintiff's claim and stated that the Plaintiff did not have a valid claim against them in relation to the suit land. They averred that land parcel number KAJIADO/ OLCHORO – ONYORE/ 1235 was sold to third parties by the registered owner NAISIANOI ENE MISHISH who was their mother and is not a party to the suit.

The parties filed their respective documents and the matter proceeded to full hearing.

Evidence of the Plaintiff

PW1: SANGALE OLE LANGAS who is the Plaintiff herein stated in Court that the defendants had encroached on his land KAJIADO/OLCHORO-ONYORE/9183, produced the title deed as Plaintiff exhibit '1'. He confirmed having bought suit land from his brother and that at the time of the purchase it did not have a dispute. He averred that his brother is the Defendants' father, and that a committee of 12 members have asked the defendants to stop encroaching on his land but they have persisted to do so. He explained that before instituting the suit, they sought the intervention of the Surveyor who advised the Defendants' to desist from their acts of encroachment. Further, that the Registrar Kajiado visited the suit land and determined it belonged to him. He produced the Registrar's report dated the 11th July, 1990 as Exhibit '2'. He contended that the defendants who are brothers' sold his land but he does not know where they obtained his title deed to enable them do so. He reiterated that the defendants were really interfering with his land, claiming he does not have documents to prove ownership over the same. He sought the Court's intervention to remove the Defendants' from his land as they have constructed mabati structures thereon. Further that they sold their land and it took the Police intervention to compel them to stop interfering with the suit land.

During cross examination he confirmed being the registered owner of the suit land KAJIADO/OLCHORO-ONYORE/9183 and claimed it was the defendants who brought people to his land. He insisted he does not have a title deed in the name of the Defendants and that the suit land measures 6 acres (2.33 ha). He explained that there is a 9 meters road between his land and the Defendants'.

He stated that the defendants are sons to Naini Ole Mishish, and that their father died but he is survived by three wives. He sued the defendants because they encroached on his land and made a title to it. He insisted that land parcel number Kajiado/Olchoro - Onyore/11235

was within his land and it is the defendants who brought in Vincent Onserio Mose and Hezborn Momanyi Mose. Further that he does not know when title to land parcel number Kajiado/Olchoro - Onyore/11235 was issued but he only saw buildings.

He reiterated that the boundary to land parcel number Kajiado/Olchoro - Onyore/11235 that the Defendants' sold, had been extended across the road to his side and yet his land and the Mishish's was on opposite sides of the road. He denied selling land parcels number Kajiado/Olchoro Onyore/ 173 and 259 respectively. He further insisted that the photographs shown of the buildings were on his land. He reiterated that the Surveyors conducted a site visit on 20th May, 2015, saw the Accacia Tree and confirmed the land belonged to him.

During re-examination, he clarified that it is the defendants who brought people to his land. He confirmed selling a portion on the upper part of his land but denied selling where there is a dispute. He reiterated that the reports on the dispute for 1990 and 2011 all confirmed the land was his. He insisted the Acaccia tree is still present and that he wants the court to evict the persons who encroached on his land.

The Plaintiff thereafter closed his case.

Evidence of the Defendants

DW1: STEPHEN SARUNI MISHISH who is the 1st Defendant herein adopted his witness statement and stated that he had been sued together with his brother George, for encroaching on the plaintiff's land. He averred that the Plaintiff claimed they have encroached on land parcel number Kajiado/Olchoro-Onyore/9183 but he does not know the said parcel of land. He clarified that they sold land parcel number Kajiado/Olchoro- Onyore/173 to Eliud Kimotho, and it is the land where they border with the Plaintiff. He testified that there is a nine (9) meter road between their lands and that his mother sold to Vincent Onserio Mose and Hezbon Momanyi Mose, the land, which borders Eliud Kimotho's land. He denied that his land borders the road and insisted that Vincent Mose and Hezbon Momanyi Mose were issued with their title deed in 2012 and yet this suit was instituted in 2014. He said that his mother is still alive and that when the Surveyor came to the land in May 2015, he was present and they prepared a report which was presented in court. He disputed the presence of an Acaccia tree on the disputed land and averred that the same fell before the Kisiis bought the land. He confirmed that beacons had been put on the disputed land and that in the Surveyor's report the break is at point (b) to (c). Further that before their father died, they were involved in a Land Disputes Case at the Tribunal, that issued an award which was adopted and the Executive Officer signed the transfer.

In cross examination he insisted that the plaintiff sold some land but did not have documents to prove this. He confirmed that their mother also sold land but did not produce any documents to that effect. He knew Vincent Mose and Hezbon Momanyi who their mother sold to land and stated that they had not encroached on the Plaintiff's land. He clarified that their land and the Plaintiff's are separated by a road. He averred that the District Surveyor visited the suit land in 1990 and prepared a report that states that the Mishish's to desist from encroaching on the Plaintiff's land.

He denied encroaching on the Plaintiff's land and that when a site visit was conducted in 2015, after the Court had directed, the Surveyor's report indicates where the road passes. He contended that he was in Court when the Surveyor presented the report and that the shaded area in the said report is the disputed portion, but the Surveyor did not indicate who owns the said disputed portion. He reiterated that there were recommendations in the Surveyor's report of 2015 that the Registrar was to rectify the land to reflect point (b) and (d). He failed to produce any documents in Court including the agreement and transfer where they sold land to Vincent Mose and Hesborn Mose and stated that the dispute in question had not lasted for 30 years.

In reexamination he confirmed his mother sold land to Vincent Mose and Hezbon Mose land and once someone is issued with a title, he is the legal owner.

The Defendant thereafter closed their case.

Both the Plaintiff and the Defendants filed their respective submissions.

In the Plaintiff's submissions, he reiterated his claim and emphasized that a site visit exercise conducted on 19th May 2015. The District Land Surveyor filed a report on 25th May 2015 and produced the same in court on 11th October 2016 clearly indicating that the disputed area belongs to the plaintiff. The Plaintiff submitted that he is the rightful owner of the suit property known LR NO. KJD/ONCHORO-ONYORE/9183 which includes the disputed area as clearly indicated in both the Surveyors' Report. He demonstrated that he was issued with a Certificate of Title by the District Land Registrar on 10th June 2010 conferring to him the absolute and indefeasible right of ownership, in accordance with Sections 24 and 25 of the Land Registration Act. Further that his title deed was not controverted by the defendants whatsoever. The Plaintiff relied on various judicial authorities to support his claim which included **ELC NO. 222/15 (Kisumu), Victoria Distributors-vs Joseph Obwao Nyawir and ELC NO. 65/2013, Christopher Kitur Kipwambok-vs- Vipulratilal Dodhia & 3 ORS.** He submitted that there is neither evidence on record nor any claims made by the defendants to indicate and/or insinuate that he acquired his title illegally, un-procedurally or through a corrupt scheme and hence the legitimacy of his certificate of title is unopposed. He insisted the Defendants had encroached on his land

The Defendants in their submissions contended that the dispute herein related to a triangular piece of land that borders two parcels of land whose original numbers were KAJIADO/OLCHO-ONYORE/19 and KAJIADO/OLCHORO-ONYORE 16 respectively. They reiterated that parties were in agreement that between the two parcels of land there is a 9 m road that separated them but the point of departure was the exact position of the road.

The defendant submitted that prior to filing this instant case, the Plaintiff had filed CMCC NO.76B of 2013 at the Machakos Law Courts against the same defendants, claiming similar orders but regarding a totally different land known as KAJIADO/OLCHORO-ONYORE/1429 which he also claimed the defendants had encroached upon.

They submitted that the plaintiff erroneously and mistakenly sued them and the entire suit should be dismissed with costs. Further, that there is no nexus between what the plaintiff has pleaded and the alleged wrong by the defendants. They clarified that land parcel number KAJIADO/OLCHORO-ONYORE/19 belonged to their father NAINI MISHISH (deceased), which land bordered the Plaintiff's land parcel number KAJIADO/OLCHORO-ONYORE/16. Further, that their father sub-divided his land amongst his 3 wives prior to his demise, and each of the wives then further sub-divided their respective portions to their individual sons. They challenged the Plaintiff's submission that the defendants sold the suit premises without obtaining letters of administration and contended that the same is misleading and should be expunged from the record.

They challenged the plaintiff's failure to produce any document to show that they were the administrators of the estate of their late father NAINI MISHISH. Further, that their mother (who is still alive) sold part of her land KAJIADO/OLCHORO-ONYORE/11235 to VINCENT ONSERIO MOSE & HEZBON MOMANYI MOSE and they wondered why the Plaintiff never sued them. They reiterated that the Plaintiff had not produced documents including Green Card to prove the Defendants sold land to third parties hence his suit should be dismissed. Lastly, the boundary report tabled by the surveyor and his entire testimony for that matter touched on KAJIADO/OLCHORO-ONYORE /19 and KAJIADO/OLCHORO-ONYORE/16 which are not in dispute in this matter. They submitted that both the plaintiff and surveyor did not pin point the exact location of KAJIADO/OLCHORO-ONYORE/9183 and this court cannot therefore be called to make assumptions on the exact location without any strong evidence to guide the court. Lastly, the defendants attached to their list of documents a copy of title deed for KAJIADO/OLCHORO-ONYORE/11235 registered to VINCENT ONSERIO MOSE & HEZBON MOMANYI MOSE whom the plaintiff deliberately omitted to sue despite knowing that they were the registered owners of that piece the plaintiff claims to have been encroached upon. They denied encroaching on the Plaintiffs land and contended that the suit should be dismissed with costs.

Analysis and Determination

After perusal of the pleadings, witness statements including the documents filed herein and upon hearing the testimony of PW1 as well as DW1 and on considering submissions for both parties, I find that the following are the issues for determination.

- Whether the plaintiff is the rightful owner of the suit land known as LR NO. KJD/ONCHORO-ONYORE/9183 which was a subdivision from Kajiado/Olchoro- Onyore/16.
- Whether the defendants have encroached onto land parcels number Kajiado/Olchoro- Onyore/9183.
- Whether the Defendants should be evicted from land parcel number Kajiado/Olchoro- Onyore/9183.
- Who will bear cost of this suit.

As to whether the Plaintiff is the rightful proprietor of the suit land.

The Plaintiff tendered evidence in court that he is the registered proprietor of the suit land and produced a title deed to that effect. The Defendants did not controvert this piece of evidence. Section 26(1) of the Land Registration Act stipulates as follows: **“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except**

(a) On the ground of fraud or misrepresentation to which the person is proved to be a party or

(b) Where the Certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”

Further Section 24 (a) of the Land Registration Act provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”.

I note in the current scenario the Defendants did not challenge the Plaintiff's Certificate of title nor indicate it was issued through fraud, misrepresentation or through a corrupt scheme and it is trite law that A valid Certificate of title held by a party is prima facie evidence that the person registered thereon is the absolute proprietor of the suit land.

In the case of **ELC NO. 65/2013, Christopher Kitur Kipwambok-vs- Vipulratilal Dodhia & 3 ORS; Hon. Sila Munyao J** sitting at the High Court of Kenya at Eldoret held that Certificate of Lease just as a Certificate of Title was conclusive evidence of proprietorship.

Further, in the case of Ahmed Ibrahim Suleiman and Another vs. Noor Khamisi Surur (2013) eKLR Justice J.M. Mutungi stated that **' the Plaintiff having been registered as proprietor and having been issued with a certificate of lease over title No/ Nairobi/Block 61/69 are in terms of section 26(1) of the Land Registration Act entitled to the protection of the law'**.

In relying on the facts as presented, legal provisions quoted above, and being persuaded by the above cited judicial authorities, I find that legal provisions empower the Plaintiff by virtue of being the registered owner of the suit land with vested rights and privileges therein and which no person including the Defendant should not interfere with.

Since the Defendants' did not challenge the Plaintiff's title to land parcel number KAJIADO/ OLCHORO ONYORE/ 9183, I find that the Plaintiff is indeed the absolute proprietor of land parcel number KAJIADO/OL CHORO ONYORE/9183.

As to whether the Defendants have encroached on the suit land

Since I have already made a finding that the Plaintiff is the absolute proprietor of land parcel number KAJIADO/ONCHORO-ONYORE/9183, the issue for determination is whether the Defendants have encroached thereon. It is the Defendants' evidence that there was a boundary dispute between the original two parcels of land Kajiado/Olchoro – Onyore/16 and 19 owned by the plaintiff and the defendants' families respectively. Further that the Plaintiff is claiming a shaded portion as per the Surveyor's report. Both parties accept that there is a road that was to separate the Plaintiff's as well as the Defendants' parcels of land. Further, there was an acacia tree that demarcated the boundary. It was the Plaintiff's evidence that the acacia tree was still present on the suit land, which fact was disputed by the defendants. As per the evidence presented including the documents, I note the suit land emanated from Kajiado/Olchoro- Onyore 16 that has since been sub-divided into various portions. Further, that Kajiado-Olchoro- ONyore 19 which was initially owned by the defendants family has also been divided into smaller portions. I note the boundary dispute between the two parties' families' had been determined by the Land Registrar in 1990 vide his report dated the 11th July 1990 that was produced in evidence and marked as Plaintiff's exhibit 'P2'. A excerpt from the said report at the findings and rulings section reads as follows: **' Considering the evidence of the elders some of whom belonged to the adjudication committee, I am of the opinion that the acacia tree is the extreme northern end of Meshe's land. Mr. Meshesh to stop forthwith claiming Mr. Langas' land. With the help of the surveyor we have cut out the 9 metre road on the northern side of the Acaccia tree down to the river course. The 9 metre road is between the land of Mr. Meshesh and that of Mr. Langas.**

I note the Defendants never sought to review nor reverse the findings and ruling of the District Land Registrar then C.W. Ngechu, who was/is legally mandated to handle issues of boundary disputes still stands

There was a Survey report by Geomakos Land Agents dated the 29th October, 2014 that stated that it is the Plaintiff who had encroached on the Defendants' land

While anotheer Surveyor dated the 11th March, 2015 which was produced in court, confirmed that the Acaccia tree marked the boundary between the Plaintiff and Defendants' family land. The Surveyor stated as follows: **' we carried out measurements from the upper beacons between plot 19 and 16 and extended the boundary line through the Acacia point to the seasonal river with 9.0 road of access towards the north (i.e right side) of the acacia tree position. On reaching the river, we pointed out the Mishish and Langas beacon positions, the beacons/ boundary position was objected and our work was stopped by the Mishishi family. Our survey work as represented by the Red line on the attached map shows the position of the Acacia point and the resulting measurements down the River. Lines in blue show the earlier position taken by the Mishish family.'**

From yet another Survey report filed dated the 20th May, 2015, the District Surveyor filed the report in court and at its findings stated that both the parties accepted there existed a 9 metre road between the two suit properties. Further, that both the Plaintiff and Defendants pointed out different boundaries. I note from the said report he did not conclude on the measurements.

It was the Plaintiff's submission that from 1990 there was no boundary dispute between him and the Defendants' family land Parcels number Kajiado/Olchoro- Onyore/16 and Kajiado/Olchoro- Onyore/19 until the demise of the defendants father, NAINI MISHISH, when the said defendants herein resurrected this boundary dispute. Further, that the defendants herein encroached into the suit premises and sold some portion to some third parties who are strangers to the Plaintiff herein. During the hearing, the plaintiff produced photographs as his exhibit '3' showing the extent of the encroachment. The Plaintiff contended that the Defendants herein disregarded the Land Registrar's Ruling dated 11th July 1990 and continued with their of encroachment on his land. Further, that the Hon. Court directed the District Surveyor-Kajiado to conduct another site visit in the presence of both parties and witnesses and to file a report in court, which report was report by District Surveyor was filed in court on 25th May 2015.

From the testimony of the Plaintiff including the documents produced as exhibits, it is evident from the mutation forms and maps that the two parties families indeed shared a common boundary as I have alluded to above.

I note that section 19 and 20 of the Repealed Registered Land Act as well as Section 14 of the Land Registration Act, it is only the Land Registrar who is mandated to deal with boundary disputes. Section 20 (4) of the repealed Registered Land Act was clear that **'No court shall entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in this section.'**

It is against the foregoing that I find that the Land Registrar's Report dated 11th July,1990 was authentic and dealt conclusively with the boundary dispute between the original Kajiado/Olchoro- Onyore/16 and Kajiado/Olchoro-Onyore/19 respectively, as mandated by the law. I find that the resultant subdivisions from the Kajiado/Olchoro-Onyore/16 and Kajiado/Olchoro-Onyore/19 respectively should not interfere with the Land Registrar's determination of boundaries as per his report dated the 11th of July, 1990. In line with the said findings whose excerpts I have quoted above, I find that the Defendants' have indeed moved the boundary inwards to the disadvantage of the Plaintiff and hence encroached on the Plaintiff's land. I note the Defendants contended that they nolonger border with the Plaintiff as they have sold the suit land to third parties. At this point I will not delve into whether they had a title to pass to the third parties as this was not an issue in dispute herein, but I will base my judgment on the Land Registrar's report dated 11th July,1990 because when it comes to determining general boundaries, it is only the Registrar who is mandated to do so and not the Surveyor. The Surveyor is only mandated to fix the boundaries once the Land Registrar has made a determination of the boundary dispute. It is against the foregoing that I find that the Defendants have indeed encroached on the suit land and direct that they be permanently restrained from encroaching on the Plaintiff's land parcel number KAJIADO/ OLCHORO ONYORE/ 9183 which was a resultant subdivision from Kajiado/Olchoro-Onyore/16. Further, based on the Land Registrar's report of the 11th of July, 1990, I direct the District Surveyor Kajiado to fix the boundary between the original land parcels number Kajiado/Olchoro- Onyore/16 and Kajiado/Olchoro- Onyore/19 respectively as per the said report.

Who should bear the costs of the suit.

Costs generally follow the event, and in this instant case I do award the plaintiff the costs of this suit.

In the circumstances, I find that the Plaintiff has proved his case on a balance of probability and proceed to enter judgment in his favour and make the following final orders :-

a) That a declaration be and is hereby issued as against the defendants, that the plaintiff is absolute proprietor of land parcel KAJIADO/OL CHORO ONYORE/9183

b) A permanent injunction be and is hereby issued restraining the Defendants either by themselves, their agents and or servants from harassing, threatening, intimidating, trespassing upon, or in any manner whatsoever interfering with the Plaintiff's property known as title number KAJIADO/OLCHORO ONYORE/9183

c) The costs of the suit are awarded to the Plaintiff.

Dated signed and delivered in open court at Kajiado this 12th day of July, 2018.

CHRISTINE OCHIENG

JUDGE