



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE NO 1021 OF 2014**

**LUCY WANJIKU GITHINJI ..... PLAINTIFF**

**=VERSUS=**

**EPHANTUS IRERI ENA ..... DEFENDANT**

**JUDGMENT**

**Introduction**

1. This suit is about a boundary dispute relating to Title Number **Ruiru East Block 1/4186** belonging to the plaintiff and Title Number **Ruiru East Block 1/4187** belonging to the defendant. The plaintiff alleges that in April 2014, the defendant encroached into her property by 7 feet (1.7 metres) and began erecting structures on the encroached part of her land. Aggrieved by the alleged encroachment, the plaintiff initiated this suit through a plaint dated 31/7/2014 seeking the following prayers

- a) An injunction restraining the defendant (whether by himself, employees, servants, agents tenants and/or persons authorized by him or otherwise howsoever) from entering, remaining on or continuing in occupation, trespassing into, constructing upon, alienating, transferring, leasing, wasting, damaging and or in any other manner whatsoever interfering with the proprietor's quiet possession of the suit property known as Title No Ruiru East Block 1/4186 measuring 0.042ha.*
- b) A order of forcible eviction of the Defendant, his employees, servants, agents, tenants and/or persons authorized by him or otherwise howsoever from the suit property or any part thereof forming part of the suit property;*
- c) An order for demolition of any construction encroaching on the suit property known as Title No Ruiru East Block 1/4186.*
- d) Damages for trespass for the period the illegal encroachment and occupation shall subsist until the defendant renders vacant possession of the suit property.*
- e) Costs of the suit*
- f) Any other or further relief as this honourable court may deem fit and just to grant.*

**Defendant's Case**

2. The defendant's case is that he purchased two adjacent plots measuring 50 feet by 100 feet from **Irene Wamuyu Kimani** who pointed out the beacons to him in 2007. The beacons pointed out by the said Irene Wamuyu Kimani are still intact to date. He adds that the structures erected by him are within the boundary beacons. He further contends that in April 2014, the plaintiff and his agents trespassed on the premises and fixed new beacons, an action which prompted him to call Irene Kimani who once more confirmed that his structures were within the original beacons. The defendant further contends that he received summons from the District Lands Office relating to the boundary dispute requiring him to attend the site on 1/7/2014. His position is that the district surveyor did not visit the site on the appointed day. He later learnt that the district surveyor had visited the site on 3/7/2014 and marked the boundary in his absence.

**Evidence**

3. At the hearing, the plaintiff testified as PW1 and called one witness, **Chris Macharia – PW2**. The evidence of PW2 was that he is a land surveyor from the Ministry of Lands and he is based at Survey of Kenya, Ruaraka. He visited the site and prepared a surveyor's report dated 9/7/2014. Attached to the report was a sketch map. He produced the report together with the sketch map as exhibits. His findings were that the construction on Parcel Number **Ruiru East Block 1/4187** had encroached into Parcel Number **Ruiru East Block 1/4186** by 1.7 Metres. He further testified that he had a chance to look at the relevant mutation forms for the two plots which contained their measurements. He added that on the mutations, the two plots are the same in size, each measuring 0.42 hectares or 20.5 Metres by 20.3 Metres. He further

testified that he measured the two plots based on the mutation forms and established that the encroachment was by 1.7 Metres.

4. The defendant testified as DW1. He did not call any witness. His testimony is as summarized in paragraph 2 of this judgment. He further stated that he did not recall any other communication from the Land Registrar or the district surveyor regarding the boundary dispute. He was surprised to learn that the surveyor went to the site on 3/4/2014. He denied encroachment into the plaintiff's plot.

### Submissions

5. The plaintiff filed written submissions dated 15/1/2018. The plaintiff referred to the defendant's advocate's letter dated 21/6/2014 to Irene Wamuyu Kimani which the defendant produced as an exhibit, in which the defendant alluded to a visit to the site by a surveyor sent by Irene Wamuyu. The plaintiff further submitted that the defendant had failed to establish the correct boundary of his plot. She urged the court to grant her prayers.

6. The defendant filed written submissions dated 7/2/2018. He submitted that by the time the plaintiff purchased her plot, he had been in possession of his plots for over 3 years. He added that the beacons fixed in 2007 were still in place. He faulted the mutation dated 2010 contending that the mutation done in 2010 did not take into account the portion of land already sold to him. The defendant further submitted that the sales of the respective properties were subject to easements and rights of way, Act, special conditions, covenants and other matters in the title. The defendant faulted the surveyor's report, contending that it is contradictory. He urged the court to dismiss the plaintiff's suit.

### Determination

7. I have considered the parties' respective pleadings, evidence, submissions and cited case law. I have also considered the relevant legal framework on resolution of boundary disputes. Two issues fall for determination in this suit. The first issue is whether the defendant has encroached into the plaintiff's property, Title Number **Ruiru East Block 1/4186**. The second issue relates to the appropriate remedy in the event that the answer to the first issue is in the affirmative.

8. It does emerge from the evidence before court that when the defendant embarked on development of **Ruiru East Block 1/4187**, there was a boundary dispute, with the plaintiff contending that the defendant was encroaching into her land. Indeed, in a letter dated 2/6/2014 from the defendant to Irene Wamuyu Kimani, the defendant acknowledged the dispute and intimated to Ms Kimani that he had relied on the beacons pointed to him by her. He proceeded to caution Ms Kimani to desist from sending any surveyor to the site to verify the boundary.

9. Secondly, it does emerge from the evidence that faced with the dispute, the plaintiff lodged a boundary dispute with the district land registrar. Consequently, the district land registrar sent the district surveyor to go to the ground and mark the boundary. PW 2 attended and marked out the boundary. He prepared a report which confirmed that indeed the defendant had encroached into the plaintiff's property by 1.7 Metres. The defendant contends that the site visit leading to the report was not made on the appointed.

10. On his part, the defendant did not request for a second site visit by the surveyor. He did not cause any surveyor to visit the site to prepare a report. He has not provided any evidence to challenge the survey report prepared by the government surveyor on behalf of the district land registrar. His contention is that he relies on what was captured in the sale agreement at the time of purchasing his property.

11. Land boundary identification is a scientific exercise that is carried out by properly authorized professionals. Where a land boundary dispute exists, the first port of call is the district lands office. The reference material to be used in the resolution of the dispute include the duly registered mutation maps and registry index maps (RIMS).

12. Section 18 of the Land Registration Act vests in the Land Registrar the power to determine boundaries. Indeed, this court is precluded from exercising jurisdiction over boundary disputes relating to registered land unless the boundaries have been determined by the registrar in accordance with the Act.

In the present suit, there is evidence that the registrar made a determination in which he ascertained that indeed the defendant had encroached into the plaintiff's property. The defendant has not invited the registrar to review the determination.

13. In light of the foregoing, it is the finding of this court that the plaintiff has proved on a balance of probabilities that indeed the defendant had encroached into her parcel of land **Title Number Ruiru East Block 1/4186** by 1.7 Meters.

14. It therefore follows that, the plaintiff is entitled to the prayers sought in the plaint. It is however noted that the defendant has erected some single floor structures on the encroached portion. I will take this into account in the court's disposal orders.

15. The plaintiff prayed for general damages. She however did not lead any evidence to support the claim for general damages. In the absence of evidence, I will not make any award for general damages.

### Disposal Orders

16. In light of the above findings, the plaintiff's suit succeeds and the following disposal orders are made:

*a) An order hereby issues for demolition of any construction encroaching on the suit property known as Title Number Ruiru East Block 1/4186.*

*b) An order hereby issues for forcible eviction of the defendant, his employees, servants, agents, tenants and/or persons*

*authorized by him or otherwise howsoever from the suit property or any part thereof forming part of the suit property, Title Number Ruiru East Block 1/4186.*

*c) An order for injunction hereby issues restraining the defendant (whether by himself, employees, servants, agents, tenants and/or persons authorized by him or otherwise howsoever) from entering, from remaining on or continuing in occupation entering, trespassing into, construction upon, alienating, transferring, leasing, wasting, damaging and or in any other manner whatsoever interfering with the plaintiff's quiet possession of the suit property known as Title Number Ruiru East Block 1/4186.*

*d) Costs of this suit are awarded to the plaintiff*

*e) Order numbers (a), (b), and (c) above are suspended for a period of 90 days to allow the defendant time to engage the plaintiff with a view to acquiring the stretch of 1.7 Metres through purchase as may be mutually agreed by the parties to this suit.*

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27TH DAY OF SEPTEMBER 2018.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Mr Wafula Advocate for the defendant

Lucy Wanjiku Githinji - plaintiff present in person.

Ms June Nafula - Court Clerk.