



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC CIVIL SUIT NO. 112 OF 2014

AYABEI CHERUTICH.....PLAINTIFF

VERSUS

TAPNYABEI CHESARO.....DEFENDANT

JUDGMENT

By a plaint dated 7th April 2014 the plaintiff herein sued the defendant seeking the following orders:

- a) A declaration that the disputed portion of land measuring 0.2 Ha belongs to the Plaintiff and that the same comprises part of land parcel BARINGO/ KAPROPITA/ 309.
- b) A declaration that the Defendant's invasion of the Plaintiff's portion of land measuring 0.2 Ha of the suit land is unlawful.
- c) An order compelling the Defendant to pull down the erected fence and vacate the Plaintiff's portion of land measuring 0.2 Ha comprised in land parcel BARINGO/ KAPROPITA/ 309.
- d) An order of permanent injunction restraining the Defendant and her agents from interfering with the Plaintiff's land parcel BARINGO/ KAPROPITA/ 309.
- e) Costs.

The plaintiff contemporaneously filed a Notice of Motion seeking for a temporary injunction restraining the defendant from interfering with the plaintiff's portion of land measuring 0.2Ha comprised in land parcel No. BARINGO/ KAPROPITA/ 309 until this matter is heard and determined.

The application came up for hearing and the Judge made an order that the defendant be barred from ploughing or developing the 0.2 Ha which is the disputed area pending the hearing of the application. He further ordered that the status quo be maintained on the disputed area.

Later the court directed that the Surveyor in charge of Baringo County within whose jurisdiction the land parcels No. BARINGO/ KAPROPITA/ 309 & 310 fall to proceed to the ground and establish or re establish the boundary between the disputed land parcels 309 & 310, identify the disputed portion, point out to the parties their respective boundaries, determine whether either parties to the two parcels has encroached into the other's land and if so identify the said party and the area encroached, and file a report within 30 days. The matter was to be mentioned on 24th October 2014. This order was never adhered to as the defendant was not comfortable with the local surveyors.

Plaintiff's Case

The plaintiff gave evidence and stated that he is the registered owner of the suit land known as parcel No. BARINGO/ KAPROPITA/ 309 of which he produced a copy of the title deed. He also produced the proceedings of the boundary dispute dated 11/10/12, photographs of the boundary indicating the tree stumps which had been planted in the original boundary and a letter dated 7/2/14 by the District Land Registrar addressed to the defendant to pull down the fence illegally erected on the disputed portion.

The plaintiff further stated that the defendant encroached on his parcel of land and planted bananas and vegetables which he urged the court to order the defendant to remove.

On cross examination by the defendant's Counsel, the plaintiff stated that the Adjudication Officer did his work and marked the boundaries which he respected but the defendant encroached on his parcel of land. The plaintiff also stated that he is the one who planted the trees, has been in occupation and that the defendant is the one who cut down the trees on the boundary. It was further his evidence that both parties were present when the Land Registrar came to the disputed land to arbitrate and ordered that the status quo be maintained. He reiterated that

the defendant has encroached on his 0.2 ha of land.

PW2 testified and stated that he knows the disputed parcels of land as his home borders the defendant's parcel of land. It was his evidence that the defendant's husband Chesaro Chelimo came to purchase the suit land in 1960's when adjudication had already been done and boundaries established. He also stated that the plaintiff had already planted trees and fenced his parcel No. 309 and that the parties had maintained the boundaries until 2012 when the defendant lodged a boundary dispute against the plaintiff.

On cross examination PW2 stated that the existing boundary between the plaintiff and the defendant is marked by tree stumps and a foot path and that the same has been maintained since 1960's.

PW3 the County Land Registrar Baringo testified and stated that he was familiar with the dispute herein and had attended court in order to produce the proceedings of the Boundary Dispute which was conducted by Mr. Sewer while he was still in office. He stated that it is the defendant who had made the complaint which was adjudicated upon by the Land Registrar who made a finding that the right boundary was along the ridge and tree stumps along the fence that has existed since 1965.

PW3 also stated that there can be situations where the survey map may not concur with the boundary existing on the ground and in such cases the Land Registrar goes by the boundary on the ground if it has been in existence since the Adjudication period. The witness further stated that the boundary on the ground in this case has been in existence since 1960 and that there has been no complaint until 2012 when the defendant filed one.

He stated that the ruling was delivered in the presence of both parties but the Defendant herein failed to comply with the Land Registrar's order/directive that she pulls down her newly erected fence and revert to the old boundary along the ridge prompting the Registrar to issue a notice in 2014 to the Defendant through the Area Chief directing her to pull down the newly erected fence. He finally stated that there was no appeal of the Registrar's verdict.

On cross examination PW3 stated that boundaries are quasi-judicial disputes where parties must be allowed to testify. He confirmed that the parties testified and a ruling delivered on 8/1/13. He said that they summon the parties through the area chief which was done in this case. It was his evidence that the parties were present during the deliberations and determination of the dispute. That was the close of the plaintiff's case.

Defence Case

The defendant gave evidence and produced a copy of her title and a search certificate. The defendant claimed that she has not encroached on the plaintiff's land and that it is the plaintiff who has encroached on her land. It was her evidence that the plaintiff removed her fence and she admitted that she is the one who cut the trees as they are on her land and not on the boundary.

It was the defendant's evidence that the registrar did not demarcate the land as they had refused. She further stated that she did not get the ruling of the Registrar. She also stated that she was present during the demarcation and adjudication and claimed that the plaintiff had taken a big portion of her land. The defendant finally stated that she had objected to the Registrar's report.

On cross examination by the plaintiff's Counsel the defendant stated that there was a boundary when they bought the land from Chepsingei. She further stated that the plaintiff took her 0.2 ha in 1968 but waited until 2012 to report the matter to the Land Registrar.

The defendant confirmed during cross examination that she has planted bananas and maize of the disputed boundary and intends to build a house on it. It was also her evidence that she continued using the disputed portion despite the court order stopping her from doing so. She also stated that she has not filed a counterclaim in this matter.

That was the close of the defence case.

Counsel filed submissions in respect of their client's cases and reiterated their evidence.

Plaintiff's Counsel's Submissions

Counsel for the plaintiff submitted that the uncontested issues are that Land parcel BARINGO/KAPROPITA/309 belongs to the Plaintiff while BARINGO/KAPROPITA/310 belongs to the Defendant, that the 2 parcels of land herein share a common boundary, that Parties herein have lived side by side since the early 1960's, that there has never been a boundary dispute from 1960 until 2012, that the disputed portion relates to a 0.2 Ha parcel of land that the Defendant claims to be hers but has been under the possession and use by the Plaintiff since the 1960s.

Counsel therefore listed the following issues for determination by the court,

- a) Whether the Plaintiff has encroached on the Defendant's portion of land measuring 0.2 Ha.
- b) Whether the dispute over the 0.2 Ha has been pending since early 1960s.
- c) Whether the Land Registrar heard parties and determined the boundary dispute.
- d) Whether the Defendant is justified in defying Land Registrar's verdict in the Boundary Ruling.

- e) Whether the Plaintiff is entitled to the prayers sought.
- f) Who will pay costs.

Counsel submitted that it is clear from the evidence on record that the area upon which the disputed parcels of land was adjudicated in the 60's and as such the boundaries are intact. That adjudication process was complete when the defendant's husband bought the parcel of land.

Mr. Kipnyekwei submitted that although the Defendant claims that the boundary dispute has existed since the 1960s, there is no evidence that the Defendant objected to the location of the boundary of the 2 parcels of land during the adjudication period, filed a land boundary dispute before the relevant tribunal and finally that upon registration of titles in the 1960, she never raised any complaint over encroachment of the 0.2 Ha of her land herein.

Counsel therefore submitted that the Plaintiff has demonstrated that the boundary existed in the 1960's and that the Land Registrar had deliberated on the dispute and given a verdict in favour of the plaintiff of which the defendant did not prefer an appeal. He finally urged the court to enter judgment for the plaintiff as prayed in the plaint plus costs.

Defendant's Counsel's submissions

Counsel for the defendant submitted that the plaintiff's claim would appear to hinge on adverse possession which he submits that should have been brought by way of originating summons under S. 37 Rule & 7 of the Civil Procedure Rules supported by affidavit stating the essential ingredients and circumstances to justify validity of such action.

Counsel further submitted that the plaintiff's claim is time barred as the defendant's title was issued in 1969. Counsel also submitted that the Registrar's report is skewed as it does not address itself to the actual dispute in court and is therefore not of any probative value. That the disputed portion is currently in the possession of the defendant as of right. Further that the Register's report produced in court is incompetent and incapable of being termed as a report because no survey was carried out to establish respective boundaries, no sketch plan was drawn, and no boundaries were fixed. The Registrar's report lacks essential ingredients hence does not conform to the law and are of no use to the court.

Counsel cited Article 159 (11) (b) of the Constitution which requires the Honourable Court to exercise judicial authority to do justice to all irrespective of status. Counsel therefore urged the court to dismiss the plaintiff's case with costs.

Analysis and Determination

The case before the court involves an allegation of encroachment by both the plaintiff and the defendant on a shared boundary on land parcel No. BARINGO/KAPROPITA/ 309 and 310.

It is not in dispute that the plaintiff is the registered owner of plot No. 309 and that the defendant is the registered owner of plot No. 310 which are adjacent to each other. It is further not in dispute that the defendant bought the land in the 1960's while the plaintiff was already in the area. It is also not disputed that the current dispute is for the land measuring 0.2 ha which is admitted by both parties.

The issues for determination therefore are who has encroached on the disputed land measuring 0.2 ha, whether the suit is time barred, whether the dispute was adjudicated upon by the Land Registrar and determined, and who should pay costs of the suit.

Having dealt with the undisputed issues, the main issue to be determined is who has encroached on the disputed land parcel. The evidence on record is that the adjudication of the land on which the disputed parcels fall were done in the 1960's and the demarcation done. The plaintiff's title deed was issued in 1982 even though he was registered as owner in 1971 with the register having been opened in 1968. It is also clear from the evidence that there has never been any boundary dispute between the plaintiff and the defendant until 2012 when the defendant filed a complaint against the plaintiff with the District Land Registrar Baringo.

The District Land Registrar together with the land surveyor visited the suit land on 11/10/12 and proceeded to determine the boundary dispute as per the proceedings which were produced in court. The Registrar ruled that the boundary be maintained along the ridge that has existed since 1960's.

Further by a letter dated 7/2/14, the District Land Registrar Baringo wrote a letter to the defendant giving her 14 days to demolish a fence erected contrary to the ruling made on 11/10/12 in respect of the boundary dispute on Baringo/Kapropita/309 &310. The defendant admitted that she had waited for more than 40 years to lodge a complaint about the boundary. If the deceased husband was aggrieved by any trespass on the suit land if any, then why did he not raise the issue?

The defendant filed a complaint in 2012 against the plaintiff which was heard and determined and if she was not satisfied with the verdict, why did she not prefer an appeal against the decision of the Land Registrar. The defendant was not being candid when she claimed that she did not get the ruling as in the same breath she stated that she did not agree with the verdict. Which verdict did she not agree with? She had also admitted that they were summoned by the Registrar who visited the disputed land and that when the Registrar came for the second time, she was asked to remove the fence which she did not adhere to.

I find that the defendant is the one who has encroached on the plaintiff's parcel of land and that the Registrar had deliberated on this dispute with a verdict which the defendant never appealed against. The defendant also disobeyed the court order stopping her from interfering with the disputed section pending the hearing and determination of the suit.

The other issue is as to whether this suit is time barred. Counsel for the defendant concentrated on the issue of adverse possession which was not in issue. Neither the plaintiff nor the defendant is claiming adverse possession. This is a pure case of trespass on a common boundary which the Registrar with powers and authority to determine called evidence and gave a verdict. I find that the suit is not time barred as the alleged trespass started in 2012 and the suit was filed by the plaintiff in 2014. There was no evidence that there was a dispute before 2012 which was admitted by the defendant.

The defendant admitted that the disputed boundary had trees which she cut down, erected a fence and planted bananas and maize while the court order was still subsisting stopping any interference. This shows that the defendant trespassed with impunity on the disputed portion without regard for court orders and the order by the Registrar which she blatantly disobeyed.

Had the parties been cooperative, this matter would not have taken this long in court. The court had earlier given an order directing the Registrar and the surveyor to visit the suit land and file a report as to boundary between plot no 309 and 310 but the parties became difficult. The map produced in court as exhibit no. 3 by the defendant purporting to show the boundary was not authentic as it was shaded by the defendant's children. The original map which was authentic did not have such shadings.

I have considered the pleadings, the evidence, the supporting documentation and Counsel's submission and I come to the conclusion that the plaintiff has proved his case against the defendant on a balance of probabilities. I therefore enter judgment for the plaintiff and make the following orders:

- a) A declaration is hereby issued that the disputed portion of land measuring 0.2 Ha belongs to the Plaintiff and that the same comprises part of land parcel BARINGO/ KAPROPITA/ 309.
- b) A declaration is hereby issued that the Defendant's invasion of the Plaintiff's portion of land measuring 0.2 Ha of the suit land is unlawful.
- c) An order is hereby issued compelling the Defendant to pull down the erected fence and vacate the Plaintiff's portion of land measuring 0.2 Ha comprised in land parcel BARINGO/ KAPROPITA/ 309 within 30 days failure of which an eviction order to issue.
- d) An order of permanent injunction restraining the Defendant and her agents from interfering with the Plaintiff's land parcel BARINGO/ KAPROPITA/ 309.
- e) Costs to the plaintiff.

Dated and delivered at Eldoret this 24th day of September, 2018.

M.A ODENY

JUDGE

Judgment read in open court in the presence of Mr. Kipkenei for defendant and in the absence of Mr. Kipnyekwei for Plaintiff.

Mr. Koech: Court Assistant.