



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 521 OF 2016

JAMES ONWONGA BOSIRE MOGAKA.....PLAINTIFF

VERSUS

EUNICE BOSIBORI MWARIMU.....DEFENDANT

J U D G M E N T

1. The plaintiff initiated the present suit by way of a plaint dated 10th October 2010. It was his claim that the defendant had without any authority and without any colour of right trespassed onto his land parcel **West Mugirango/Bogichora/570** (hereinafter referred to as **“the suit property”**) and caused destruction to his trees thereon. The plaintiff averred that the defendant was liable to compensate him in damages arising from the defendant’s acts of trespass. The plaintiff claimed that the defendant had demolished his fence and denied the plaintiff access and use of the facilities in the portion the defendant laid claim to.

2. The plaintiff sought judgment against the defendant for:-

1. **A permanent injunction restraining the defendants, its agents, servants and/or employees from interfering with the plaintiff’s parcel of land reference West Mugirango/Bogichora/570 in whatsoever manner, sale, transfer, utilize for any gain till this suit is heard and determined.**
2. **An order eviction the defendant from interfering with the property reference West Mugirango/Bogichora/570.**
3. **An order for compensation in terms of general damages for the destruction caused on the said property and massive profit therefrom.**
4. **Exemplary damages.**
5. **Costs of this suit.**

3. The defendant filed a defence (under protest) on 18th October 2011. The defendant denied all the allegations leveled against her by the plaintiff in the plaint. She particularly denied all the allegations of trespass set out under paragraph 5 of the plaint. In reply to the allegations of trespass the defendant pleaded under paragraph 5(a) to (f) of her defence as follows:-

- (a) **THAT the defendant is the owner of all that parcel of land known as West Mugirango/Bogichora/934.**
- (b) **THAT subject parcel of land known as West Mugirango/ Bogichora/934 borders the parcel of land known as West Mugirango/Bogichora/570 belonging to the late Naftal Gesicha Mogaka (deceased).**
- (c) **THAT she is duly entitled to her subject parcel of land and has been cultivating on her subject parcel of land aforesaid.**
- (d) **THAT the defendant has not in any way trespassed or cleared the fence in West Mugirango/Bogichora/570 nor destroyed the fence or isolated the compound (including the plaintiff’s home and toilet) but she has been cultivating and clearing the ground on her subject parcel of land.**
- (e) **THAT the defendant is only utilizing her subject parcel of land and has not in any way threatened the plaintiff or his family herein.**
- (f) **THAT there is boundary dispute between the parties herein whereof the deceased family herein have utterly failed to attend for the settlement of the subject dispute.**

4. It is evident that from the defendant's aforesaid pleading, the defendant's contention was that all activities she had done were restricted to her land parcel **West Mugirango/Bogichora/934**. According to the defendant, the dispute between the parties was one that related to a boundary dispute between their respective parcels of land.

5. The suit was fixed for hearing on 23rd July 2018 when the plaintiff attended but there was no attendance on the part of the defendant. The hearing proceeded ex parte and the plaintiff in his evidence reiterated the contents of the plaint and relied on the witness statement that he had recorded and had filed together with the plaint. He stated that he had sued the defendant for encroaching onto land parcel **West Mugirango/Bogichora/590** and for destroying his kieapple fence which he stated was worth kshs.300,000/=. The plaintiff placed reliance on the documents he had filed in support of the case.

6. I have reviewed the evidence tendered by the plaintiff and his witness statement filed together with the plaint herein and I am not satisfied that the defendant had encroached onto land parcel **West Mugirango/ Bogichora/570** as claimed. In the defence the defendant had asserted that she was the owner of land parcel **West Mugirango/Bogichora/934** which bordered land parcel **570** and that her activities were restricted to land parcel **934**. It was her further contention that what existed between the parties was a boundary dispute.

7. The plaintiff in his witness statement which he adopted in his evidence acknowledged that the defendant had on 30th September 2010 interfered with the boundary between land parcels **570** and **934** which had existed over a long period by erecting a new boundary inside land parcel **570** and uprooting the live fence that marked the old boundary. The plaintiff asserted this was encroachment onto land parcel **570**. In my view, it was necessary for the plaintiff to adduce evidence to confirm where the boundary of land parcel **570** and **934** ought to have been as clearly the dispute related to the position of the boundary between the two parcels on the ground. Whether or not there was encroachment by the defendant onto the plaintiff's land parcel could only be established if there was a report by a surveyor confirming the actual position of the boundary between the two parcels of land.

8. The law recognizes that the court cannot be the appropriate forum to have boundary disputes adjudicated as it lacks the technical ability to determine such disputes. The court under Section 18(2) of the Land Registration Act, 2012 is divested of jurisdiction to entertain suits relating to boundary dispute. Section 18(2) of the Act provides:

“The Court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this Section.”

9. The plaintiff's claim for damages was predicated on the plaintiff being able to prove encroachment by the defendant onto his land parcel **570** which regrettably he has failed to prove and consequently no damages can be awarded.

10. The end result is that upon the evaluation of the evidence tendered by the plaintiff, the plaintiff has failed to prove the suit on a balance of probabilities. Accordingly, the plaintiff's suit is ordered dismissed.

11. The parties will bear their own costs of the suit.

JUDGMENT DATED, SIGNED and DELIVERED at KISII this 26TH DAY of OCTOBER 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

N/A for the plaintiff

N/A for the defendant

Ruth Court assistant

J. M. MUTUNGI

JUDGE