



REPUBLIC OF KENYA

IN The ENVIRONMENT AND LAND COURT

AT NAROK

ELC CAUSE NO. 384 OF 2017

FORMERLY KISII ELC CAUSE NO. 272 OF 2012

DANIEL LEKIRERE OLE KOSENCHA.....PLAINTIFF

-VERSUS-

JULIUS LEPAP KOSENCHA & ANO.....DEFENDANTS

JUDGEMENT

By a plaint dated 9th July, 2012 the Plaintiff sought for Judgment against the Defendants jointly and severally for a permanent injunction restraining the Defendants from encroaching into land parcel No. TRANS-MARA/ISAMPIN/191 and a declaration do issue that the Plaintiff is the sole proprietor of the suit land and costs of the suit.

It is the plaintiff's case that at all material times to the suit herein he was the proprietor of Land Parcel NO. TRANS MARA/ISAMPIN/191 measuring 9.80ha and that sometime in the year 2002 the Defendants encroached on the suit land and started cultivating sugar cane and herding there cattle on the land and despite asking the Defendants to move out, they have refused and thus the Plaintiff continues to suffer loss and damage.

The Defendants on the other hand contend and admit that the Plaintiff is the owner of parcel NO. TRANS MARA/ISAMPIN/191 but they deny that they ever encroached on the suit land as alleged by the Plaintiff and aver that they are owners of land parcel No. TRANS MARA/ISAMPIN/193 which shares a common boundary with the Plaintiff's land.

The Defendants in their defence further contend that it is the Plaintiff who trespassed on the 2nd Defendant's parcel in 2002 with a view to defraud her of rightful entitlement to land parcel NO. TRANS MARA/ISAMPIN/193.

The Plaintiff testified as PW1 and it was his case that he is the owner of the suit land which is LR NO. TRANS MARA/ISAMPIN/191 measuring about 9.8hectares and his father also allocated another parcel of land which is TRANS MARA/ISAMPIN/193 to the Defendants.

He further stated he was shown the boundary of the two parcels by his late father but in 2002 the Defendants removed the live fence and subsequently refused him to access the land claiming that the suit land belonged to them (Defendants).

The Defendants to prove their case, produced a certificate of title, search certificate and a sketch map as exhibits in the matter and in conclusion prayed that the court do order the Defendant to move out of the suit land.

The Plaintiff also called one Jackson Parsaloi who testified as PW2 and in his evidence he stated that he is uncle to the 1st Defendant and that in year 2000 his grandfather sub-divided his land among his sons who are the Plaintiff and the 1st Defendant and they were respectively allocated land parcels TRANS MARA/ISAMPIN/191 and 193 respectively and before the sub-division the family jointly used the entire land together. PW2 further stated that sometime in 2002 the Defendants created a new boundary on their portion of the land which was not the original boundary between the two parcels of land.

During cross-examination PW1 admitted that the issue between him and the Defendants related to a boundary between land parcel No. TRANS MARA/ISAMPIN/191 and 193 and that the issue of the boundary was placed before the elders but they could not agree. He further stated that he is aware that the Defendants have title to their land.

PW1 on further cross-examination stated that he is aware that the District Land Registrar Trans-Mara visited the suit land to define the boundary on his application and a report duly filed in court but he is not aware about its contents.

PW2 on cross-examination stated that he knew the dispute between the parties was handled by the elders but was not there during the deliberation and hence not aware of its outcome.

He further stated that he knew there is a house on the disputed portion that belonged to the first defendant.

On the close of the Plaintiff's case as stated above the Defendants elected not to call any witness and chose to rely on the pleadings as filed and at the close of the plaintiff and the Defendants case, both counsel filed their respective submissions.

Having heard the Plaintiff's evidence and that of his witness and having read the submissions made by the counsel for the parties, the main issue for determination is whether the plaintiff has established the conditions for the grant of an injunction, and whether the plaintiff has proved a case of trespass against the Defendants.

From the evidence on record I find that this is a matter that relates to boundary dispute between the Plaintiff and the Defendants. Both parties are in agreement that they own parcels No. TRANS MARA/ISAMPIN/191 and 192 respectively and the power to fix and determine boundaries are contained in the provisions of section 18 and 19 of Land Registration Act, No. 3 of 2012 which provide:-

“Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary”.

“Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed”.

According to the above provisions, a dispute as pertaining to the boundaries position falls within the jurisdiction of the land registrar and in the instant case on the application of the plaintiff, the registrar visited the suit land and carefully determined, demarcated and fixed the boundaries as between land parcel No. TRANS MARA/ISAMPIN/191 and 192 and accordingly filed in court and it is my finding therefore that the Registrar having determined the boundaries within the Provisions of Section 18 and 19 of the Land Registration Act the report thus filed in court on 9th October, 2013 which the Plaintiff has not challenged in any manner be deemed as a judgement of this court.

On whether the Plaintiff has established the grounds for the grant of injunction, I find that the condition for the grant is well settled as elucidated in the case of **GEILLA -VERSUS- CASSMAN BROWN** and I find that the Plaintiff has not established a prima facie case with a probability of success taking into account that the report by the registrar which determined the exact boundary did not find the Defendant has encroached on his land and hence I find that the Plaintiff has not proved the above grounds.

The upshot of the above is that I find the plaintiff has not proved his case on a balance of probabilities and I therefore dismiss the plaintiff's suit.

Since the parties herein are related I order that each party shall bear its costs.

DATED, SIGNED and DELIVERED in open court at **NAROK** on this **17th** day of **October, 2018**

Mohammed Noor Kullow

Judge

17/10/18

In the presence of:-

Mr Ogutu for the Defendant

Mr Nyasimi holding brief for Bosire Gichana

CA:Chuma