



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 35 OF 2012**

**MULINGE KILUNGU KIKWAWU .....PLAINTIFF**

**VERSUS**

**WILLIAM MATILU KIKUVI .....DEFENDANT**

**JUDGMENT**

1. In the Plaintiff dated 20<sup>th</sup> April, 2012, the Plaintiff averred that he is the owner of land known as Kalama/Iiuni/919; that in the year 2005, the Defendant trespassed on the suit land and commenced construction on the land and that the Defendant constructed a wall around the suit property. The Plaintiff is praying for an order compelling the Defendant to demolish the structures on the suit land and for exemplary damages at the rate of Kshs. 25,000 per month from 2005 until payment in full.
2. In his evidence, the Plaintiff, PW1, informed the court that he is a businessman at Katua Market; that the Defendant has developed the suit property and that the suit land is registered in his name.
3. According to PW1, the surveyor visited the suit land and confirmed that indeed the Defendant had developed the suit land and that he used to generate Kshs. 25,000 per month from the plot before the Defendant took over.
4. In cross-examination, PW1 stated that he purchased the suit land from the Defendant's father; that the sale was never reduced into writing; that he never purchased plot number 960 and that the Defendant has his own plot which is next to his. According to the Plaintiff, Plot No. 960 belongs to Haroun Mitua which is next to his plot which is developed.
5. It was the Plaintiff's case that the Defendant's plot is between Katungwa and Ann Mathuli's plots and that he exchanged his plot with Mr. Mitua after they realized that Mr. Mitua had developed his plot by mistake.
6. The Defendant, DW1, informed the court that he has built on a plot belonging to his father; that the Plaintiff bought plot number 960 in Katua market from his father and that he bought plot number 165 from his father.
7. According to DW1, the suit plot is actually plot number 165; that the Plaintiff had built on Plot No. 165 and that his children demolished the said house. According to DW1, it is the area chief who ordered for the demolition of the Plaintiff's house which was standing on Plot No. 165 and that his plot borders Plot No. 850 on the upper side while on the lower side, it borders Plot No. 919 belonging to Haroun
8. DW1 informed the court that Haroun developed his plot in the early 1970's and that Plot No. 165 was vacant; that Plot No. 960 is still vacant and that Haroun occupies Plot No. 919. According to the Defendant, Plot No. 960 belonging to the Plaintiff is still vacant. It was the evidence of DW1 that Plot numbers 850, 165, 919 and 960 follow each other in that order and that the Plaintiff's plot is 960.
9. In cross-examination, DW1 stated that the Plaintiff's bricks house is on plot number 165 which is his (Defendant's) and that Haroun's plot (919) is owned by Haroun.
10. DW2 informed the court that he is a surveyor; that the survey report produced by PW1 is not conclusive and that the map does not tally with what is on the ground.
11. The Plaintiff's advocate submitted that the Defendant admitted in his evidence that he has authorized the construction of a wall around the Plaintiff's shop; that the Plaintiff has developed Plot No. 916 and not 165 as alleged by the Defendant and that the Plaintiff should be allowed.
12. The Defendant's advocate submitted that this court does not have jurisdiction to entertain the claim; that plot number 919 and 165 adjoin each other and that being a boundary dispute, it is the Registrar of Land who should have dealt with the dispute.

13. The Plaintiff produced in evidence a copy of the Title Deed for parcel of land known Kalama/Iiuni/919. The said Title Deed shows that the Plaintiff was registered as the owner of the land on 8<sup>th</sup> July, 2009. It was the evidence of PW1 that although he bought parcel of land number 960 from the Defendant's father, he exchanged the said plot with his neighbour, Haroun Mathew, who had developed plot number 960 by mistake.

14. The evidence of the Plaintiff was that he developed Plot No. 916. However, the Defendant demolished a portion of his shop and put a wall around the said plot.

15. On the other hand, the Defendant admitted that he has put a wall around the premises built by the Plaintiff. However, according to the Defendant, the Plaintiff has developed parcel of land number 165 and not 919. The evidence of DW1 was that parcels number 850, 165, 919 and 960 follow each in that order and that the Plaintiff's land is parcel number 919 by the Defendant.

16. The Plaintiff produced in evidence the surveyor's report dated 18<sup>th</sup> May, 2011 in respect of parcels number 919 and 165. According to the surveyor's report, the proprietor of parcel number 165 (*the Defendant*) has erected a building on plot number 919 (*the Plaintiff's land*). The surveyor annexed the diagram showing the encroachment on plot number 919.

17. The diagram of sheet number 25 of Iiuni Registration Section shows plot numbers 850, 165, 919 and 960 follow each, with all the plots fronting a road. Although DW2 stated that the sketch map drawn by the District Surveyor does not tally with what is on the ground, he did not file a report and a sketch map to enable the court ascertain the position on the ground.

18. The surveyor's report of 18<sup>th</sup> May, 2011 and the map shows that the Defendant, in addition of Plot No. 165, has annexed a portion of parcel number 919. The Defendant has admitted that indeed he demolished some of the structures that had been put up by the Plaintiff.

19. On the basis of the surveyor's report, and the diagram of Iiuni Registration Section, I am convinced that the Plaintiff has proved on a balance of probabilities that the Defendant has encroached on parcel number 919. Consequently, the Defendant should remove the impugned wall, except the portion on the border of parcel number 165 and 919. The Plaintiff has however not proved that he has incurred damages due to the construction of the impugned wall by the Defendant.

20. For those reasons, I allow the Plaintiff's application dated 20<sup>th</sup> April, 2002 in the following terms:

***a. A permanent injunction be and is hereby issued restraining the Defendant by himself, his agents, servants or employees from entering upon, remaining thereon, sub-dividing, digging on, excavating, fencing, building or otherwise dealing with parcel of land known as Kalama/Iiuni/919.***

***b. The Defendant and or his agents be and are hereby ordered to vacate parcel number Kalama/Iiuni/919 and to demolish any structure or wall that they have build on or around parcel of land known as Kalama/Iiuni/919.***

***c. The Defendant to pay the costs of the suit.***

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 12<sup>TH</sup> DAY OF OCTOBER, 2018.**

**O.A. ANGOTE**

**JUDGE**