



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**E.L.C NO. 17 OF 2018**

**MBOTE GICHINI.....PLAINTIFF**

**VERSUS**

**NJIHIA MWANGI.....DEFENDANT**

**JUDGMENT**

1. The Plaintiff filed suit against the Defendant on the 30/7/13 seeking orders interalia;
  - a. An order directing the Defendant to restitute one acre from land Parcel No. LOC 18/KIRERE/4 to land parcel No LOC 18/KIRERE/3 and subsequently the boundaries be rectified after the restitution.
  - b. Costs of the suit
2. The Plaintiff avers that he is the registered proprietor of half share of land parcel No LOC18/KIRERE/3 while the Defendant is the owner of No LOC18/KIRERE/4. The plots border each other. It is the Plaintiff's case that the Defendant has encroached upon his land, LOC18/KIRERE/3 (suit land) and converted 1 acre to his own use by altering the boundaries. That the conversion is tortious, unlawful wanton and unwarranted. He sought restitution of one acre from LOC18/KIRERE/4 and the rectification of the boundaries.
3. The Defendant denied the Plaintiff's claim in the statement of defense filed on the 23/8/13. In it he stated that he is not the registered owner of the suit land as alleged by the Plaintiff. That he has been wrongly sued as the parcel No LOC18/KIRERE/4 is registered in the names of his late father MWANGI NJIHIA. In that regard any suit in respect to the suit land should be against the legal administrators of the estate of the said MWANGI NJIHIA. He added that the boundary dispute between the two parcels of land was adjudicated by the District Land Registrar in 1988 and a verdict arrived at. He denied that he has encroached nor converted one acre of the Plaintiff's land into his own.
4. During the hearing of the suit the Plaintiff stated that he is the registered owner of the suit land. That the Defendant has interfered with the boundary features and damaged the boundary demarcating the two parcels of land and erected his own boundary without the help of a surveyor. That he unlawfully encroached on one acre of the land. That the boundary was established in 1964. That though the dispute was submitted to the Land Register it remained unresolved. He informed the Court that he neither saw the Defendant remove or destroy the fence nor did he report the destruction of the fence to the police. He indicated that he was given the share of the land belonging to his brother Mwangi Gichina to his (Gichina's) sons namely Muturi and Mwangi.
5. Upon being cross examined as to whether he saw the Defendant uprooting the fence, he informed that Court that he did not. He stated that there are houses belonging to his relatives in between his house and that of the Defendant. He stated that he neither sued the Land Registrar nor enjoined the sons of Mwangi Gichina in the case as they are not interested in the dispute.
6. The Defendant gave evidence and stated that he is not the registered owner of the suit land and that it is registered in the name of his later father Mwangi Njihia. That this boundary dispute was adjudicated in 1988 by the Land Registrar, Muranga Lands office. That the boundary dispute does not touch on the side which is occupied by the Plaintiff rather on the side owned by his co-proprietor Mwangi Gichini who is not a party to the suit.
7. He informed the Court that the Plaintiff is claiming one acre of his fathers' land. That his fathers land borders that of Mwangi Gichini who is deceased and not the Plaintiff. He informed the Court that the boundary was planted in 1964 in the presence of his mother and grandmother. That the boundary has never been interfered with to date. The Land Registrar who visited the land found the boundary intact. The Land Registrar upon hearing the case and visiting the locus quo ruled that the ground was intact and that the RIM was to be amended to reflect the ground. That decision was not appealed. He produced the proceedings of the Land Registrar and the decision that was reached in evidence. He produced a search and copy of the title for LOC18/KIRERE/4 which showed the size of the land as 1.45 ha. He informed the Court that the Plaintiff's land measures 1.66 ha.
8. DW2 – Martin Kariuki testified and informed the Court he is a land surveyor and that he visited the suit land in the presence of the

parties. He presented the report in Court and informed the Court that parcel No LOC18/KIRERE/3 is 0.099 ha before the area across the stream is added. That the area across the stream is 0.81 ha which has no discernable boundary between the two parcels of interest. That the owner of Parcel LOC18/KIRERE/4 stated that he had not utilized the portion of the land past the stream. He informed the Court that the area of LOC18/KIRERE/4 corresponded with the area on the ground while the sum total of the land on LOC18/KIRERE/3 and the land past the stream gives the total acreage of 1.66 ha which is the area stated on LOC18/KIRERE/3, that is to say 1.666 ha in the title. When put together agrees with the acreage of the suit land LOC18/KIRERE/3. That LOC18/KIRERE/4 is 1.48 ha. He stated that the owner of LOC18/KIRERE/4 is not utilizing the land across the stream which is 0.81.

9. The Plaintiff submitted that LOC18/KIRERE/3 is smaller on the ground in comparative terms. That the surveyors report did not help much because he did not consider the land across the river.

10. The Defendant submitted that the boundary was put in place during demarcation of the suit land when he was about 15 years old and the same has never been moved by anyone as alleged by the Plaintiff. The position on the ground is as established in 1964 since land demarcation. The Land Registrar's report shows that the Plaintiff's land goes across the stream at the lower part of the land. Although the Plaintiff denied it then but his brother and his brother's son admitted that they use the land across the stream. The Land Registrar concluded that the ground is intact and that the RIM be amended to show the correct position on the ground. The new survey report dated the 18/9/18 and filed in Court on 14/9/18 concluded that the Plaintiff's land which includes the portion of land across the stream tallies with the registered land size which is 1.666 ha. He confirmed that the land has Napier grass meaning that it is being utilized by the Plaintiff and family.

11. The Defendant relied on case law; **William Gacani Mbaria Vs Charles Kirimi Mbui (2018) ECLR and Azzuri Limited Vs Pink Properties Limited (2017) ECLR.**

12. It is not in dispute that the suit properties are owned by the Plaintiff (1/2 share) and the father of the Defendant. According to the title of LOC18/KIRERE/4, it is registered in the name of the father of the Defendant namely Mwangi Njihia. The Defendant has been sued in his name. The Plaintiff has not produced evidence in form of letters of administration to show that the Defendant is the right person to be sued. I hold that the suit is incompetent as even if the Court were to grant any orders the same will not be enforced against the wrong party. The Defendant is therefore unsuited in this case.

13. That notwithstanding, the Defendant has stated in his evidence that the portion that the Plaintiff appears to be claiming to have been encroached is on the part of his co-proprietor, his late brother Mwangi Gichina. The Plaintiff has given evidence that the family of his brother live in between him and the Plaintiff. This puts into doubt the issue of encroachment on his land, if any. This evidence was not controverted by the Plaintiff save to state that the family of his brother are not interested in the dispute.

14. According to the evidence tendered by the Plaintiff at the trial of the case he stated as follows;

"I did not see the Defendant uprooting the fence. I did not report any removal of the fence to the police. I have not witness to support the uprooting of the said fence"

The import of the evidence above is to negate the Plaintiffs own cause of action that the Defendant has destroyed the fence along the boundary and put his own boundary thus encroaching on his land. He who alleges must proof.

15. Section 18 of the Land Registration Act states as follows;

"Except where, in accordance with [section 20](#), it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.

(2) 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.

(3) 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:

Provided that where all the boundaries are defined under [section 19\(3\)](#), the determination of the position of any uncertain boundary shall be done as stipulated in the Survey Act, ([Cap.299](#))".

16. The above section gives the mandate to the Land Registrar to resolve boundary disputes of land with general boundaries. Registry Index Map (RIM) only indicates approximate boundaries and the approximate situation on the ground. In this particular case it is not in dispute that the Land Registrar determined the dispute in 1988 and concluded that the ground was intact and the only thing to be done was for the rectification of the RIM to tally with the ground. The Land Registrar concluded that the land across the stream belonged to the Plaintiff and that decision was reconfirmed by the survey Report dated 18/9/18.

17. This is a dispute that was resolved as per the provisions of the Land Registration Act, Cap 300 as then and the verdict of the Land Registrar still stands. The District Land Registrar is ordered to implement the decision and effect changes on the RIM.

18. In the end I find that the Plaintiff's claim is rendered incompetent pursuant to para 17. The same is struck out with costs to the Defendant. It is dismissed with costs for the Defendant.

**It is so ordered.**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 13<sup>TH</sup> DAY OF DECEMBER 2018**

**J. G. KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Kimani James HB for TM Njoroge for the Plaintiff

Chege HB for Nganga for the Defendant

Irene and Njeri, Court Assistants