



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 355 OF 2012**

**PHILIP NYAMASYO KAVISI.....PLAINTIFF**

**VERSUS**

**SECRETARY OF THE PARENTSTEACHERS**

**ASSOCIATION OFATHI-KAMUNYUNI PRIMARY**

**SCHOOL.....1<sup>ST</sup> DEFENDANT**

**CHAIRPERSON OF THE PARENTS,TEACHERS**

**ASSOCIATION ATHI KAMUNYUNI**

**PRIMARY SCHOOL.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. In his Complaint dated 24<sup>th</sup> September, 2012, the Plaintiff sued the Chairman and Secretary of the Parents Teachers Association of Athi Kamunyuni Primary School pursuant to the provisions of the Education Act.
2. The Plaintiff averred that he is the registered owner of Plot No. 1464 situated at Kitengei "A" Settlement Scheme; that on 3<sup>rd</sup> February, 2003, his father sub-divided Plot No. Kitengei "A" 54 measuring 100 acres into two portions; that he donated 15 acres to the Defendant and that the remaining 84 acres is what is referred to as Plot No. 1464 which was left for the beneficiaries of Mr. Job Wambua Kathoka (*deceased*).
3. It is the Plaintiff's case that when a dispute arose between the school and the Kavisi family, the Land Adjudication and Settlement Office directed that the boundary between the two to be replanted which was done; that the Defendant uprooted the common boundary on 23<sup>rd</sup> July, 2012 and that the Defendant should be restrained from trespassing on parcel of land number known as 1464 Kitengei "A".
4. The Plaintiff is also seeking for an order of restoration of the boundary between his family and the Defendants.
5. The Attorney General entered appearance on behalf of the Defendants on 31<sup>st</sup> October, 2012 but never filed a Defence.

6. The matter proceeded for hearing on 28<sup>th</sup> September, 2016.
7. The Plaintiff, PW1, informed the court that his late father had land known as Kitengei "A" Plot No. 54 situated in Kitengei Settlement Scheme measuring approximately 100 acres; that he donated to the Defendant a portion of his land measuring 15 acres and that the Defendant forcefully extended the common boundary.
8. It was the evidence of PW1 that the boundary dispute was resolved by the Land Adjudication and Settlement Officer in the year 2011 who reinstated the boundary that had existed before.
9. PW1 informed the court that parcel of land known as No. 54 was sub-divided into Plot Nos. 54 "A" and 1494 but the Defendant is still claiming that it owns the whole land measuring 100 acres.
10. In cross-examination, PW1 stated that the land belongs to his father and that he had the letters of administrators in respect to his father's Estate; that he had not been issued with a Title Deed for his portion of land and that his father died in the year 2005.
11. PW2 informed the court that in the year 1986, he was summoned by the Defendants' head teacher and was informed that the late Wambua had donated land to the school; that he was an assistant chief then and that he was present when the late Job Wambua pointed out the boundaries between his land and the land that he had donated to the school.
12. The Plaintiff's advocate submitted that the Plaintiff produced evidence to show that he is the owner of Plot No. 1464 Kitengei "A"; that the department of Land Adjudication and Settlement resolved the issue of the boundary dispute between the Plaintiff and the school and that the Defendants never filed a Defence.
13. The Attorney General, on behalf of the Defendants, submitted that the Plaintiff did not produce Letters of Administration authorizing him to sue on behalf of his father's Estate; that it is the deceased who donated the suit land to the Defendant and that the suit should be dismissed for want of Letters of Administration.
14. The Defendants' counsel finally submitted that the Plaintiff does not have the Title Deed for the suit land and that the dispute can only be resolved by a Surveyor's report.
15. Counsel submitted that the Plaintiff failed to prove his case against the Defendants.
16. The Plaintiff, PW1, informed the court that his father, who died in the year 2005, had a parcel of land number 54 within Kitengei "A" Settlement Scheme.
17. According to PW1, the said land measured approximately 100 acres and that his father donated to the Defendants 15 acres leaving 85 acres for the family.
18. When the Defendants attempted to alter the boundary between parcel No. 1464 and 54 "A", the Plaintiff informed the court that the Land Adjudication and Settlement office intervened.
19. PW1 produced in evidence the proceedings of the Land Adjudication and Settlement-Kitengei "A" Settlement Scheme, dated 28<sup>th</sup> November, 2015.
20. According to those proceedings, the school was represented by its Chairman, head teacher and the schools' Parent's representatives.
21. The proceedings which were signed by the divisional Land Adjudication and Settlement Officer shows that all the parties present visited the *locus quo* and found that the Defendants' parents had "destroyed" and "defaced" the common boundary that had demarcated the land.

22. The proceedings of the Land Adjudication and Settlement Officer further shows that the common boundary was picked using a G.P.S and was indicated in the map thus separating the school's land and the land belonging to the Kavisi family. The officer's final order was as follows:

***“The Kavisi family have the right to re-plant their common boundary with the school without interference from anybody since they gave the school this portion of land free of charge.”***

23. The proceedings by the Land Adjudication and Settlement Office were produced in evidence without any objection. The question as to whether the maker of the document should have been called to testify does not therefore arise.

24. Although the Defendants' counsel has raised an objection as to the *locus standi* of the Plaintiff to prosecute the suit, I find that indeed the Plaintiff has the *locus standi* to file the suit.

25. I say so because the letter dated 11<sup>th</sup> May, 2012 by the District Land Adjudication and Settlement Officer clearly states that Plot No. 1464 situated at Kitengei “A” Settlement Scheme is owned and recorded under the Plaintiff's name.

26. Consequently, and in view of the records held by the Land Adjudication and Settlement office, it is the Plaintiff, and not his father, who owns the suit land. Considering that the boundary of Plot Nos. 1464 and 54A is clearly demarcated on the map which is held by the department of the Land Adjudication and Settlement office, Kibwezi District, the Defendants should respect the said boundary represented in the map.

27. Indeed, having not appealed against the order of the Land Adjudication and Settlement Officer, the Defendants are bound by that decision. They should therefore not alter the boundary of Plot Nos. 1464 and 54A.

28. It is for the reasons that I have given above that I allow the Plaintiff's Plaint dated 24<sup>th</sup> September, 2012 as follows:

***a. A permanent injunction be and is hereby issued restraining the Defendants, their servants and or agents from trespassing on land parcel number 1464 Kitengei “A” Settlement Scheme.***

***b. An order be and is hereby issued directing the Defendants to restore the common boundary of Plot Nos. 1464 and 54 “A” as captured in the report of the Land Adjudication and Settlement officer, Mtito Andei Division dated 28<sup>th</sup> November, 2011.***

***c. The Defendants to pay the Plaintiff the costs of the suit.***

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2017.**

**O.A. ANGOTE**

**JUDGE**