



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

LAND CASE NO.59 OF 2013

JOEL ADUMA RAMOGO.....1ST PLAINTIFF

MARY ATIENO ONDORO..... 2ND PLAINTIFF

VERSUS

JASPER ODONGO OCHOGO DEFENDANT

JUDGMENT

1. Joel Aduma Ramogo and Mary Ateino Ondoro, hereinafter referred to as 1st and 2nd Plaintiffs respectively, filed this suit through the plaint dated 18th March 2013 against **Jasper Odongo Ochogo**, the Defendant, seeking for the following:

- a) Eviction orders against the Defendant from land parcel **Kisumu/Muhoroni/584**.
- b) Injunction orders restraining the Defendant from interfering with the Plaintiffs peaceful use of the said land.
- c) Mesne profits from 15th October 2012 until the day Defendant vacates from, the suit land.
- d) Costs and interest.

The Plaintiffs avers that they commenced the process of purchasing land parcel **Kisumu/Muhoroni/584** in early 2012. That when they got a surveyor to confirm the lands boundary, they discovered that a portion of it had been occupied by the Defendant who owns land parcel **Kisumu/Mohoroni /576**. That they engaged the Defendant who agreed to vacate the land in six months from 15th April 2012 but he did not and hence this suit.

2. The Defendant filed the statement of defence dated 10th May 2013 denying the Plaintiff's claim and putting him to strict proof.

3. The hearing commenced on 30th June 2015 when one **Lukhoko Were**, a District Land Registrar Nyando, Mohoroni and Nyakach testified as PW1. PW1 told the court how he visited land parcels **Kisumu/Mohoroni/584 and 576** with the district Surveyor on 21st January 2014 following the court order of 20th May 2013. PW1 stated that their finding was in their report dated 4th February 2014 that shows that the Defendant's land parcel **Kisumu/Mohoroni/576** had been encroached into by the Plaintiffs' land parcel **Kisumu/Mohuroni/584** by 0.2617 hectares. PW1 testified that they marked the correct position of the common boundary between the two parcels of land. The second witness was **Paul K. Rugut**, the surveyor who testified as PW2. He told the court of the visit to the two parcels of land and his finding that though the common boundary between the two parcels was a straight line, the

fence erected was curved and therefore on parcel **Kisumu/Mohoroni/576**.

The witness testified that he doubted that the use of google maps would have given a different finding on the position of the boundary. The third witness was **Zachary Ondinjo Mita**, a surveyor in Private practice who testified as PW3. He told the court how the Plaintiffs asked him to confirm the boundary for parcel **Kisumu/Mohoroni/584** in April 2012. He testified that he found an encroachment onto parcel **584** and that he advised the Plaintiff to lodge a complaint with the Land Registrar and Surveyor. He testified that he visited the same land again later in the year with PW1 and PW2 and that the boundary was confirmed and marked by PW1. PW3 testified that he visited the scene again on invitation of the Plaintiff in 2014 and found a fence had been erected. He took measurements and prepared his report dated 19th April 2014 that show that the Defendant's parcel, **Kisumu/Mohoroni/576**, had encroached onto the Plaintiffs land, **Kisumu Mohoroni/584**. The next witness was **Joel Aduma Ramogo**, the 1st Plaintiff, who testified as PW4. He told the court that after, acquiring land parcel **Kisumu/Mohoroni/584**, he engaged PW3 to confirm the boundaries of the land and discovered that the Defendant's parcel, **Kisumu/Mohoroni/576**, had encroached onto his land. He contacted the Defendant who agreed in writing to vacate in six months. The witness testified that on advice of PW3, he contacted the Land Registrar and surveyor who visited the land on 27th June 2012 and the Land Registrar fixed the boundary between the two parcels. That the Defendant then declined to vacate as agreed. That in November 2012, the witness learnt that Defendant's son had damaged one of the beacons on the boundary and he reported to the police. The witness confirmed that he had erected a fence after the boundary was marked on 27th June 2012. He added that the Land Surveyor visited the scene again on orders of the court in January 2014 but stated that he did not agree with their report. He therefore instructed his advocate to get another surveyor to do a report and as a result PW3 prepared the report dated 19th August 2014 which shows that the Defendant's land had encroached onto his land.

4. The Defendant testified as DW1. He testified that he occupied his land first in 1965 and got the title deed issued on 2nd February 2006. He stated that his nearest neighbour was **Jacob Ochieng**, who owned parcel **Kisumu /Mohoroni/584** which he later sold to the Plaintiffs. He testified that the boundary between the two parcels was marked by a big trench and portions of the trench are still visible together with the other beacons. That he has never had any boundary dispute with **Jacob Ochieng**. He denied that his land has encroached onto the Plaintiffs land stating that it was the Plaintiffs who brought in surveyors and placed a fence inside his land about 3 to 4 years ago. That he engaged an advocate who did a letter to the Plaintiffs after erecting a fence onto his land and thereafter the Plaintiff filed this suit. The Defendant produced the report dated 4th February 2014 made by PW1 and PW2 showing that it is the Plaintiffs land that had encroached onto his land. The Defendant prays for the Plaintiffs case to be dismissed with costs.

5. That after closure of the case for both parties, their advocates filed written submissions. The Plaintiffs advocate submission dated 1st April 2016 were filed on 8th April 2016 while Defendant's counsel's submissions dated 25th April 2016 was filed on the 26th April 2016.

6. The main issues for the courts determination are as follows;

- a) Whether land parcel **Kisumu/Mohoroni/576** has encroached onto land parcel **Kisumu/Mohoroni/584**, and if so, whether injunction orders should be issued against the Defendant.
- b) Whether the Plaintiff are entitled to mesne profits, and if so, how much.
- c) Who pays the costs?

7. The court has considered the pleadings filed by both parties, oral and documentary evidence, written submissions by both counsel and come to the following determinations;

- a) That land parcels **Kisumu/Mohoroni/576** and **584** share a common boundary and were both

first registered on 24th August 1983 as shown in their respective copies of the title deeds. The two parcels also appear in the same registry map sheet number 2.

b) That land parcel **Kisumu/Mohoroni/576** was first registered in the names of **Jasper Odongo**, the Defendant herein, who is still the registered proprietor. The land parcel **Kisumu/Mohoroni/584** was first registered in the name of **Jacob Ochieng** who later transferred it to **Joel Aduma Ramogo and Mary Atieno Ondoro**, the Plaintiffs, on 4th February 2013.

c) That the copies of title deeds and registers obtained from the Land Registrar's office for parcels **Kisumu/Mohoroni/576 and 584** indicates their acreages/sizes as 1.8 and 1.6 hectares respectively.

d) That the provisions of **Section 18 of the Land Registration Act No.3 of 2012** places the responsibility of determining the boundary disputes on the Land Registrar. The courts of law are not the first forum to determine issues to do with boundary disputes and are without jurisdiction in the first instances as shown under **Section 18(2) of the Land Registration Act**, which states

"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."

e) That when the Plaintiffs application dated 18th March 2013 for injunction orders came up for hearing on 20th May 2013, the counsel for the parties entered a consent that the district Land Registrar and Surveyor, Nyando do visit land parcels **Kisumu/Mohoroni/576 and 584** and determine their common boundaries and file a report in court. The report dated 4th February 2014 was filed and their makers, PW1 and PW2, found that it was the Plaintiffs parcel of land that had encroached onto the Defendant's land by a portion of about 0.2617 hectares which is shown as the shaded area in the Surveyor's attached sketch. That according to the Defendant, PW1 and PW2, the common boundary between the two parcels is on a straight line and was marked by the land Registrar. The position taken by the 1st Plaintiff and PW3 is that, the boundary is curved and the fence erected by the Plaintiff in 2012 marks it on the ground.

f) That the position of the fence erected by the Plaintiffs was not with the agreement of the Defendant. That the Defendant actually had his advocates do a demand letter to the Plaintiffs dated 14th January 2013 after which this suit was filed on 19th March 2013. That though the Defendant agreed that the identity card number and the signature on the handwritten document dated 15th April 2013 to the effect that the structures erroneously built by Defendant on the Plaintiffs land would be removed in six months, he denied making such an undertaking. The court is of the view that even if it was true that the

Defendant had undertaken to do so, he would have been entitled to change his mind after the Land Registrar and Surveyor, who in law are the authorities upon which the law places the responsibilities of determining boundary position, certified that the portion he was to vacate from was indeed part of his land. The court is of the view that PW3, being a Surveyor in Private practice, had no legal mandate to determine the boundary dispute. That role rests with the Land Registrar.

g) That the report dated 19th August 2014, by PW3 confirmed that the boundary between the two parcels was as earlier pointed out by the Land Registrar. It is marked in the attached sketch as a straight line marked C to J. The witness then indicated a shaded area marked C MND, measuring 0.07 hectares, which he said is the portion the Defendant had encroached onto the Plaintiffs land by. The effect of PW3 report is that the Plaintiffs land size is indicated as 1.6349 hectares, which is an increase in size from 1.6 hectares, while that of the Defendant comes to 1.5391 hectares which is a decrease from 1.8 hectares shown in the records from the Lands office. That the Land Registrar and Surveyor were not involved in the exercise leading to the report prepared by PW3. That while the Plaintiffs counsel's submission are that the testimony of PW1 and PW2 should not be taken as part of the evidence presented by the Plaintiffs, the court has already found that the

report the two witnesses made was pursuant to a consent order of both counsel on 20th May 2013. The Land Registrar is in law the custodian of documents relating to land and after the exercise agreed upon by both counsel, his finding was that the Defendant had not encroached onto the Plaintiffs land. That it was actually the Plaintiffs who had encroached into the Defendant's land. The Defendant's evidence that he never had any with **Jacob Ochieng** who owned the land before the Plaintiffs acquired it remains unchallenged. There is no evidence availed to the court to challenge the impartiality and competence of PW1 and PW2 and the court cannot doubt their finding on the correct position of the common boundary between **Kisumu/Mohoroni/576 and 584**.

8. That in view of the foregoing the court finds that the Plaintiffs have failed to establish on a balance of probabilities that the Defendant had encroached onto their land parcel **Kisumu/Mohoroni/584**. The order of injunction and eviction cannot therefore issue as against the Defendant, nor would mesne profits prayer arise as the disputed portion of land was found to be part of the Defendant's land by the Land Registrar. The Plaintiffs case is therefore dismissed with costs.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 8TH DAY OF JUNE 2016

In presence of;

Plaintiffs Absent

Defendant Absent

Counsel Absent

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

8/6/2016

8th June 2016

S.M. Kibunja J

Oyugi court clerk

Parties absent

Charles Ochogo: I am son to the Defendant

Court: The judgment read over in open court in absence of all parties and Deputy Registrar to notify them.

M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

8/6/2016