



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT BUNGOMA.**

**LAND AND ENVIRONMENT CASE NO. 185 OF 2013.**

**LUTULI ALEX WANYONYI NYONGESA PAUL**

(Suing under the power of Attorney for, on behalf of  
and for the benefit of WEKESA RAPHAEL NYONGESA LIHANA).....**PLAINTIFF**

**VERSUS.**

**ALICE KHISA.....DEFENDANT**

**JUDGMENT.**

[1]. The Plaintiff Lutuli Alex Wanyonyi Nyongesa Paul who sues under a power of Attorney for the benefit of Wekesa Raphael Nyongesa Lihana filed this suit against Alice Khisa the defendant herein seeking for an order of eviction to remove the defendant, her relatives, servants, agents and property from parcel Number Ndivisi/Ndivisi/2646 plus costs and interest.

[2]. The defendant filed a defence and said that the Plaintiff has not come to Court with clean hands that the Plaintiff deleted the original boundary and enlarged parcel number Ndivisi/Ndivisi/2466 which was created from parcel number Ndivisi/Ndivisi/632 and attempted to encroach on land parcel number Ndivisi/Ndivisi/2219 which had been created from the original parcel Ndivisi/Ndivisi/1036 and which had distinctive boundary on the ground.

The defendant went on further to state in his defence that she has been living on Ndivisi/Ndivisi/2219 created from Ndivisi/Ndivisi/1036 since 1991 and has built a six room permanent house which she lives in. She stated that the Plaintiff had forged Mutation forms with the intension of encroaching on Ndivisi/Ndivisi/2219.

[3]. During the hearing of this case, the Plaintiff called Mr. Isiah Ouma who is the Provincial Surveyor based in Kakamega Western Province who testified and said that he received a letter from Annet Mumalasi and Company Advocates to confirm the boundary between Land parcel Ndivisi/Ndivisi/632 and Ndivisi/Ndivisi/1036. The Surveyor said that he made a response in writing and he also made a copy of the Map that has the two parcels of land and attached it to the letter to Annet Mumalasi & Co. Advocates. He told the Court that, in the letter he outlined the status of the two parcels of land as reflected on the records of his office. He also said that he had a look at the mutation forms purporting to subdivide Ndivisi/Ndivisi/1036 and commented on the same. He observed that the mutation indicated that parcels Ndivisi/1036 and 632 are one and the same parcel of land. He said that the records in his office indicated that the parcels are separate and distinct only that they share a common boundary to the West. He produced to Court the report dated 15/3/2011 as PExh 5(a) and a map showing the two Lands as PExh 5(b). He said that the mutation had a brace showing that the two lands as one land number 1036. He told the Court that the map from his office represented the true position on the ground. He

produced the letter to Annet Mumalasi also as PExh.7. The Surveyor explained to Court that a brace is put where there is a linear feature crossing or cutting through the land, like a road or a river or electric wire. He said that the brace put between parcels Ndivisi/Ndivisi/1036 and 632 does not make sense.

[4]. From the history of the respective land Registers, Land parcel Ndivisi/Ndivisi/632 was first registered on 16/7/63 in the name of G. Nyongesa Liana who changed his name to Mahelo George Lihana on 17/4/89. On 30/9/09 Susan Nelima Nyongesa and Raphael Wekesa Nyongesa were registered pursuant to Succession Cause filed in Nairobi. The land was distributed as follows, John Nyongesa, 1 acre, Wambulwa Mahelo Lihana 2.25 acres, Lutuli Alex Wanyonyi 2.25 acres, Raphael Wekesa Nyongesa Lihana 5.27 acres, Rachel Nyongesa 0.25 acres and on 19/4/2010 the title was closed on subdivision and new titles issued as land parcels Ndivisi/Ndivisi 2646 to 2651 respectively. Land parcel Ndivisi/Ndivisi/1036 was first registered on 16/7/63 in the name of Jotham Siberenge. On 21/3/78 a caution was registered in the name of Neke Lusimbo claiming purchasers interest and the same was removed on 21/2/2001. On 24/6/2004 it was registered in the name of Jackson Masoni Siverenge, Priscilla Siverenge and Pamela Lumbasi. On 1/9/2005 a restriction was put on the same preventing dealing with the same. On 13/7/2009, the title was closed on subdivision of the same into parcel Ndivisi/Ndivisi 2216 – 2221 respectively.

[5]. From the history of the above two parcels as obtained from the Register in the land office, it is quite clear that the said lands were never the same. The evidence of the Provincial Surveyor is vindicated and supported by the records in the land office. The trouble started when someone put a fraudulent brace on the Western side where the two parcels share a common boundary. He tried to make the two lands appear as if they are one as parcel Number Ndivisi/Ndivisi/1036. The owner of the said 1036 then purported to subdivide the said original parcels 1036 and 632 aforesaid and had parcels marked A – 2216 of 1.40 hectares, B – 2217, 0.06 hectares C – 2218, 0.80 hectares, D – 2219, 0.82 hectares, E – 2220, 1.0 hectares and F – 1.60 hectares all spanning over the two parcels of land. Parcel D thereof now claimed as Ndivisi/Ndivisi/2219 of 0.82 hectares (the parcel in dispute herein) fell squarely on original Land Parcel Ndivisi/Ndivisi/632 aforesaid which is now Ndivisi/Ndivisi 2646 belonging to the Plaintiff herein. There is therefore no doubt that Land Parcel Ndivisi/Ndivisi 2219 is illegal since it is curved out of the original neighbouring land Ndivisi/Ndivisi 632 whose, subsequent subdivision Ndivisi/Ndivisi 2646 now belongs to the Plaintiff. The Provincial Surveyor of the then Western Province gave evidence that he refused to approve the subdivision presented to him of Ndivisi/Ndivisi/1036 since it had encroached on original land parcel Ndivisi/Ndivisi/632. A parcel he had already accepted and approved its subsequent subdivisions.

The defendants averment that she has lived on the suit land since 1994 (plot 2219) cannot be true as the title for Ndivisi/Ndivisi/1032 was closed on subdivision on 13/7/2009 while land Parcel Ndivisi/Ndivisi/632 was also distributed via a Succession cause in Nairobi on 14/10/2009. Action on both land was going on at the same time.

For those reasons I am convinced that the Plaintiff has proved his case as set out in his Plaint he will also have the orders sought and costs of the suit.

Judgment read in Open court in presence of the Counsels.

**Dated, Signed and delivered on 29<sup>th</sup> September, 2016**

**S. MUKUNYA**

**JUDGE.**

**In the presence:**

Court Assistant - Joy

Mr. Kassim: For the defendant

Mr. Simonjero: For the Plaintiff