



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 14 OF 2008**

**ARON KIBIWOT CHEPSIROR..... PLAINTIF**

**VERSUS**

**FLORENCE CHEMONGES..... DEFENDANT**

**J U D G E M E N T**

**INTRODUCTION**

1. The plaintiff is the registered owner of **LR. No. Trans-Nzoia/Mito Mbili/23**. The defendant is the registered owner of **LR. No. Trans-Nzoia/Mito Mbili/22** which is adjacent to the plaintiff's parcel.
2. The plaintiff brought this suit against the defendant claiming that the defendant had encroached into his portion by **2.722 hectares**. He consequently prayed for a declaration that the defendant is a trespasser on his land who should be evicted and that he should be paid damages for unlawful occupation and loss of user.
3. The defendant filed defence and raised a counter-claim in which she claims that the plaintiff had encroached on to her land and that the plaintiff should be evicted from the one acre.

**PLAINTIFFS' CASE**

4. The plaintiff testified that he bought his land in **1979** from **Samuel Moiben** but that Samuel Moiben did not show him the boundaries of the land. When he bought his land, the defendant had already settled on her portion of land which had been allocated to her by the **Settlement Fund Trustee**.
5. In **1985** he complained to the Settlement Fund Trustee that he was occupying less land than he had purchased. The Settlement Fund Trustee advised him to raise the issue after he had cleared the loan due to it.
6. The plaintiff later lodged a boundary dispute with the Land Registrar in accordance with the provisions of the **Registered Land Act Cap 300 (Now repealed)**. The boundary dispute was touching on three plots: That of the plaintiff and the defendant as well as **Plot No. Trans-Nzoia/Mito Mbili/24** belonging to his brother-in-law. The Land Registrar came to the ground and found that the plaintiff's claim was not a boundary dispute but rather a land claim. This is what prompted the plaintiff to file the present suit.
7. The plaintiff in his evidence in chief stated that he is claiming **8 acres** from the defendant. Before the case was heard, the parties herein had agreed to send a surveyor to the ground to determine whether there was any encroachment. A surveyor went to the ground and a report was prepared which report was produced by **PW2 Bainito Ombudu Hussein**. The plaintiff now wants the defendant to be evicted from

the **8 acres**.

### **DEFENDANT'S CASE**

8. The defendant testified that she is the original allottee of **LR. No. Trans-Nzoia/Mito Mbili/22**. She took possession of it in **1976**. The Settlement Fund Trustee used to dig terraces to mark the boundaries and that she has maintained the boundaries as they have been both before the plaintiff bought his land and after the plaintiff purchased his land from Samuel Moiben.

9. The defendant further stated that there had never been any boundary dispute with Samuel Moiben who later sold the land to the plaintiff. Samuel Moiben was the original allottee of the plot now held by the plaintiff. The defendant's land is **6.3 hectares** which is about **15 acres**. Two rivers pass through her land and the wetland is **9 acres**.

10. The defendant testified that the plaintiff has encroached on to her land by **one acre**. That the one acre encroached on is on the wetland. She brought in **DW2 Dominic Kiruri Nyumbu** an employee of Ministry of Agriculture who went and prepared a map showing her arable land which is **15 acres** and wetland which is about **9 acres**.

### **ANALYSIS OF EVIDENCE AND ISSUES FOR DETERMINATION**

11. According to the evidence adduced herein, the plaintiff's land is in between the plaintiff's plot and that **Alfred K. Kogo** who is a brother in-law to the plaintiff. The plaintiff lodged a boundary dispute with the Land Registrar against the defendant and Alfred K. Kogo. From the report of the Land Registrar which the defendant produced as Defence Exhibit 4, the plaintiff stated during the boundary dispute that he settled on his land in **1982** having bought it from Samuel Moiben. That he bought the land the way it was and that Samuel Moiben did not show him boundaries as he had not cleared the purchase price.

12. The plaintiff further testified during the boundary dispute that he had complained to the Settlement Fund Trustee in 1985 about the boundary dispute but that he was advised to first clear the loan. That he cleared the Settlement Fund Trustee loan in **2005**. He further stated that Samuel Moiben had no problem with the defendant.

13. It is clear from the evidence adduced herein is that the plaintiff was not being honest in his testimony both before the Land Registrar and before this court. He did not produce the sale agreement between him and Samuel Moiben. He said that he did not enter into any agreement with Samuel Moiben. This may be true as at that time, it was not a legal requirement that a sale agreement be in writing. However it cannot be true that a person can buy land without being shown its boundaries. He has already stated in his evidence that he bought the land the way it was and which means he saw what he was buying. He concedes that there was no dispute between Samuel Moiben and the defendant.

14. The issues which emerge for determination are firstly, whether there is any encroachment by the defendant on to the plaintiff's land and if so what is the extent? Secondly, is there encroachment on to the defendant's land and if so to what extent. Thirdly is this suit time barred? Lastly which order should be made on costs?

### **Whether there is encroachment on to the plaintiff's land by the defendant and if so what is the extent of the encroachment**

15. When this case was filed in **2008**, the plaintiff claimed that the defendant had encroached on to his land by **2.722 hectares** which is about 6 acres. A consent was later entered into by the parties agreeing to send a Surveyor and Land Registrar to the ground to determine the boundaries between the plaintiff and the defendant's land and determine if there was any encroachment into the other and by what acreage. This consent was recorded on **26/9/2011**.

16. A survey report was prepared pursuant to the consent. This survey report was produced by PW2

Bainito Ombudu Hussein as Plaintiff Exhibit 3. According to this report, there was encroachment by the defendant on to the plaintiff's plot by **3.24 hectares** which is approximately **8 acres**. The plaintiff based his claim on this report and therefore claims **8 acres** from the defendant. It is important to note that there was no amendment made to the plaint to reflect this new developments. A party is bound by his pleadings and he cannot be allowed to adduce evidence which is outside his pleadings.

17. Mr. Kiarie in his written submissions took issue with the report by the surveyor which he argued should not be admitted as person who signed it was not the one who went to the ground and that it is therefore hearsay. He further argued that the report was not prepared in accordance with the order of the court. In support of his argument that this court should not allow it, he cited a decision of Justice Waki as he then was in *Salim & Another -vs- Mohamed reported in KLR (E&L) 1*.

18. I have gone through the Salim case (Supra) and find that it is distinguishable from the present case. In the Salim case, the judge was dealing with surveys which had been carried out which resulted into subdivision and subsequent registration of parcels. It turned out that survey had been done on the basis that the subdivided parcel was vacant. This resulted into peoples houses which had existed on the ground before the survey falling on other parcels. It was conceded by the surveyors who gave evidence that there was no physical visit of the parcel in issue. This is unlike in the present case where a surveyor went to the ground and surveyed. She came back with her findings which were then signed by the witness who produced the report after indicating that the person who went to the ground was on leave. There was no objection to the report being produced by a person other than the maker.

An objection to its admission cannot be raised in submissions.

19. Mr. Kiarie also took issue with the final findings of the survey report. He argued that there is a mathematical error. According to the report, the defendant's land is **9.53 hectares** on the ground when it is supposed to be **6.3 hectares**. On the other hand, the report found out that the plaintiff's land is **4.97 hectares** on the ground when it is supposed to be **7.5 hectares**. What the surveyor did was he got the difference between what the defendant has on the ground and what she is entitled to in the title and assumed the excess is what should be given to the plaintiff. What is over and above **6.3 hectares** is **3.24 hectares** which is about **8 acres**. However if the report by the surveyor is correct that the plaintiff has **4.97 hectares** on the ground when he is supposed to have **7.5 hectares**, then the shortfall on his land is **2.53 hectares** which is about **six acres**. What the defendant has could be more but if the surveyor's report is anything to go by, then, the shortfall by the plaintiff should be only **2.53 hectares** which is about **six acres** and not **3.24 hectares** which is about **8 acres**.

20. Initially the plaintiff had lodged a boundary dispute against the defendant and the plaintiff's in-law **Alfred K. Kogo**. When it came to filing this suit, he only filed a case against the defendant leaving out his brother in-law. During the hearing, it turned out that there was a road which was created in between the plaintiff's parcel and **Parcel No. 24** owned by his in-law. This road ate into the plaintiff's land. It may not have eaten into the six acres which seem to be the shortfall but one can also not rule out the possibility of part of the plaintiff's land being encroached into by **Parcel No. 24**.

21. The surveyor did not measure the extent of **Parcel No. 24**. This may be because the court order was specific. The surveyor's mandate was to determine the boundaries of **Plot No. 22** and **23**. Had **Plot No. 24** been measured, it would have turned out that part of his land fall there. However be that as it may, the fact remains that the surveyor's report has errors be they mathematical or whatever else. It is clear that there is no basis upon which this court can make a finding that there is encroachment into the plaintiff's land by **8 acres** as he claimed in his evidence.

**Whether there is any encroachment on to the defendant's land by the plaintiff and if so to what extent**

22. The defendant in her evidence stated that the plaintiff had encroached on to her land by **one acre**. The encroached area is on the wetland as per her evidence. There was absolutely no evidence adduced of any encroachment. If there was to be any encroachment, then the same was to be captured in the survey

report because the mandate of the Surveyor and Land Registrar were to ascertain if there was any encroachment on to either parcels. I therefore find that there was no encroachment on to the defendant's land by the plaintiff.

### **Whether the plaintiff's claim is statute barred**

23. The plaintiff's evidence is that he first discovered that his land was less than what he bought in **1985**. His evidence is that he cleared paying the Settlement Fund Trustee loan in **2005**. It was his evidence in cross-examination that he obtained title before he cleared the loan due to the Settlement Fund Trustee. This cannot be true because he was issued with the title deed on **17/8/1987**. Even if we were to assume that the cause of action accrued on **17/8/1987** when he obtained title, this suit was filed in **2008**, **21<sup>st</sup> years** after he obtained title.

24. The practice when it comes to settlement schemes is that one cannot be issued with title if the scheme has not been registered. If one completes the Settlement Fund Trustee loan before the scheme is registered, he or she is given a discharge and certificate of outright purchase pending registration of the scheme when titles are issued. There is no way the plaintiff would have been issued with title in **1987** before he cleared the loan. The plaintiff's claim that he cleared the Settlement Fund Trustee loan in **2005** was meant to bring his suit within the **12 years** period. The plaintiff's claim is clearly statute barred. He cannot seek to claim land **21 years** after he obtained title. I find that even if he proved that there was encroachment on to his land by the defendant his claim would not have succeeded on account of *Limitation of Actions Act Cap 22*.

### **DECISION**

25. From the analysis of the evidence, it is clear that the plaintiff has not only failed to adduce credible evidence of encroachment but his claim is statute barred. The same is hereby dismissed. The defendant has also failed to prove her counter-claim. Given the fact that both the plaintiff and defendant have lost their respective claims, I make an order that each party should bear his/her costs.

**Dated, signed and delivered at Kitale on this 7<sup>th</sup> day of November, 2016.**

**E. OBAGA**

**JUDGE**

In the presence of plaintiff and Ms. Mufutu for defendant.

Court Assistant – Isabellah.

**E. OBAGA**

**JUDGE**

**7/11/2016**