



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 36 OF 2010**

**DAVID SIMIYU WANYONYI ..... PLAINTIFF**

**VERSUS**

**JOHN SILAKWA..... 1ST DEFENDANT**

**SAMWEL CLAKIFUMA..... 2ND DEFENDANT**

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

**INTRODUCTION**

1. The plaintiff is the registered owner of **L.R. No. Kapkoi/Mabonde Block 1/Ex-Prison/264**. The first defendant is registered owner of **L.R. No. Kapkoi/Mabonde Block 1/Ex-Prison/265**. The second defendant is the registered owner of **L.R. No. Kapkoi/Mabonde Block 1/Ex-Prison/226**. The defendants plots are adjacent to the plaintiff's plot (suit land).
2. The plaintiff brought this suit against the defendants claiming the following reliefs:-
  - (a) **A declaration that the defendants are mere trespassers to his land comprised in L.R. No. Kapkoi/MabondeBlock1/Ex- Prison/264.**
  - (b) **An eviction order against the defendants, their family, agents and or servants from L.R. No. Kapkoi/Mabonde Block 1/Ex-Prison/264.**
  - (c) **Costs.**
3. The second defendant who was duly served with summons to enter appearance and file defence neither entered appearance nor filed defence within the required time. The plaintiff obtained judgment against him. The second defendant's bid to set aside the judgment and file defence was rejected by the court.

**PLAINTIFF'S CASE**

4. The plaintiff is a military officer with the Kenya Defence Forces based at defence headquarters. He bought the suit land around **July, 2005** through a public auction conducted by **Joyland Auctioneers** on instructions of **National Bank of Kenya**. He processed and obtained title on **5/10/2005**. The two defendants are his neighbours.

5. When he bought the land, he realized that its boundaries had been altered. He approached the second defendant who is one of his neighbours and asked him to restore the boundary but he declined. The plaintiff then applied to the District Land Registrar to come and establish the boundary. The Land Registrar visited the disputed boundary on **28/5/2006**. A survey was carried out but its results were not revealed.
6. The plaintiff testified that the defendants have curved out about two acres of the suit land. The plaintiff called **PW2 Bainito Ombudu Hussein** who testified that he received a court order which required him to go and establish the extent of the road of access in relation to **Plot Nos. Kapkoi/Mabonde/Ex-Prison/161, 226 and 160** in relation to **Plot No. 264**. This witness is a surveyor at Trans-Nzoia. He testified that he compared the area map and the plots on the ground and noticed that people were not settled on the ground as per the map. He found out that the first defendant had encroached onto **Plot No. 264** by about **0.9 of an acre** and that the second defendant had encroached on the **Plot No. 264** by **0.72 of an acre**. He confirmed that the acreage of the suit land had been reduced. The second defendant had closed the road which existed between him and the suit land. He also found out that another road had been closed but that he did not know who was involved in its closure as he had not been asked to ascertain the details.

### FIRST DEFENDANT'S CASE

7. The first defendant stated that the suit land borders his land as well as a number of others. He testified that the suit land used to be owned by one **Yusuf** who was a surveyor in Trans-Nzoia. Yusuf sold the suit land to **James Okwako Aswani**. The suit land finally changed hands to the plaintiff who bought it during a public auction. The first defendant testified that he took possession of his land in **1997** and that he had never had any problem regarding the boundary with the two previous owners of the suit land. He denied encroaching on the suit land as alleged.

### ANALYSIS OF EVIDENCE AND ISSUES FOR DETERMINATION

8. I have gone through the evidence adduced by the plaintiff and that of the first defendant as well as submissions filed herein. There is only one issue for determination and that is whether any of the two defendants have encroached on to the plaintiff's land. The plaintiff testified that the two defendants have encroached on to his land by about two acres. The plaintiff called **PW2 Bainito Ombudu Hussein**. This witness produced his report as Exhibit 5. It is important to note that the surveyor had been asked to carry out a9
9. specific assignment. This was to ascertain the extent of a road of access on **Plot Nos. Kapkoi/Mabonde/Ex-Prison/161, 226 and 160** in relation to the suit land. It is the plaintiff's counsel who asked for this. However when the surveyor came to testify in court, it turned out that the plots intended to be visited were actually **Kapkoi/Mabonde/Ex-Prison/226, 260 and 261** in relation to **Plot No. 264**. This is because **Plot No. 1609 and 161** do not border that of the plaintiff. Be that as it may, the issue remains whether the surveyor was able to establish if there was any encroachment by the defendants on to the plaintiff's land or not.
10. The surveyor in his report found out that people on the ground were not settled as per what was on the map. He did not give evidence on the size of the defendants plots and that of the plaintiff. In his report, he stated that the coloured or shaded areas are the areas encroached on to the plaintiff's land. One of the plots which has encroached on to the plaintiff's plot is **L.R. No. Kapkoi/Mabonde/Ex-Prison/268** which is owned by **Noah Wekesa**. The extent of that encroachment is not stated by the surveyor. The surveyor states in his report that the plaintiff's plot has been reduced by closure of roads. One of the closed roads details were not given by him on grounds that he had not been asked to do so.
11. The surveyor's report would have been credible and of use if he were to state the acreage of the plaintiff's land and that of the defendant's land as is supposed to be on the map and what is the actual position on the ground. The surveyor should have stated that the first defendant is occupying a certain acreage when he is supposed to occupy a certain acreage. Then what is over

and above the defendants entitlement were to be the encroached area after the surveyor has ascertained that the plaintiff is missing what is equivalent or similar to what is excess in the defendants plots. In the surveyor's report, there is no indication of what the present position of the plaintiff's land is. It is therefore not possible to say with certainty that there is encroachment without these measurements having been taken. This is particularly made worse given that Plot No. **Kapko/Mabonde/Ex-Prison/268** is said to have encroached on to the plaintiff's land but the extent is not indicated and the said owner of Plot 268 was not sued.

12.The surveyor did not ascertain where the beacons were or are supposed to be as to determine the extent of encroachment. The surveyor's admission that people are not settled on the ground as per the map is a pointer to the fact that it is not possible to point out with certainty who has encroached to whose plot. He stated that roads have been closed. This closure he said has led to reduction of the plaintiff's land. There is no road between the plaintiff's plot and the first defendant's plot. It is not understandable how he could be said to have encroached or contributed to the reduction of the plaintiff's land.

13.The Land Registrar went to the ground to resolve the boundary dispute at the invitation of the plaintiff. He carried out his duties but never made his findings known. The surveyor who went to the ground at the instant of the plaintiff never made any findings on the road of access touching on **Plot Nos. 264, 260, 261 and 226** as asked. He instead went on to survey the defendant's plots and made findings of encroachment which cannot be logically supported. He was silent on the encroachment by Plot 268 owned by Noah Wekesa.

#### **DETERMINATION**

14.In the absence of any credible report, I do not think that the plaintiff has proved that there is any encroachment by either the first or the second defendant. I find that he has failed to prove his case on a balance of probabilities. The same is hereby dismissed with costs to the first defendant.

Dated, signed and delivered at Kitale on this **23rd** day of **September, 2015**.

**E. OBAGA**

**JUDGE**

**In the presence of M/s Bett for Plaintiff and Mr. Wafula for Mr. Ngeywa for First Defendant.**

**Court Assistant – Winnie.**

**E. OBAGA**

**JUDGE**

**23/9/2015**