



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L 793 OF 2012

Formerly HCC No. 222 of 2011

ELIUD KIPTOO CHERUIYOT.....PLAINTIFF

VS

FRED JUMA WANYONYI.....DEFENDANT

J U D G M E N T

The plaintiff commenced this suit vide plaint filed on 30 December 2011. In his plaint, he has pleaded that in the year 1998, he purchased certain portions of land each measuring 0.1 of an acre until the total portions purchased added up to 0.6 of an acre in L.R No. 6199 Ex-Cullen Farm from one Andrea Singoei. He also purchased from Andrea Singoei another portion of land measuring 0.2 of an acre. The land was later demarcated and the plaintiff's land became registered as Moi's Bridge/Moi's Bridge Block 12 (Ex-Cullen) /310 measuring 0.27 hectares. It is pleaded that when he measured his land on the ground, he discovered that the defendant had alienated 0.1 of an acre. In this case, he wants a declaration that 0.1 of an acre currently alienated by the defendant rightfully belongs to him and that the same should be surrendered by the defendant. He has also asked for eviction orders and for general damages for trespass.

The defendant filed defence and denied the claims of the plaintiff. He has pleaded that if there is an issue on the plaintiff's size of land, then the plaintiff should sue Andrea Singoei who is the person that sold him the land. He has pleaded that the dispute had been presented to the District Land Registrar and District Surveyor who held that the plaintiff's claim lay against Andrea Singoei.

In the course of giving directions, it was revealed that the defendant owns the land parcel Moi's Bridge/Moi's Bridge Block 12 (Ex-Cullen)/ 311 which neighbours the plaintiff's land parcel No. 310. I thought the issue could be resolved by having the District Land Registrar and District Surveyor visit the ground and determine whether the dispute is a boundary dispute and see whether the defendant has occupied 0.1 of an acre of the plaintiff's land. The Registrar and Surveyor visited the ground and made a report. According to their findings which are on record, the land plaintiff's land parcel Moi's Bridge/Moi's Bridge Block 12 (Ex-Cullen)/310 has a ground acreage of 0.289 Ha. The other land parcel belonging to the defendant has a ground acreage of 0.104 Ha. The plaintiff was however not satisfied nor agreeable with the report and this matter therefore had to proceed for hearing for the plaintiff to prove his case against the defendant.

The plaintiff testified and called one witness. He testified that he bought his land parcel No. 310 from Andrea Singoei in three bits of 0.1 acre, 0.1 acre and finally 0.4 acres all purchased in the year 1998 but on various dates. After getting title, he thought that his land on the ground is less than what he had

purchased, and he called his private surveyors, but the exercise did not take off and he eventually got the Government Surveyor. The land was measured and a report made on 26 November 2011. He disputed the report that shows that his ground acreage is 0.289 Hectares because he stated that the surveyor measured his land upto the riverbank but that the beacons are before the riverbank. He pointed out that the report also shows that the defendant occupies 0.104 Hectares whereas his title reads 0.04 hectares. He got another surveyor of his own to make a report. However the report was never produced. He asked that the land be re-surveyed and the beacons be placed afresh so as to tally with his title. In cross-examination, it was revealed that the defendant had settled on his land prior to the plaintiff. They had both bought their respective parcels from Andrea Singoei. The plaintiff on coming to the land, placed a fence and planted K-Apple and trees to mark his boundary. By that time title deeds had not come out. He asserted that his complaint cannot be against the one who sold to him land, but against the defendant, since it is him who occupies the plaintiff's land.

PW-2 was Andrea Singoei. He testified that he sold to both plaintiff and defendant some land. He sold 0.6 acres to the plaintiff and 0.1 acres to the defendant.

The defendant testified and called two witness. He testified that he bought a total of 0.2 acres from Andrea in bits of 0.1 acres in 1995 and another 0.1 acres in 1997. He settled on the land. In 1998 the plaintiff came and fenced off his land. The land was later surveyed and the parties had to slightly move their ground occupation to conform to the survey. Beacons were then put. The boundaries to the land were going upto the middle of the river. They lived in peace with the plaintiff until the year 2011 when the plaintiff started claiming that the defendant occupies part of what belongs to the plaintiff. The matter was taken to the Land Registrar who together with the District Surveyor, Uasin Gishu, resolved that each party resides on what they occupy on the ground. It was his view that if there is a shortfall, then the plaintiff should pursue whoever sold to him the land. The defendant's witnesses confirmed that the defendant bought 0.2 acres from Andrea.

In his submissions, Mr. Kamau for the plaintiff, reviewed the evidence and submitted that according to Section 26 of the Land Registration Act, the title deed is conclusive proof of proprietorship. He stated that the defendant's title shows that he only owns 0.04 hectares and the surveyor's report shows that the defendant is in occupation of 0.104 hectares. He submitted that there is no proof that the defendant owns 0.2 of an acre.

The defendant who was acting in person did not file any submissions.

It is with the above pleadings, evidence and submissions that I need to determine this matter.

The only issue that I think needs determination is whether the defendant is in occupation of the plaintiff's parcel of land and if so, the extent thereof. It is the plaintiff's case that the defendant occupies his 0.1 of an acre. The burden of proving this is certainly on the plaintiff for it is trite law that he who alleges must prove. The burden is not on the defendant to demonstrate that he does not occupy the plaintiff's land, it is for the plaintiff to prove that the defendant occupies 0.1 of an acre of the plaintiff's land.

I have seen the two reports produced by the plaintiff. The first report is dated 29 November 2011 and is a report made by the District Land Registrar, Uasin Gishu. This was made before the dispute was filed in court. The Land Registrar observed that it appears that the boundary is the edge of the river and it appears as though the plaintiff is missing some acreage. In his view, he thought that some of the acreage may have been in the river. He thought that Andrea may have sold more land than he actually had on the ground. He delivered an opinion that the boundaries on the ground be maintained as they are. That report did not give the exact acreage occupied on the ground which is the reason that I commissioned the second report by the District Surveyor.

In that report, the surveyor has stated that the plaintiff occupies 0.289 hectares whereas the defendant occupies 0.104 hectares. It therefore appears that both parties occupy on the ground land that is bigger than what is captured in their titles. The report was produced as the plaintiff's exhibit. The plaintiff had intended to produce another report to contradict this, but at the end of the day, he never did. I therefore do

not have any report that is contrary to that before me. The only conclusion I can reach, following the report, is that the plaintiff actually occupies more than 0.27 hectares noted in his title. The plaintiff therefore occupies more land than he is actually entitled to. Moreover, nowhere in the two reports does it say that the defendant occupies land that falls within the title held by the plaintiff. How then can he say that the defendant occupies his 0.1 of an acre ? From the evidence before me, I really do not see how. True, it could be that the defendant occupies on the ground more than the 0.04 hectares that he is entitled to, but so too does the plaintiff . On what basis would I give that extra acreage of the defendant to the plaintiff who indeed occupies more than his entitlement ? The plaintiff has not provided me with any legal basis for doing so, and on my part, I see no basis, just as I would have no basis to ask the plaintiff to cede the extra acreage that he occupies to the defendant. I am sure that the plaintiff would in fact balk at the very idea.

If the plaintiff feels that there is a problem with the Registry Index Map, or the acreages reflected in his title then he has to file the appropriate litigation for this to be corrected. I do not think that the answer lies in trying to grab extra land from his neighbor.

The end result is that the plaintiff's suit must fail. I hereby dismiss it with costs to the defendant.

DATED AND DELIVERED AT ELDORET THIS 16TH DAY OF JULY 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in the presence of:

N/A for M/s Birech & Co for Plaintiff.

Defendant Acting in person present.