



REPUBLIC OF KENYA



KENYA LAW
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**Gudka v Morebu (Environment & Land Case 367 of 2013)
[2024] KEELC 5640 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5640 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 367 OF 2013**

M SILA, J

JULY 25, 2024

BETWEEN

ASHWIN RAMJI GUDKA PLAINTIFF

AND

RICHARD MOMANYI MOREBU DEFENDANT

JUDGMENT

(Plaintiff filing suit and claiming that his plot abuts the main Kisii-Kilgoris road and that the defendant has built on the road reserve in between and also encroached into his plot; survey evidence tendered showing that the defendant owns a market plot owned by the County Government of Kisii and that the market plots come in between the plaintiff's land and the main road; report further affirming that there has been no encroachment by the defendant into the land of the plaintiff; plaintiff clearly misguided and his suit is dismissed with costs)

1. This suit was commenced through a plaint filed on 2 September 2013. The plaintiff avers to be the registered proprietor of the land parcel Nyaribari Chache/B/B/Boburia/3085 measuring 0.09 Ha. He contends that the suit land abuts the main Kisii – Kilgoris Road. He claims that the defendant has built a permanent structure in the road reserve that is between himself and the main tarmac road and that the defendant has further encroached into his land and consumed a portion measuring 0.01 Ha. In the suit, he seeks the following orders :-
 - i. Declaration that he is the *bona fide* registered owner of the suit land.
 - ii. A declaratory order that the suit land abuts the main road and that there is no plot between the suit land and the main Kisii-Kilgoris Road.
 - iii. An order of eviction against the defendant and demolition of his structures.
 - iv. A permanent injunction to restrain the defendant from interfering with the suit land.



- v. General damages for trespass and/or *mesne* profits.
 - vi. Costs.
 - vii. Such other relief that the court may deem fit and expedient.
2. The defendant filed defence and denied that the suit land abuts the main Kisii-Kilgoris road. He averred that what he occupies is the Plot No. D/11-Gekomu Market which abuts the main Kisii-Kilgoris road on the lower side and shares a common boundary with the suit land on the upper side. He denied encroaching into the plaintiff's land. He admitted developing a storey building but insisted that it was on his plot i.e Plot No. D/11 – Gekomu Market. He asked that the plaintiff's suit be dismissed.
 3. The plaintiff testified on 6 October 2021 before Onyango J. He testified that he purchased the suit land and had it transferred into his name on 9 September 2010. He stated that at the time of purchase he bought a copy of the map of the area and the same showed that there was no plot between him and the Kisii- Kilgoris road. He testified that upon purchase, he fenced his plot save for the front part as there was a construction coming up. He stated that the defendant put up the structure in issue in 2013. He averred that he engaged a surveyor who visited the land and prepared a report. He asserted that the defendant's structure is partly on the road reserve and partly on his plot and is therefore illegal. Cross-examined, he testified that he purchased the suit land from Selina Simba and Abuta Silas Nyarangi. He was aware that the plot was originally owned by one Margaret Onyiego. He did not know whether Selina and Abuta had letters of administration. On the occupation of the land, he testified that alongside the structure of the defendant is another structure which is also in front of his plot. He revealed that he owns this other plot that is in front which plot he purchased from the Gusii Municipal Council. He testified that he wrote to the Municipal Council to object to the defendant's structure.
 4. After the plaintiff had testified the court directed the County Surveyor, Kisii and the County Physical Planner to visit the suit land and establish whether there is any encroachment on it. They visited the land and prepared a report.
 5. PW-2 was Oswera Cecilia Harriet, the Land Registrar. She testified that the suit land is in Sheet No. 13 and affirmed that the plaintiff is the registered proprietor. She also affirmed that the suit land measures 0.09 Ha. She testified that the suit land arose from subdivision of a parcel No. 1480.
 6. PW -3 was Solomon Njoga who introduced himself as a surveyor working with Prime Land Surveys. He claimed to have been a surveyor for 40 years. He stated that he was engaged by the plaintiff to establish the position of the suit land. He visited the land in February 2023. He stated that he found out that the storey building has encroached into the plaintiff's land by 3m X 3.5 m. He produced a report that he prepared. Cross-examined, he claimed to hold a Diploma in Survey from Kenya Polytechnic in 1981. He claimed to have seen the map of the market plots which he used to determine the boundaries. He however did not identify the Plot No. D10. An issue arose as to whether the witness was truly qualified to undertake surveys. He promised to present his credentials at a later date but he never showed up and that was the last we saw of him. Counsel for the plaintiff in later attendances stated that he could not trace him.
 7. With that evidence, the plaintiff closed his case.
 8. DW – 1 was David Lemaiyan, a surveyor working with the State Department of Lands and Physical Planning in Kisii. He testified that he visited the land pursuant to the court order and made a report dated 1 September 2022 which he produced. His findings were that there was no encroachment into the plaintiff's land. He however found that the plaintiff had encroached into a neighbouring land parcel No. 3467. He testified that the plaintiff and defendant do not share a common boundary. He



elaborated that the area below the suit land has old buildings forming part of Gekomu Market and that the land of the defendant is among the market plots. In preparing his report he stated that he relied on the Preliminary Index Diagram to separate the Gekomu Market plots from the private parcels of land. He added that the plot of the defendant directly borders the parcel No. 3467. He testified that the plaintiff has an access road from the main tarmac road which goes round the market plots. In his opinion it was a case of poor planning of market plots for they have shops in a row without a break for an access road for the plots behind. He explained that you cannot access the suit land from the tarmac road directly as there is no road passing between the market plots meaning that you need to go round them.

9. DW – 2 was the defendant. His evidence was that his plot is a market plot which he purchased in 2007 from the previous proprietor. He developed the plot after getting the requisite approvals. He had a plot card to show ownership. In cross-examination he could see that the Plot Card does not show the size of the plot.
10. With the above evidence the defendant closed his case.
11. I invited counsel to file submissions and I have taken note of the submissions filed by both counsel for the plaintiff and defendant. I have taken into account the said submissions before arriving at my decision.
12. At the outset I need to emphasise that what I have before me is not an ownership dispute regarding the suit land. I say so because in his cross-examination and also in his submissions, counsel for the defendant raised issue about the manner in which the plaintiff obtained title to the suit land, and there was insinuation that proper succession had not been done. That is not the dispute before me. If any person is of the view that the plaintiff did not obtain title properly such person is at liberty to file suit for the cancellation of the title of the plaintiff. The dispute that is before me is whether or not the defendant has encroached into the suit land and whether the suit land abuts the main Kisii-Kilgoris Road. It is that which I will address myself to.
13. The issue whether there is a market plot between the plaintiff's suit land and the main Kisii-Kilgoris road is a matter that must be determined from documentary records. In that regard, the survey evidence presented is critical and fully material. The plaintiff did provide a survey report and the defendants presented the survey report prepared by the County Surveyor. There are certainly doubts about the veracity of the person who prepared the report of the plaintiff for he never proved his credentials and this court cannot affirm that he was an expert in matters survey. In his statement, Mr. Solomon Njoga claimed to be a qualified and licenced surveyor but he had no proof of such and it will be recalled that upon being given opportunity to present his papers he opted to skip court. In those circumstances the only reasonable conclusion I can come to is that the said Mr. Njoga is not a licenced surveyor, nor a person authorised to undertake survey, and holds no credentials that would entitle him to undertake a survey of the nature that he did. I will for that reason not rely on his so called 'expert' evidence.
14. What I will rely on is the report dated 1 September 2022 filed by the Survey Department of the Ministry of Lands and Physical Planning. I am aware that in her submissions, Ms. Ochwal, learned counsel for the plaintiff, tried to disparage this report on the basis that it was prepared and signed by one Thomas Orangi, and that it was him who ought to have testified and not Mr. David Lemaian. I see no substance in that argument. It is true that the report is signed by Thomas Orangi but that report does affirm that those present during the survey included Mr. David Lemaian who is also a surveyor in the same office. Thomas Orangi did not prepare and sign the report in his private capacity but as a public officer and I find that Mr. Lemaian was competent to produce the report and testify on its contents as he was present during the survey and is also from the same public office as that of Thomas Orangi.



15. I further observe that when the survey was being done, apart from David Lemaiyan and Thomas Orangi from the national Government Survey office, there was also present Mr. Patrick Achoki, the Director, Physical Planning of the County Government of Kisii. It will be recalled that one of the issues herein is whether the plot of the defendant is a market plot of Gekomu Market which are plots allotted by the now defunct Municipal Council of Kisii and presently under the County Government of Kisii.
16. The report of 1 September 2022 is comprehensive and had five findings as follows :
- i. Parcel No. Kisii/Nyaribari Chache/B/B/Boburia/3085 as occupied on the ground is bigger than the dimensions shown on mutation form that created it; subdivision of parcel No. Kisii/Nyaribari Chache/B/B/Boburia/1480 into 3084 and 3085.
 - ii. Parcel No. Kisii/Nyaribari Chache/B/B/Boburia/3085 borders parcels 2600 and 4473 to the west; also parcel No. 3467 to the east and 3668, 3666 and 3663 to the south and Gekomu market to the north.
 - iii. The derived area for parcel No. Kisii/Nyaribari Chache/B/B/Boburia/3085 as computed from measurements indicated on the mutation subdividing parcel 1480 into 3084 and 3085 is 0.12 acres (0.05Ha) (approx) which differs with that on page 1 (one) of the mutation which is indicated as 0.75 acres (0.30ha) which also differs with the registered area which is 0.35ha (copy of mutation attached).
 - iv. Measurements taken on the ground as per the said mutation dated 7.7.71 shows that parcel 3085 does share a common boundary with that of the defendant which is a market plot within Gekomu market.
 - v. Parcel 3085 as fenced on the ground has left out a 3m strip of land western side totalling to 0.01 ha (approx.). It also encroached onto parcel 3467 by a margin of 20m by 28m which translates to 0.06 ha (approx.) (sketch provided).

Conclusions :

From the finding above it is clear that :

1. The defendant has not encroached into the plaintiff's land nor has the plaintiff encroached into the defendant's land.
 2. The plaintiff by way of erecting a perimeter wall has encroached onto parcel No. Kisii/Nyaribari Chache/B/B/Boburia/3467 by 0.06 ha (approx.).
17. The findings above speak for themselves. First, they emphasise that the allegation of the plaintiff, that it is the suit land which abuts the Kisii-Kilgoris road, and that there is no plot in between, is not true. The fact of the matter is that there are market plots, which form Gekomu market, between the freehold plots of which one is the suit land, and the Kisii – Kilgoris road. Secondly, it is not true that the defendant has encroached into the plaintiff's land parcel No. 3085. The surveyors took the measurements of the suit land from the mutation form, for the suit land resulted from subdivision of the parcel No. 1480, which appears to have been an original adjudication number. From it the surveyors established the dimensions of the suit land and are clear that there has been no encroachment into the suit land by the defendant as alleged by the plaintiff. Ironically, it turns out that it is actually the plaintiff who seems to have encroached into the land of his neighbour but I need not go into that because that is not a dispute before me. In her submissions, Ms. Ochwal argued that the defendant cannot ascertain that he has developed only within his plot as he does not know the dimensions of it.



In the scope of things, it is immaterial, because as I have taken some time to explain, the plot of the plaintiff is known and identifiable from the mutation form. So long as there is no demonstration of any encroachment pursuant to what delineates the size of the plot of the plaintiff, it does not matter that the defendant did not provide the particulars of the size of his plot. What matters is that we have the size of the plot of the plaintiff and it has been established that there is no encroachment whatsoever by the defendant's building on what comprises the plaintiff's plot.

18. It is clear to me that the suit by the plaintiff was completely misguided and uncalled for. Before rushing to court he ought first to have gotten his facts right by engaging the County Surveyor and/or Physical Planner and/or the National Government Department of Survey. He could even have engaged the defendant directly when he had started construction to verify the boundaries of the two plots. That is what any reasonable person would do. He did not, and it turns out that he was mistaken. His allegation that his plot abuts the main Kisii-Kilgoris road is incorrect and he is also wrong in alleging that the defendant has built on part of his plot. I have no option but to dismiss his case with costs to the defendant. It is so ordered.

19. Judgment accordingly.

DATED AND DELIVERED THIS 25 DAY OF JULY 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT AT KISII

Delivered in the presence of :

Mr. Mulisa for the plaintiff

Ms. Nyaenya for the defendant

Court Assistant – David Ochieng'

