



**Poreka v Sekento (Environment & Land Case 145 of 2018)
[2024] KEELC 14023 (KLR) (18 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 14023 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 145 OF 2018
MN GICHERU, J
DECEMBER 18, 2024**

BETWEEN

PATEL OLE POREKA PLAINTIFF

AND

MERUBO SEKENTO DEFENDANT

JUDGMENT

1. The plaintiff seeks the following reliefs against the defendant.
 - a. A declaration that the suit property Kajiado/Ewuaso-Kedong/5400 is the plaintiff's property and that the defendant is a trespasser on the property.
 - b. An order directing the defendant, his agents, employees, servants and whomsoever is claiming under him to vacate the suit property.
 - c. A permanent injunction restraining the defendant, his agents, employees, servants and/or whomsoever is claiming under him from setting foot on the suit property.
 - ac. An order directing the defendant, his agents, employees and/or servants to exhume and remove his parents' bodies currently buried on the suit property and have them buried elsewhere.
 - d. An order directing the defendant to pay general damages for trespass.
 - e. An order directing the OCS, Ngong Police Station to supervise the court's orders.
 - f. Costs of the suit with interest from the date of filing till payment in full.
2. The plaintiff's case is as follows. Firstly, he is the registered owner of L.R. No. 5400, the suit land. Secondly, in the year 2008, the defendant entered and trespassed upon the suit land, put up structures thereon and he has since then taken possession of a section of the suit land. Thirdly, the defendant has buried his parents on the suit land against the advice of the village elder. Fourthly, despite numerous



efforts to settle matter amicably, the defendant has refused to vacate the suit land making the filing of this suit necessary.

3. In support of his case, the plaintiff filed the following evidence.
 - i. Witness statement by himself, Parkesui Ole Osukeri and Julius Risa Tompoi dated 22/8/2018.
 - ii. Copy of title deed for the suit land dated 6/3/2017.
 - iii. Copy of demand letter dated 18/4/2018.

4. In his written statement of defence dated 5/11/2018, the defendant avers as follows. Firstly, he denies the plaintiff's claim generally in its entirety. Secondly, the defendant states that he is the lawfully registered owner of L.R. Kajiado/Ewaso-Kedong/1699 which neighbours the plaintiff's original parcel which was Kajiado/Ewaso/Kedong/1293. Thirdly, the plaintiff subdivided his original land into several parcels which he sold and remained with the suit land. Fourthly, the defendant was issued with the title deed for his land on 1/9/1999 and since then he has been in occupation thereof and this occupation has been uninterrupted, exclusive and continuous. He has not trespassed upon the plaintiff's land. Fifthly, the defendant has initiated numerous efforts to engage a land surveyor to prove that there is no encroachment on the plaintiff's land but the plaintiff has frustrated the defendant's efforts.

For the above and other reasons, the defendant calls for the dismissal of the plaintiff's suit with costs.

5. In support of his case, the defendant filed the following evidence.
 - i. His own witness statement dated 5/11/2018.
 - ii. Copy of title deed for L.R. No. Kajiado/Ewaso-Kedong/1699 dated 1/9/1979.
 - iii. Copy of report by District Surveyor dated 5/5/2022.
6. At the trial on 3//10/2023 and 25/6/2024 the plaintiff and the defendant testified on oath and they were cross-examined by counsel for the adverse party. Both of them reiterated their case as per their pleadings. None of them could change their position even in the face of intense cross-examination.
7. The report by the District Surveyor was admitted in evidence by consent without calling the maker. This was on 31/10/2024.
8. Counsel for the parties filed written submissions dated 19/11/2024 and 27/11/2024 respectively. The plaintiff's counsel identified the following issues for identification.
 - i. Whether the defendant is in occupation of a portion of the plaintiff's land parcel No. KJD/Ewaso-Kedong/5400.
 - ii. Whether the plaintiff has encroached on the defendant's parcel of land KJD/Ewaso-Kedong/1699.
 - iii. Whether the surveyor's report on record is capable of resolving the parties' dispute bearing in mind that there are no beacons dividing the land into two.
 - iv. Who pays the costs.

The defendant's counsel who ideally should have identified the issues for determination as envisaged by Order 18 rule 2(2) Civil Procedure Rules did not do so in the submissions dated 19/11/2024.



9. I have carefully considered all the evidence adduced by the two parties including the witness statements, the documents and the testimony at the trial. I have also considered the report by the District Surveyor which is to the effect that while the registered area for the original parcels 1699 and 1293 was 215.25 Ha. the ground is 125.182 Ha. The short fall is therefore 90.118 Ha. Secondly, on the ground, the two families occupy the same parcel of land. Thirdly, there is consensus between the two parties that the boundary beacons between the two parcels have never been established. Finally, the two parties herein have never had any dispute with their other neighbours. I make the following findings on the identified issues.
10. On the first issue, I find that the plaintiff who has the burden of proof in this case has not proved that the defendant occupies a portion of his land being L.R. No. 5400. Under Sections 107 and 108 of the *Evidence Act*, it is the plaintiff who would fail if no evidence was adduced to prove encroachment. The plaintiff has not adduced any evidence from the Land Registrar to prove that the defendant occupies his land or any part thereof. The way in which he could have proved this was to call the evidence of the Land Registrar showing the two parcels of land and the encroachment by the defendant. Under Section 18(2) of the Land Regulation Act (*Act No. 3 of 2012*) it is the Land Registrar who is the authority on boundaries. Without the evidence of the Land Registrar of the area in which the land is situated, there is no proof of where the boundary between the parcels is and if there is any encroachment. When the plaintiff was under examination in chief by his own counsel on 25/6/2024 he had this to say at page 20 of the handwritten record.

“I do not know the level of encroachment...”

This is not what is expected of a plaintiff who has filed a case in which he seeks to prove trespass. What is expected is evidence of the degree of encroachment in metres. Such evidence ought to be supported by a map showing the precise location of the homestead and the graves of his defendant’s parents. Without this kind of evidence, there is no proof at all.

11. I do not find the second issue identified by the plaintiff’s counsel to be relevant to the plaintiff’s claim against the defendant. There is no counterclaim by the defendant alleging encroachment on his land by the plaintiff. If there was such a counterclaim, then the question as to whether the plaintiff had encroached on the defendant’s parcel would have arisen.
12. Coming to the third issue, I find that the report by the surveyor to be inconclusive. This is especially so because the report says in part,

The families are in agreement that the boundary beacons have never been established”

See lines 7 and 8 of page 1 of the report dated 5/5/2022. Without established beacons, it is not possible to know where the plaintiff’s land ends and where the defendant’s begins. To exacerbate the uncertainty, the total registered area in the title is about 90 hectares less than the ground. To date, the plaintiff cannot tell for sure the precise dimensions of his land.

For the above reasons, I find no merit in the plaintiff’s suit and I dismiss it with costs to the defendant.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY 18TH DAY OF DECEMBER 2024.

M.N. GICHERU

JUDGE

