



REPUBLIC OF KENYA



**Mbuthi v Muoki & another (Environment & Land Case 39 of 2019)
[2023] KEELC 216 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 216 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 39 OF 2019
CG MBOGO, J
JANUARY 26, 2023**

BETWEEN

STEPHEN KYALO MBUTHI PLAINTIFF

AND

NZINGA MUOKI 1ST DEFENDANT

CHARLES MAKAU 2ND DEFENDANT

JUDGMENT

1. *Vide* the further amended plaint dated August 2, 2011, the plaintiff sought the following reliefs against the defendants: -
 - a) A declaration that plot number 40 as registered is the absolute property of the plaintiff and that the defendants do not own any portion thereof.
 - b) An order for vacant possession or in the alternative an eviction order.
 - c) A permanent injunction restraining the defendants whether by themselves, their agents, servants, assigns and or personal representatives from entering, occupying, alienating or in any manner whatsoever interfering with the plaintiff's occupation of plot No 40 Kathyaka settlement scheme.
 - d) Costs of this suit and interest.
2. The plaintiff's suit was opposed by the defendants *vide* the defence dated August 6, 2007.
3. At the hearing, the plaintiff called one witness, Stephen Kyalo Mbuthi, who adopted his statement dated July 31, 2014 as his sworn evidence in chief. He produced the bundle of documents dated December 18, 2014 as exhibits in support of his case which were marked as PEX Nos 1 – 10 respectively.



4. It was the plaintiff's testimony that he purchased the suit property, plot No 40 Kathyaka settlement scheme, from one Philip Muoki Kamuya. He produced the sale agreement thereof as PEX No 1 (a) and the english translation as PEX No 1 (b). That in 1990, the plot was surveyed and registered in his name. He further stated that he has built a permanent house in the suit property wherein he also does farming. He stated that in 2006, the defendants demolished his toilet on the basis that it was their land. The plaintiff further averred that the defendants uprooted the sisal hedge along the boundary and made a new boundary, taking two acres of his land.
5. The plaintiff averred that the defendants did not have his permission. That the defendants are still in occupation. He stated that the ministry of lands did not send him any communication directing him to move the boundary. The plaintiff stated that the defendants have their own land which is plot No 35. He urged the court to grant the reliefs claimed in his further amended plead.
6. In cross-examination, the plaintiff stated that he earlier filed a civil case No 94 of 2000 against the defendants' father which concerned the suit property. That the said case was dismissed with costs. He added that he executed another sale agreement with Philip Muoki Kamuya dated September 19, 1998 produced as PEX No 2. That, however the said agreement did not specify the acreage. The plaintiff averred that plot No 40 measures about fourteen acres. That plot No 35 belongs to Philip Muoki Kamuya. He further averred that his land does not have a title deed.
7. In re-examination, the plaintiff maintained that he bought four acres of land. That he has a letter from the district land adjudication and settlement officer showing that plot No 40 is his land. He added that he has never been convicted of the offence of forgery.
8. The defendants called five witnesses. The 1st defendant, Alfred Nzinga Muoki, adopted his statement dated November 25, 2019 as his sworn evidence in chief. He stated that while his father was still alive, he sold a piece of land to the plaintiff. That the acreage of the land was not indicated. That the plaintiff prepared forged documents in order to enable him own a bigger portion of land than what he purchased. That his plot No is 40 while theirs is plot No 35.
9. The 1st defendant produced his further list of documents dated November 25, 2019 in support of the defendants' case. He urged the court to dismiss the plaintiff's suit with costs.
10. In cross-examination, the 1st defendant stated that he was not present when the agreement dated September 14, 1988 was being prepared. He added that plot No 40 was excised from plot No 35. That the plaintiff had encroached into plot No 35.
11. In re-examination, the 1st defendant reiterated that even though the plaintiff purchased plot No 40, the acreage was not indicated on the agreement.
12. The 2nd defendant, Charles Makau Muoki, adopted his statement dated November 25, 2019 as his sworn evidence in chief. He stated that the 1st defendant is his brother while the plaintiff is their neighbour. That the suit property did not have a plot number when the plaintiff purchased it. The plot number was generated in 1990 after the area was surveyed. The 2nd defendant however noted that he was not present when the sale agreement was signed on September 14, 1988.
13. In cross-examination, the 2nd defendant stated that plot No 40 belongs to the plaintiff. That the defendants had never sued the plaintiff to vacate the four acres that he purchased.
14. DW1, Richard Musau Muoki, adopted his statement that was filed in court on April 12, 2021 as his sworn evidence in chief. He stated that the defendants are his brothers and that he is familiar with the



- plaintiff who is a teacher. DW1 reiterated that plot No 40 belongs to the plaintiff while plot No 35 belongs to the defendants. That the dispute between the parties concerns the boundary.
15. In cross-examination, DW1 averred that the plaintiff had encroached into the defendants' land. He however stated that he did not have a surveyor's report to show the extent of encroachment. He added that the plaintiff has never been sued for trespass either in a criminal suit or a civil suit. He again reiterated that the plot No 40 belongs to the plaintiff.
 16. DW2, Raphael Mutuku Maundu, adopted his statement dated November 25, 2019 as his sworn evidence in chief. He stated that he was the retired assistant chief of Kikumbulyu location. That he was familiar with both the plaintiff and the defendants who are residents of his administrative zone.
 17. In cross-examination, DW2 stated that he retired in 1992. That the chief at the time was one David N Mang'ulu. He further indicated that he was summoned before the Land Disputes Tribunal which also visited the suit property. That the suit property had no acreage at the time of sale. He was quick to point out that he did not go back to measure the land after he had prepared the sale agreement.
 18. In re-examination, DW2 refuted that he was the drafter of the document that was shown to him by the plaintiff's counsel. He averred that he only prepared the sale agreement in the terms that were expressed by the parties.
 19. DW3, Josphat Musyoka Yumya, averred in his evidence in chief that he was the area chief Kikumbulyo location. That he was employed in the year 1994 and that he was familiar with both the plaintiff and the defendants. He recalled that the plaintiff once came to his office with a complaint over his parcel of land. Showing him the sale agreement, the plaintiff's complaint was that he had purchased four acres of land from one Philip Muoki. DW3 stated that he did not know the parcel number of the suit property.
 20. DW3 further stated that he summoned the defendants and heard them on the dispute. That after hearing the parties, he wrote the latter dated February 28, 2000 which he produced as DEX No 5. He further averred that the defendants' copy of the sale agreement did not match with what the plaintiff had presented. He resolved that the parties should go to the DCI's office for further investigations.
 21. In cross-examination, DW3 stated that even though he heard the parties herein, he did not have the minutes of the proceedings. After being shown PEX No 7, DW3 stated that the land that was being sold was four acres. He averred that the chief who authored the said letter was in office when the sale took place.
 22. After the parties had duly closed their respective cases, the plaintiff filed his submissions on September 28, 2021. Counsel for the plaintiff submitted that from the oral evidence given by the defendants, it was not in contest that plot No 40 Kathyaka settlement scheme belongs to the plaintiff. That the plaintiff had produced supporting documents confirming ownership of the suit property. That the dispute was over the boundary. That in the absence of any challenge to the plaintiff's title, the plaintiff is entitled to orders of permanent injunction as sought.
 23. None of the authorities cited in the plaintiff's submissions were annexed and the same are hereby disregarded.
 24. The defendants filed their submissions on September 20, 2021. Counsel for the defendants submitted that the defendants have been sued wrongly because the property the suit property was purchased from Philip Muoki Kamuya and there was no succession cause or citation filed to comply with the provisions of the *Law of Succession Act*. It was thus argued that the defendants do not have the legal capacity to be sued and the plaintiff's claim should fail.



25. It was further argued that the plaintiff's claim over suit property was not disputed and thus there was no essence in the orders of permanent injunction as sought. It was further submitted that from the evidence given by the parties, this dispute pertains to a boundary and since the same had not been pleaded by the plaintiff, the suit should be dismissed because parties are bound by their pleadings.
26. I have perused the pleadings, the evidence and the submissions filed by the counsel on record for the parties. In my disposition, the undisputed facts are as follows: -
- i) The plaintiff is the contractual owner of the suit property known as plot No 40 Kathyaka settlement scheme having purchased it from one Philip Muoki *vide* the sale agreement dated September 14, 1988.
 - ii) That the suit property was demarcated in or about 1990 following the land adjudication and survey exercise in the area.
 - iii) That the suit property borders plot No 35 Kathyaka settlement scheme which is occupied by the defendants.
27. I have isolated the issues for determination as follows: -
- i) Whether the plaintiff has established a case of trespass to land against the defendants herein; and
 - ii) Whether the plaintiff is entitled to the orders sought in the further amended plaint.
28. *Black's Law Dictionary* (9th Edn) page 1643 defines trespass to land (*trespass quare clausum fregit*) as follows: -
1. A person's unlawful entry on another's land that is visibly enclosed. • This tort consists of doing any of the following without lawful justification: (1) entering upon land in the possession of another, (2) remaining on the land, or (3) placing or projecting any object upon it. 2. At common law, an action to recover damages resulting from another's unlawful entry on one's land that is visibly enclosed.
29. As noted above, it was established from the oral evidence by all the witnesses and further at paragraph 4 of the defence that the ownership of the two neighbouring plots is not in contest. The dispute herein concerns where the boundary of the two plots is.
30. The law governing determination of boundary disputes is to be found under sections 18, 19, 20 and 21 of the [Land Registration Act](#), 2012. Under sections 18 (2) and (3) of the Act, the law outlines as follows: -
- (2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.
 - (3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary
31. It is the statutory duty of the land registrar to ascertain and fix boundaries which separate various parcels of land as per the area cadastral map. Since the parties agree that demarcation of the land at



Kathyaka settlement scheme was done, it is unfortunate that neither has availed the official report by the district land registrar which establishing the correct acreages for both plot No 35 and plot No 40 as per the official records. Sections 19 (1) and (2) of the [Land Registration Act](#) provide as follows: -

- (1) If the registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the registrar, the registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.
 - (2) The registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.
32. Most likely than not, the suit property has fixed boundaries as does the neighbouring plot No 35 since demarcation was completed in 1990. Once a boundary has been ascertained and fixed by the land registrar, it shall be an offence to interfere with the said boundary except in accordance with section 21 of the [Land Registration Act](#), 2012.
33. The upshot of the matter is that this court cannot conclusively make a determination on trespass which would entitle the plaintiff to the orders of vacant possession and permanent injunction as sought. On the preponderance of the evidence, it is clear that this court is bereft of jurisdiction to deal with the boundary dispute herein. The plaintiff has failed to establish a case for trespass to land on a balance of probabilities and the suit is hereby dismissed. In the interest of promoting an out of court settlement should the parties decide to engage the services of the land registrar, I hereby direct that each party bears its own costs of the suit.

SIGNED, DATED AND DELIVERED AT NAROK VIRTUALLY THIS 26TH DAY OF JANUARY, 2023.

MBOGO C.G.

JUDGE

In the presence of:

CA:T.Chuma

