



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

ELC NO. 172 OF 2016

JAMES ANALI ALARY.....PLAINTIFF

= VERSUS =

JOHN A. A. IKOKONYIDEFENDANT

J U D G E M E N T

1. Vide an amended Plaint dated 15th of December, 2018 the Plaintiff impleaded the Defendant in this suit and prayed for judgement against him for:

a) An order directing the County Land Registrar, Busia and the County Surveyor, Busia do proceed to land parcel Nos. South Teso/Osuretti/1827 and South Teso/Osuretti/1828 and demarcate on the ground the respective boundaries in accordance with the actual acreage assigned to the respective title deeds and or as per the boundaries on the area map;

b) Costs of this suit to be paid by the Plaintiff;

c) Any other relief that this Honourable Court may deem fit to grant to the Plaintiff herein.

2. The Plaintiff contends that he is the absolute owner and registered proprietor of the land parcel known and L.R NO. **SOUTH TESO/OSURETTI/1828** (the **suit property**) measuring 0.64Ha while the Defendant is the owner of the neighbouring land parcel number **SOUTH TESO/OSURETTI/1827**. That their father had subdivided the land for them before his demise and that after that they have never lived in harmony. That the Defendant has interfered with the suit land by encroaching onto his suit parcel.

3. The Defendant filed an amended statement of defence on the 1st of October, 2020 and denied that he had interfered with features demarcating the two parcels instead stating that the boundaries are in place as established during the partition. That the matter had been reported to the County Land Registrar who visited the suit property and gave his determination for the existing boundaries to be respected.

4. The hearing commenced on the 17th of June, 2020 when the Plaintiff, **JAMES ANASET OKELLO ALARY** testified as **PW1**. He testified that he lives in Machakus village in Osuret within Busia County. That the Defendant is his blood brother. He adopted his statement as his evidence in chief. That their father was called Rasto Okacho Alary who was the registered owner of L.R. Osuret/59. That he subdivided and shared the land to his six sons. The plaintiff stated that he got his share given L.R Osuret/1828 and the Defendant got L.R Osuret/1827. He continued further that although he was not present during the demarcation, the boundaries were planted which he was satisfied with. That the boundaries were entered into the survey map sheet No. 12.

5. **PW1** continued in evidence that the Defendant used to use both parcels of land and it was only in 2014 when he built his home and he realised that the sisal boundary that had been planted were missing. That the surveyor came without a court order but returned with the Land Registrar in 2016. That he was not satisfied with their report. That his land according to his title is 0.67ha while 1827 is 0.27ha. That on the ground the Defendant's land is now one acre reducing the size of his land. He urged this Court that the boundaries be placed according to the map. He produced the maps, green card and Land Control Board consent as exhibits in this case.

6. Upon cross-examination, **PW1** stated that the land was shared in 1987 although he was not sure. That although there was no agreement at the time of sharing the land, there was an agreement when the Defendant was added land. That there was no boundary dispute during the lifetime of their father. That Michael Alary and Andrew Omuse agree with him that the boundary had been moved. He stated although he does not know the year when the boundary was interfered with, he noticed it in the year 2003. With regards to the issue of the registrar's report of 2016, **PW1** stated that he did not agree with the same as it stated that there was no interference.

7. On re-examination, **PW1** stated that Michael and Andrew were his witnesses to the survey exercise even though their statements were not captured in the survey report. He stated that his complaint is that the registrar did not take any measurements despite him stating that the map is bad and he could not rely on it. That the Defendant used to plough his land from the year 1997-2006.

8. **ANDREW OMUSE** testified as **PW2**. He stated that he lived in Machakus location within South Teso Sub County. That the Plaintiff and the Defendant were his brothers from a different mother but the same father. That their father owned land reference number South Teso/Osuret/59 and while he was still alive, he subdivided the land amongst his six sons and gave each one titles: comprised in L.R Nos. 1827-1832 and boundaries were placed on each of the portion in 1987. That he gave the sizes as he chose. He stated that his land was 1831 while the Plaintiff's was 1828. That the defendant was using the Plaintiff's parcel from 1987-2016 but when the Plaintiff returned and wanted to build, the Defendant claimed that the Plaintiff had no land.

9. **PW2** continued further that the Defendant proceeded to destroy the boundary and wanted to use both plots. He stated that to his knowledge, the physical location on the ground has been interfered with compared to the position on the map where L.R No. 1827 is 0.27ha. That the size of Plaintiff's land on the ground is smaller than that of the Defendant due to the interference with the boundary. That the surveyor visited the said parcels in the presence of the parties but they neither measured the land nor rectified the boundary.

10. Upon cross-examination, **PW2** stated that he was present when the surveyor came in 2016 and he gave his views and even asked the surveyor to use his tools to measure the land. He denied telling the surveyor that the boundary was in order and that the same should not be rectified. That the Plaintiff's lives on the land with his family. This marked the close of the Plaintiff's case.

11. The defence case commenced on the 11th of February, 2021 with the sole evidence of the Defendant himself. He testified that he is a retired teacher who resides in Machakus village in Osuret within Amukura division. He adopted his statement dated 19th June, 2017 as his evidence wherein he stated that the Plaintiff was his brother and their father was called Rasto Alary. That before their father died, he distributed the land to them in 1989 and the plots were demarcated and the boundary marks placed are still in place todate. That the Plaintiff lodged complaints severally to various places over the same but his complaints have always been dismissed. That there was a dispute in 2016 and the Land Registrar came and resolved the case. He produced the documents on his list of documents as Dex 1-3.

12. Upon cross-examination, **DW1** stated that their father shared the land in the presence of elders including the Liguru and their eldest brother, Akochi. That the Plaintiff was a prison warder and he built after he retired. That he had relocated earlier to Nambale with his eldest wife and that while he was away Absalom was using his land and denied that he has never used the Plaintiff's land. He continued further that the boundaries marked by their father were still intact. He testified further that the Plaintiff alleges

that his land is 0.64ha but the size of the land on the ground may not be the same with what their father shared as he did not do the measurements himself and neither did, he use the map when doing his measurements. He agreed he that his land was smaller. He concluded by stating that the land registrar visited the land with four people to hear the case and that they did not take any measurements.

13. On re-examination, DW1 stated that it was the Plaintiff who had lodged a complaint at the Lands office. He agreed to have a survey being conducted to pick the ground position as given to them by their father.

14. DW1 was stood down and parties entered into a consent to have the County Land Registrar and the Surveyor to visit the disputed plots S.TESO/OSURETTI/1827 and S.TESO/OSURETI/1828 to:

- a) Picking the boundaries of the two plots as they exist on the ground;
- b) The boundaries as per the map;
- c) Give a report on the variation if any.

15. The Surveyor filed his report on the 20th of May, 2021 and DW1 took the stand again on the 6th of October, 2021 to be cross-examined on the survey report. He stated that he did not know about the boundaries on the sketch but on the ground the boundary is curved as planted by their father and it did not encroach. He stated that his house is on the curved portion where he was shown to build by his father and he did not know what the Plaintiff was complaining about.

16. The survey report was produced as is and the attendance of the Surveyor was dispensed with. Parties were granted 14 days each to file their respective their submissions.

17. The Plaintiff filed his submissions on the 10th of November, 2021. He reiterated the parties' respective pleadings and stated that the Defendant was utilizing both portions of the land being parcel 1827 and 1828 and the resultant effect was that the Plaintiff had more land than on the ground than what his title showed. He submitted that the County Surveyor and the County Land Registrar confirmed that the long-standing hedge does not conform with boundary of the Plaintiff as captured on the map. That he had proved his case on a balance of probabilities and that this Court should order that the County Land Registrar, Busia and the County Surveyor Busia should demarcate on the ground the respective boundaries in accordance with the acreage assigned to the respective title deeds and or as per the boundaries of the area map.

18. The plaintiff supported his submissions by the holding in the **James Kihara Wandera & 5 others vs. Paul Wachira Muchunu (2020) eKLR** where the court stated thus, ***"I find that the dispute between the two parties entailed a substantial reduction, on the ground, of a size of one parcel, and corresponding increment of the size of another by about 12 acres. This was therefore a land claim for a chunk of land which in my humble opinion, was beyond the jurisdiction of the land registrar, as it was not merely a boundary dispute but trespass, encroachment or invasion of land"***.

19. The Defendant filed his submissions on the 21st of October, 2021, submitting on two issues of; whether the claim is time barred and whether the court should side with the demarcation set out by their father or vary the same. On the first issue, the Defendant submitted that the claim is time barred because the boundaries were set out in 1987 and the Plaintiff brought the suit 29 years later whereas the law states that it has to be a period not exceeding 6 years. On the second issue, he submitted that the boundaries were placed in 1987 and the same have been accepted by the other sons of the deceased.

20. Having considered the parties' pleadings, evidence and submissions, the issue which in my opinion arise for determination are as follows:

- a) **Whether the Plaintiff has established that the Defendant has encroached onto his parcel of land;**

b) Who pays for the costs of this suit?

21. The Defendant has raised the issue of limitation of time for the first time in his submissions. However, because it is a question of law the court will consider it because the issue of limitation questions the jurisdiction of this Court and jurisdiction is everything. This was the holding in the case of **Bosire Ogero vs. Royal Media Services (2015) eKLR**. Once this is determined then the deliberation or not of the other issues can be done. The Plaintiff alleges that the boundaries were placed in 1987 while the Plaintiff brought the present claim in 2016 making it statute barred. Section 7 of the Limitations of Actions Act provides that:

“An action may not be brought by any person to recover land after the end of twelve (12) years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

22. The discovery of the intrusion is important for the determination when time began to run. Even though the Plaintiff was registered as a proprietor of the suit land on the 9th of April, 2001, the title was issued to him on the 30th of June, 2011. He admitted that he discovered the intrusion in 2014 when some boundary sisals were missing. He reported the complaint to the Land Registrar in 2016 and being dissatisfied with the said decision filed the present case. From the foregoing it is evident that only two years had lapsed since the Plaintiff discovered the said intrusion and as such the suit cannot be said to be time barred.

23. The court will thus proceed to analyse whether the Plaintiff has proved that the Defendant has encroached into his land parcel number L.R No. 1828 by moving the boundaries. During the hearing all the witnesses agree that there was a Land Registrar’s hearing held on the boundary dispute on the 9th of November, 2016. PW1 produced the proceedings of the Boundary dispute hearing as PEx 3 where both the parties were present and 16 other people in attendance. The Land Registrar at the time Mr. Stephen Kambaga asked the Village Elder, Kabai Ikobo, Absolom Okochil, Lazaro Okurui and Matayo Emoru whether they witnessed the planting of the boundaries, whether it was the same boundary they witnessed being planted or if it has ever been disturbed or shifted from its original position. They all responded that they witnessed the planting of the boundary, it was still the same one and it has never been disturbed or shifted from the original position. The Land Registrar ruled as follows:’

“The existing boundary was confirmed and adopted as the common boundary separating the two parcels of land considering that it was planted by the father if the parties to the suit. Any aggrieved party is allowed to exercise his right of appeal 30 days from the date hereof.”

24. The surveyor, Mr. Geoffrey Kamadi in his findings stated that there exists a long-standing hedge as the boundary between parcels 1827 and 1828 which both parties agree has been in existence for decades although it does not conform with the boundary of the Plaintiff as captured on the map. He provided a sketch that indicated that the Plaintiffs boundaries on the ground were drawn in black while the boundaries captured on the map were marked in red. His conclusion was:

“By virtue of decades-long hedge that marks the boundary of the Plaintiff and the Defendant plus putting into perspective that the preliminary index diagram (map) is not an authority but a guide on matters general boundaries, it is the advice of this office that the court upholds the longstanding hedge as the boundary between parcels 1827 and 1828.”

25. The parcels originated from parcel number S.Teso/Osuretti/59 and from the evidence of both parties the subdivision was done in 1987. The parties were issued with their respective titles on the 9th of April, 2011 for the Plaintiff and 10th February, 1995 for the Defendant. It is apparent that the Defendant took possession earlier than the Plaintiff and proceeded to construct his house thereon.

26. This Court is alive to the provisions of section 18 and 19 of the Land Registration Act, which mandates the Land Registrar to resolve boundary disputes. In this instance, the Land Registrar visited the

parcels as well as the Surveyor and they both arrived to the same conclusion that the position of the boundary on the ground is different from that on the map. They however, recommended that the long-standing hedge should be considered as the boundary and not the sketch in the Registry Index Map.

27. In his evidence, the plaintiff stated that his land on paper measures 0.64ha while that of the defendant on paper is 0.27ha. However, on the ground, the defendant's land is approximately one hectare. The plaintiff pleaded in paragraph 7A of the amended plaint thus,

“The plaintiff avers that following the encroachment of the defendant onto the plaintiff's L.R. No. South Teso/Osurette/1828, the actual size of L.R No. South Teso/Osurette/1828, on the ground has greatly diminished and is not in accordance with the actual acreage assigned to it as appears on the title deed while L.R No. South Teso/Osurette/1827 is bigger on the ground than the acreage assigned to it as appears on the title deed”.

28. Although, there is no evidence to support this assertion, the inference drawn is that on the ground, the defendant occupies 0.13ha portion which forms part of the plaintiff's land. The case of **James Kihara Wanderi** *supra*, where the trial court found that the dispute between the two parties was a substantial reduction on the ground, of a size of a parcel and the increment of the size of another. Oundo, J. concluded that it became a land claim which in her opinion was beyond the jurisdiction of the Land Registrar...”

29. On the basis of the pleadings and the evidence presented before this court especially the proceedings that was taken by the Land Registrar during their first visit in 2016, this court determines that the Land Registrar had no authority to interfere with the existing boundary until the Plaintiff provided evidence that he was entitled to the disputed portion. Such evidence and or determination can only before a court which then give both parties opportunity to present their case. This case is presented as seeking orders for rectification of the boundary dispute but in my opinion and I so hold that it is a claim for a land “*illegally*” occupied by the defendant hence the orders as prayed cannot issue.

30. In conclusion, I find the Plaintiff's suit as pleaded is not proved and the same is hereby dismissed. Given the circumstances of the case, I make an order for each party to each bear their costs.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 16TH DAY OF MARCH, 2022.

A. OMOLLO

JUDGE