

REPUBLIC OF KENYA

High Court at Kakamega

Civil Case 18 of 2009

JOSEPHINE KADI ASAMBA PLAINTIFF

V E R S U S

EUGINE JAMWALA OKUDE DEFENDANT

J U D G M E N T

In her plaint dated 11.2.2009 the plaintiff is seeking an order of injunction restraining the defendant from interfering with her peaceful enjoyment of plot number **KAKAMEGA/KONGONI/2512**. Two witnesses testified for the plaintiff. The plaintiff's evidence is that she is the registered owner of plot number **KAKAMEGA/KONGONI/2512**. She bought the land from the late **BURUDI**. The land borders plot number **KAKAMEGA/KONGONI/2513** which is still in the names of the late **Burudi**. When she bought the land the boundary was fixed on the ground. In February 2009 the defendant entered her land and started putting up a structure. Her plot is half an acre. The boundary is marked by sisal plants. She was shown. She was shown the boundary in 1984. The original plot number was 519. The surveyors went to the land and divided it.

PW2, JOYCE MUYEMBE, is a neighbor to the plaintiff. Her evidence was that the defendant went to erect a building on the plaintiff's land in 2009. She testified that the plaintiff's land is half an acre. The defendant's structure is inside the plaintiff's fence.

The defendant testified that he bought his land on 8.11.2007. A surveyor was sent by the court and it was shown that he has not encroached on the plaintiff's land. The land was sold to him by the relatives of the deceased owner. He bought a portion of land measuring 0.1 acres that was to be curved out of plot number **KAKMEGA/KONGONI/2513**. The sale price as per the agreement was KShs.80,000/=. There is an old sisal boundary but a new boundary was put up using some trees. He does not have a title deed as the relatives of the deceased owner are still conducting a succession cause. He has lived on the land for three years.

DW2, PETER WERUNGA BURUDI, is a son of the late Burudi Ondo who was the proprietor of plot number **KAKAMEGA/KONGONI/519**. He testified that his father sold half an acre of land on 19.8.1984 to the plaintiff's mother. The plot is next to a Catholic Church. According to him the plaintiff is occupying more than half an acre. The surveyors went on the ground and confirmed that the plaintiff's land does not extend to where the defendant has built. He is the one who sold the portion of land to the defendant. The remaining plot number 2513 is still in the names of his deceased father. The plot sold to the defendant is next to the plaintiff's land. DW3, PHILIP KIRUI, is the Kakamega District Land Surveyor. He produced a survey report prepared by his colleague Mr. Thomas Opondo. According to his evidence when the sub-division of plot number 519 was done there was a small portion that was left in between the two plots. The survey report does not indicate the exact measurements on the ground but the surveyor found that there is a gap in between the two plots.

The issue in dispute in this case is that the defendant encroached on the plaintiff's land. The plaintiff's mother bought plot number **KAKAMEGA/KONGONI/2512** from the late Burudi. The boundary was marked by sisal plants. The plaintiff took over the ownership of the plot and had herself registered on the 16.5.2006. According to the title deed the plot is 0.196 Ha. which is approximately half an acre. She produced a photograph that shows her house and the mud structure that was erected by the defendant. On the part of the defendant, it is contended that the plaintiff is occupying more land than the portion sold to her by the deceased. According to the defendant his portion of land is part of plot number

KAKAMEGA/KONGONI/2513. According to the extract from the land register that plot is about 0.129 Ha.

The main issue for determination is whether the defendant has encroached on the plaintiff's land. The relevant evidence is the survey report done by Thomas Opondo. According to that report there is a small stretch of land that was left when the sub-division of plot number **519** was done. According to the survey it appears that the late Burudi's sons became aware of the existence of that gap and decided to sell it. The report shows that there is a boundary which is existing on the ground and the same was accepted by the proprietors of the two plots. Another boundary exists in accordance with the survey map. If the second boundary was to be followed then the defendant's structure falls outside the plaintiff's land. But if the original boundary was to be followed then the defendant's structure falls within the plaintiff's land.

The report by the surveyor did not give the exact measurements for each of the two plots. From the extracts from the land register it is clear that plot number **2512** is slightly bigger than plot number **2513**. If we have to go by the surveyor's report it will be established that the plot where the defendant build does not fall within plot number **2513**. According to the report it is no man's land. That will therefore mean that DW2 could not have sold that portion of land as it is not contained within plot number **2513** owned by his late father. The survey report unfortunately does not indicate whether after the subdivision of plot number **519** there was some land that was not accounted for. The photograph produced by the plaintiff shows that the structure erected by the defendant falls within the old boundary and is therefore inside her compound. The surveyor's evidence does not show that the plaintiff is occupying more than half an acre as the exact measurement of the two plots were not given. It is clear from the evidence on record that after the sub-division of plot number **519** a boundary was fixed. The plaintiff occupied her plot while the deceased was contended with his remaining plot number **2513**. It is further clear that if the deceased's children would like to sell any portion of plot number **2513** then the same should fall within the limits of that plot. There is no evidence that when the sub-division of plot number **519** was done the subsequent sub-divisions became smaller in acreage than the original plot. Unfortunately the mutation forms that were done during the sub-division were not produced.

From the evidence on record and the exhibits produced I am satisfied that after the sub-division of plot number **519** boundaries were fixed. The plaintiff has been living within her plot as per the old boundary. In 2009 the defendant went to erect a mud structure within the old boundary. This is inside the plaintiff's land. I do find that the plaintiff has proved her case on a balance of probabilities. The structure put up by the defendant shall be removed and an order of injunction shall issue restraining the defendant from encroaching on the plaintiff's plot number **KAKAMEGA/KONGONI/2512**. Each party shall meet his/her own costs.

DATED AT KAKAMEGA THIS 27TH DAY OF FEBRUARY 2013

SAID J. CHITEMBWE
JUDGE