**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC APPEAL NO. 70 OF 2018**

**TITUS MUSYA MUSEE .....APPELLANT**

**VERSUS**

**FRANCIS ICHAMUI M'MWENDA .....RESPONDENT**

***(An appeal from the Judgement of Hon. Samwel Mungai (Chief Magistrate) delivered on 13/12/2018 in Isiolo CM ELC No. 14 of 2013)***

**JUDGMENT**

1. On 16/5/2013 the appellant through a plaint sued the respondent in the chief magistrates court at Isiolo Civil Case no. 14 of 2013 seeking an order for the respondent to remove his fence and any structures in the portion of appellant's plot no. 169 Isiolo, mesne profit, general Damages, costs and interest. It was the appellant's case that he is the owner of Plot No. 169, while respondent owns plot no. 97 Isiolo. However, the respondent had encroached on a part of the appellants plot, a fact established by the district physical planning officer isiolo and the district surveyor Isiolo when they visited and surveyed both plots.

2. The respondent in his defence filed on 3.6.2013 stated that he was allocated Plot No. 97 in Zone "D" Isiolo Township and he took possession of it and built a residential plot. The letter of allotment shows the boundaries of the respondent's plot and the development plan was approved and attached to the letter of allotment. The respondent complied with the conditions of the letter of allotment and is awaiting the issuance of a certificate of lease.

**ANALYSIS**

3. As the first appellate court, this court has a duty to evaluate, assess and analyze the extracts on record and to make its own determination having in mind that it did not have the advantage of hearing witnesses. See: **Selle & Another vs. Associated Motor Board Company Ltd [1968] EA 123.**

4. At the trial, **PW1 TITUS MUSYA MUSEE** told the court that he stays on plot No. 169 at Tulo Roba. He knows the respondent as the owner of Pot No. 97 Isiolo and who has encroached into his plot. He had a case No. 484 of 1993 where he had sued the county council of isiolo, where Judgement was passed in 1996 and it stated that he was the lawful owner of plot No. 169. The district surveyor measured the plot and in his report dated 9/7/2012 confirmed the encroachment.The documents which the plaintiff relied on in support of his case are; The judgment in MERU CMCC N0. 484 OF 1993 as exhibit 1, the report by the district surveyor Joseph D. Muchungu dated 9.7.2012 as exhibit 2 and The report of the district planning officer dated 16.7.2012 as exhibit 3.

5. **PW2 KIMUTAI M CHERUIYOT** a county Physical planner Isiolo told the court that he visited Plots No. 169 and 97 and opined that the dispute is on boundary and the determination thereof can only be done by the survey department. Both parties have a claim on the land as they share a boundary. He contended that development plans cannot be used to determine boundary disputes.

6. **PW3 JOSHUA RUME** a County Surveyor Isiolo told the court that he measured the two plots and Parcel 169 was approximately

1.2 hectares and parcel 97 was approximately 0.1 hectares. The report by Joseph Muchungu dated 9/7/2012 reflected what was on the ground. He was not agreeable to the finding on the encroachment that parcel 97 had encroached unto plot 169. He contended that an encroachment arises when the boundaries are fixed but in this case, there was no survey done in the area. He therefore could not ascertain the acreage using other methods.

7. **DW1 FRANCIS ICHAMUI M’MWENDWA** told the court that he knows the plaintiff as his neighbor. He acquired Parcel no. 97 through a letter of allotment, and that his parcel 97 does not encroach into parcel 169. In support of his case, DW1, had relied on the following documents; A letter of allotment dated 18.2.1999, a PDP with a departmental reference no. ISL/117/98/26.

8. **DW2 ROBERT MITHIKA KATIWA** told the court that he is a surveyor with Geoland Surveyors Limited. He visited the said plots on 4/5/2015 and 6/5/2015 and then went to survey of Kenya to establish any documentation of the boundaries. The survey of Kenya had no records of the two plots meaning that a fixed survey was not done to indicate the specific details of the boundaries and beacon. He concluded that both plots 169 and 97 are developed on the ground without fixed boundaries as required by law. He further concluded that the parcels should remain the way they are until Isiolo County Government and the National Land Commission regularizes the position.

9. On 13/12/2018 the learned Chief Magistrate Hon Samuel M. Mungai in his judgement found that the plaintiffs claim was not proven on a balance of probabilities and proceeded to dismiss the suit.

10. Having been aggrieved by the said decision, the appellant has appealed to this court on 3 grounds;

*a. “That having found that the experts, two surveyors and the Physical Planner Isiolo County were not in a position to pin point the boundaries on the ground and having found that their recommendation was that the boundaries can only be fixed by the County Government of Isiolo in conjunction with the National Land Commission, the trial court erred in Law and in fact by dismissing the plaintiffs suit instead of directing the National Land Commission to visit the locus in quo and file a report for the court’s consideration and eventual determination.*

*b. That the learned trial magistrate erred in law and in fact by failing to find for the appellant, that the respondent had encroached unto his plot No. 169 by 0.0026 Ha and therefore occasioned the appellant a miscarriage of justice*

*c. That the decision by the learned trial magistrate was against the weight of evidence tendered and therefore erroneous.”*

11. I have considered the grounds of appeal, submissions and evidence given in the trial court and the issue to be determined is **whether the appellant had proved his case on a balance of probabilities before the trial court"**

12. The appellant in his submissions argued that he had demonstrated that he is the owner of Plot No. 169 Isiolo. He produced the report by the district surveyor showing that the respondent has encroached unto the appellant’s plot to the extent of 0.0026 ha. The trial court should have done its duty by asking the National Land Commission to table a report to determine the rights of the parties instead leaving the matter in abeyance.

13. On the other hand the respondent argued that it is trite law that he who lodges a case against another party should be able to prove the same and it is not the work of the trial court to fill gaps in the plaintiff’s case. The reports produced by the physical planner and the two surveyors clearly showed that the two plots have not been surveyed and the available part development plans cannot be used to determine the boundary. Furthermore the trial magistrate set out the issues for determination as required by provisions of order 21 rule 4 of the Civil Procedure Rules 2010, analyzed all the issues and arrived at a judgement which took into consideration all the issues raised by the appellant.

14. It is trite that whoever alleges must prove the said allegations, as set out under **Section 107(1) of the Evidence Act** (Chapter 80 of the Laws of Kenya), which provides:

***“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.’’***

15. I have scrutinized the two reports which the appellant seemed to have heavily relied on. For the report of the surveyor (Joseph

Muchungu) dated 9.7.2012, he contends that **"the positions of the beacons were searched using Isiolo Development Plan no. ISL/117/2000/2"**, while the observations made by the physical planner, Arthur Mbatia in his report dated 16.7.2012 were that **"After comparing the ground of the two parcels and the part Development Plans no. ISL/117/2000/2 and ISL/117/98/26, we identified that the parcel no. 97 had encroached on parcel no. 169."** Thus it is clear that the authors of the two reports based their observations on the Development plans.

16. Development plans are provided for under the Physical planning Act whereby a local or regional physical development plan can be prepared in respect of Government Land, former trust land and even private land. **Section 24 (3)** of the Act provides that;

***"The Director may prepare a local physical development plan for the general purpose of guiding and coordinating development of infrastructural facilities and services for an area referred to in subsection (1), and for the specific control of the use and development of land or for the provision of any land in such area for public purposes".***

17. The **Content of the local physical development plan** is provided for under **section 25** as follows;

***"A local physical development plan shall consist of—***

***(a) a survey in respect of the area to which the plan relates carried out in such manner as may be prescribed; and***

***(b) such maps and description as may be necessary to indicate the manner in which the land in the area may be used having regard to the requirements set out in the Third Schedule in relation to each type of local physical development plan".***

18. What resonates from the above mentioned provisions of law is that the Physical Development Plans(PDPs), also commonly known as Part Development Plans are planning tools, used for general purposes of determining land use in a particular area of the city, municipality or council (read county). Thus the PDPs cannot solely be used to confer or determine rights in the land. The land ought to have been surveyed in order to generate survey maps such that the specific portion of the land for each claimant is discernible from a map and on the ground.

19. DW2, Robert Mithika had stated that the two plots are not registered with the Director of survey. The allotment letter for the respondent shows that the plot is un-surveyed. PW3, the County surveyor also confirmed that no survey was done in the area. It follows that as there are no fixed boundaries the land has never been surveyed. It was therefore a grave error and an abdication of their duties for the authors of the reports of 9th and 16th July 2012, to give an incomplete report by failing to capture this crucial detail, that the suit parcels have never been surveyed.

20. On the other hand, both pw2, the physical planner and pw3 the county surveyor were forthright and were unable to determine whether there was encroachment on appellant's land by the respondent.

21. The county surveyor (pw3) has in his report stated that the National Land Commission should carry out an audit of the area with a view of re-planning the area since the current situation is unhealthy. The appellant has faulted the trial magistrate for not referring the dispute to the National Land Commission. However, I would say that reference to the National Land Commission by the court, without being prompted by the parties would have changed the cause of action, bringing into the picture parties who were not in the suit and generally reshaping the pleadings.

22. In the case of **Caltex Oil ( Kenya ) Limited vs. Rono Limited (2018)eKLR**, it was stated that ;

***"The pleadings have the potential of informing each party what they expect in the trial before the court. If a party wishes the court to determine or grant a prayer, it must be specifically pleaded and proved……".***

23. I have no doubts that the appellant owns a parcel of land known as plot 169 while defendant owns plot 97. However, the actual nature and extent of this ownership has not been determined. It is upon the parties to pursue their claims with the relevant entities to ensure that their plots are defined, delineated and surveyed on paper and on the ground. Only then can a party be in a position to pin point the actual acreage of their parcels and the positioning of the same on the ground.

24. I have over and over again stated that the unending land disputes in Isiolo County including the present dispute appear to have been authored and perpetuated by the former county council of Isiolo. That entity has not been enjoined in these proceedings, thus I would not wish to burden the litigants on the issue of costs since the dispute is far from over. In the circumstances, this appeal is hereby dismissed but each party is to bear their own costs of this appeal.

**DATED, SIGNED AND DELIVERED AT MERU THIS 21ST DAY OF MAY, 2020**

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**

**ORDER**

The date of delivery of this ruling was given to the parties at the conclusion of the hearing and by a fresh notice by the Deputy Registrar. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the ***Civil Procedure Rules*** which requires that all judgments and rulings be pronounced in open court.

**HON. LUCY N. MBUGUA**

**ELC JUDGE**

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