



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 648 OF 2014

VITALIS OTIEGO ODIDA.....PLAINTIFF

VERSUS

MARTIN CHENGO.....DEFENDANT

JUDGEMENT

1. By a plaint dated 26th June 2014, the plaintiff seeks judgment against the defendant for:-

(a) A declaration that the plaintiff is and continues to be the registered proprietor for all that property known as House No. 281 situated on LR NO. 209/20594 in Nairobi South B in Nairobi County and bearing Grant Number IR 141800 issued under the Registration of Title Act, Cap 281 and is entitled to the possession of the said property.

(b) An order that the defendant jointly and severally be strictly enjoined and restrained whether by himself or by his servants, agents or otherwise howsoever from trespassing on, alienating, constructing or continuing with the construction of any structures and/or in any way whatsoever interfering with the plaintiffs quiet possession over all that piece of property known as House No. MG 281 situated on LR No. 209/20594 in Nairobi South B in Nairobi County and bearing Grant Number IR 141800 issued under the Registration of Title Act, Cap 281.

(c) An order that the defendant do reconstruct the demolished wall that marks the boundary between the plaintiff's property house No. MG 281 situated on LR No. 209/20594 in Nairobi South B in Nairobi County and bearing Grant Number IR 141800 and the defendant's property.

(d) Further and/or in the alternative to prayer (c) aforesaid a mandatory injunction do issue requiring the defendants forthwith to remove such structures and foundations that he has erected on the plaintiff's property and restore the said property, its beacons and boundary marks to its original condition.

(e) Damages for trespass.

(f) Aggravated damages

(g) Costs.

(h) Interest

(i) Such other and/or further relief as to this honourable court may deem just and fit to grant.

2. Upon being served the defendant entered appearance through the firm of J. M. Wanjohi & Co. Advocates on 9th September 2014. He also filed a statement of defence and counterclaim dated 1st March 2016. In his counterclaim he seeks judgment against the plaintiff for:-

(a) A declaration that the plaintiff's deed plan No. 344828 dated 9th November 2012 is unlawful as it overlaps an earlier survey of the defendant's LR No. 209/12905 as approved in the deed plan NO. 181394 surveyed on 7th February 1994 by a qualified government surveyor.

(b) A declaration that the plaintiff's deed plan No. 344828 issued on 9th November, 2012 be surrendered for correction and the National Land Commission to recall deed plan No. 344828 and LR No. 209/20594 for cancellation.

(c) Costs of the suit.

The plaintiff's statement is dated 23rd May 2014. He states that he is a civil servant working with the Ministry of Public Works since 1977. By virtue of that capacity he was allocated the suit property pursuant to a letter of allotment dated 1st September 1998 and the title was issued on 30th November 2012. That he has lived on the suit property with his family since 1998 until 17th May 2014 when the defendant and his agents demolished the perimeter wall claiming that the plaintiff had encroached on his land. The plaintiff was therefore exposed to insecurity. It is further the plaintiff's case that the maps from the Survey of Kenya and a report from the Licenced Surveyor confirmed the defendant's actions were illegal.

3. PW1 Julius Orwa K'obado a licenced surveyor told the court that he did a survey in respect of House No. M. G. 281 – LR NO. 209/20594. He prepared a report dated 23rd May 2014. His instructions were to verify the position of the boundaries of LR No. 209/20594. He said he had earlier done the survey in 2012. He stated that he obtained two approved survey plans from the director of surveys being F/R NO. 538./164 and F/R No. 392/182. He found that the beacons with respect to LR No. 209/20584 were found to be correct, the boundary wall was adopted as the boundary. He took the court through the steps of authenticating the beacons before a title is issued. He told the court that the survey report by Charles Gathogo dated 3rd March 2016 contradicts his report. He said in his report he adopted the old beacons on the Northern Side and added only two beacons. That there was an old boundary separating the two plots, it had been surveyed earlier. That by the time he did the survey the concrete wall was existing. He produced the report dated 23rd May 2014 as exhibit P1. He also produced the other documents on behalf of the plaintiff who was said to be indisposed. He produced them as exhibit P1 – P8 respectively.

4. PW2 Phelgona Akumu Otiego adopted her witness statement dated 23rd May 2014. She said she is the wife of the plaintiff. She told the court that they have lived in House No. MG 281 on LR No. 209/20594 since 1990. She stated that in 2014, the defendant knocked on her gate. He told her the boundary wall had encroached on his plot. He said on 17th May 2014 the plaintiff demolished the wall and, as a result the tenants who lived there left. She made a report at Industrial Area Police Station. The police came and stopped further demolition. The plaintiff was able to obtain orders from this court to maintain the status quo.

5. PW3 Wilson Francis Ojuju a retired surveyor, told the court that he prepared a report dated 28th May 2014, and filed in court on 10th September 2014. That he did a survey pursuant to a court order dated 9th June 2014. He told the court that he was to determine the boundary between LR No. 209/12095 belonging to the defendant and LR No. 209/20594 belonging to the plaintiff. He relied on the survey plan FR/NO. 254/101 which emanated from the Director of Surveys.

6. He further he told the court once a licensed surveyor does the survey, the work is presented to the checkers to confirm the survey had been done properly. In the case of LR No. 209/20594 the final checker noted that the plot was already fenced and there was a government house. The surveyor had not choice but to maintain the area on the ground.

7. That someone in the department of survey meddled with the surveyor's work to justify a bigger area being given to LR NO. 209/12095 being 0.045 hectares. The authenticating officer picked the concrete wall as the boundary. He was of the opinion that the defendant's surveyor never went to the ground. That from the part development plan all the parcels are in a straight line and in between there is a road. And that if the defendant is allowed to go in, the road will be altered and the plaintiff's parcel will be smaller than the other parcels. He concluded that the concrete wall was not picked by the defendant's surveyor. He was of the opinion that the Director of Surveys should rectify the area of LR 209/12095 to conform with the part development plan. That will require minor amendments. He produced the survey report as exhibit p3.

8. DW1 Martin Kioko Chengo, the defendant, adopted his witness statement dated 1st March 2016. He also relied on the list of documents dated 1st March 2016. He also relied on the list of documents dated 1st March 2016. He produced the documents as exhibit D1 to D9 respectively. He stated that he purchased the property for development. He said the contractor who went to the ground realized the dimensions on the deed plan did not match those on the ground. That the plot was formerly government land and that the concrete wall was for security purposes not the beacons. As he needed to go ahead with the development he brought down the wall together with the servant quarter that had been built attached to the wall. He produced a letter written to the Director of Surveys on the issue of the wall and the beacons as exhibit D5. He also produced an internal memo to the director of surveys which talks about the findings as exhibit D6. He prays that the dimensions of his parcel be corrected to match those on the deed plan.

9. DW2 Charles Ributhi Gathogo a licenced surveyor told the court he prepared a report dated 22nd February 2016. He produced it as exhibit D10. He said he visited LR No. 209/12095 to confirm the position of the beacons. The allottee Ruth Talai Kiptui sought the service of B M Okumu a surveyor. The survey plan was submitted on 11th February 1994. The survey plan FR No. 254/101 was authenticated by the Director of Surveys. Another survey plan for LR No. 209/202594 F/R No. 536/64 was done in 2012 without cross reference with the old survey of LR No. 209/12095. LR No. 209/20594 then encroached on LR No. 209/12095. He further stated that no plan should be altered without the permission from the Director of Surveys. That the survey done in 2012 is erroneous.

10. The parties tendered written submissions.

11. The plaintiff's submissions are dated 20th August 2019. It is not in doubt that the plaintiff is the registered proprietor of the property known as LR No. 209/20594 house No. MG281. He produced copies of letters of allotment and title as exhibits in this case. The defendant admitted in cross examination that the demolition occurred. The defendant proceeded with the demolition without ascertaining the situation on the ground. The defendant ought to have sought to resurvey the disputed area by the Director of Surveys instead of taking the law into his hands. The defendant's plot was first surveyed by B. M. Okumu of Victoria Land Surveys but he was never called to testify.

12. The memo relied on by the defendant was authored by M N Mwangi is not a survey report. It was not prepared by a surveyor. It has no probative value. In respect of damages for trespass the plaintiff relied on the case of **Nakuru Industries Limited vs S S Mehta & Sons [2016] eKLR; Park Towers Ltd vs John Muthamo Njika & 7 Others [2014] eKLR**. The plaintiff proposes a sum of Kshs. 500,000 as damages for trespass. The defendant admitted that he has put up a commercial enterprise. He undertook demolitions so as to extend his commercial building. The demolition was structured to earn him profit. He prays for Kshs.500,000 as aggravated damages. He has relied on the case of **Abdulhamed Ebrahim Ahmed vs Municipal Council of Mombasa [2004] eKLR**. He prays that he be found to have proved his case on a balance of probabilities. He has put forward the case of **William Kabogo Gitau vs George Thuo & 2 Others [2010] IKLR 526**.

13. The defendant's submissions are dated 7th October 2019. The demolished wall stood on the land of the defendant who should not be made to pay for demolishing a structure on his own land. The report dated 25th May 2019 which picks the wall as the boundary is not accurate. No one knows who put up the wall. The wall which was built in colonial times in the 1940s cannot in law or otherwise be construed to a fixed boundary. The report by Charles Gathogo produced as exhibit D10 concluded that survey of the plaintiff's parcel violated the principle of respecting the old survey. The plaintiff's surveyor altered the boundary of the defendant's land. His survey ought to be considered erroneous.

14. The memo produced as exhibit D 6 and its contents have not been disputed. The plaintiff has not said it is a forgery. The plaintiff has not demonstrated what loss he has suffered as no valuation report was produced. A proper survey ought to be undertaken. He prays that the plaintiff's suit be dismissed with costs. He has put forward the case of **Moses Kiriiri Muthiru vs Kimathi Muthiru & 2 others [2018] eKLR**.

15. I have considered the pleadings and the evidence on record. I have also considered the written submissions and the authorities cited. The issues for determination are:-

(i) *Whether the demolition on 17th May 2014 was justified.*

(ii) *Whether the plaintiff is entitled to the prayers sought on the plaint.*

(iii) Who should bear costs''

16. It is not in dispute that on 17th May 2014, the concrete wall marking the boundary between the plaintiff's and the defendant's property was demolished. The defendant admitted in his testimony that he brought down the wall as it had encroached on his property. He told the court that after he bought the suit property he decided to undertake the development. It is the contractor who discovered that the dimensions on the ground did not match the ones on the title.

17. The plaintiff has relied on the survey report dated 23rd May 2014 by J. O. K'obado, a licenced surveyor. He told the court that there were two survey plans F/R 536/64 and F/R 392/182 that were used to establish the boundaries of LR NO. 209/20594. His conclusion was:-

“It was noted that the cadastral survey plans FR Nos 392/182 and 536/64 represent the registered LR No.s 209/14394, 209/14462 and 209/20594 respectively and have been approved by the Director of Surveys. The survey of plot represented by beacons P1, P2, P7 and da18 which shares its common boundary with LR 209/20594 marked by beacons P1 and P2 has not been approved by the Director of Surveys for title processing as it has not been allocated any land registration numbers. This survey must be formally approved with LR No. before its Deed Plans are submitted to the director of surveys for checking and approval before they can be submitted to the director of surveys for checking and approval before they can be admitted to Lands Registry for title registration. The position of the wall corners representing the boundary in dispute was found to be in stable positions as per the boundary beacons represented by the approved survey plan F/R No. 536/64. It was noticed on the site, that the boundary wall representing the position of the common boundary between LR No. 209/20594 and Plot represented by beacons P1, P2, P7 and da 18 as per the approved plan had been demolished without the knowledge of the occupant of the plot on LR No. 209/20594 despite the wall being on its appropriate position as per the approved surveys represented by the cadastral survey plans as attached”.

18. On the 11th June 2014, this court ordered a survey to be undertaken by the Director of Surveys to establish the boundary of the two plots. In the report dated 29th August 2014 Wilson Ojuju made the conclusion that:-

“1. The surveyor's report (9) concerning LR NO. 209/12095) seems to have been tampered with after its submissions to the Director of Surveys.

2. Plot dimensions as given in the FR 254/101 seems to differ with the PDP.

3. The subject boundary wall which is the bone of contention was not actually picked on the ground as alleged in the tampered text.

4. It is concluded that the Director of Surveys should harmonize the relevant dimensions of the Plot LR NO. 209/12095 and resultant plot acreage to conform to the approved part development plan and hence the letter of allotment. This will elicit minor amendment to be communicated to the Registrar of Titles.”

This report concurs with the findings of the plaintiff's surveyor. The defendant's surveyor Charles R. Gathogo has given a different opinion from the above. He maintained that survey plan FR 536/64 ought to have referred to the old survey and should be found to be erroneous. He however agreed that he did not pick the wall as the boundary and that the survey done in 1994 vide F/R 392/182 did not pick the wall as the boundary between the two plots.

19. I is not in dispute that the said wall was accepted by the occupants of the two plots as the boundary. This is perhaps the reason why the original allottee left things as they are. PW3 Wilson Ojuju told the court that the defendant's survey was done correctly on paper but not on the ground. He also stated that from the part development plans all the parcels ought to be on a straight line. That in between there is a road. If the defendant is allowed to go in to the plaintiff's parcel the road will be altered and the plaintiff's parcel will be smaller than the others. He maintained that the wall was not picked when the survey for the defendant's plot was done. The defendant ought to have availed the initial surveyor B M Okumu. No reason was given for the failure to avail him as a witness.

20. Except DW2 no other witness has contradicted the findings of Wilson Ojuju who acted for the Director of Surveys. This court will go by his recommendations on what needs to be done. It should be noted that the Director of Surveys is the custodian of all

public records relating to a survey. As per Section 30 of the Survey Act Cap 229 Laws of Kenya any survey and resurvey is carried out under and in accordance with the Director of the surveys. I am convinced that the concrete wall between the two properties formed the boundary. This therefore means the demolition of the same was not justified.

21. This amounted to trespass to the plaintiff's plot hence he is entitled to damages. In the case of **Nakuru Industries Ltd vs S S Mehta & Sons [2016] eKLR M Odera J** stated thus:-

“In tort, damages are awarded as a way to compensate a plaintiff for loss he had incurred due to a wrongful action on the part of the defendant. The damages so awarded are intended to return the plaintiff back to the position he was before the wrongful act was committed. In case where trespass to land results in damage then the computation of damages is on the basis of restitution of land. The value of the soil (or trees or fruits) which have been removed from that land are all factored as well as the cost of restoration of the land to the position it was before the wrongful act was committed”.

The plaintiff has proposed Kshs.500,000 as damages for trespass. I however award Kshs.200,000 which I think is adequate compensation.

22. I decline to award any aggravated damages as the plaintiff has not demonstrated that it deserves the same.

23. All in all I find that the plaintiff as proved his case on a balance of probabilities as against the defendant. The defendant's counterclaim fails.

24. Accordingly, judgment is entered for the plaintiff as against the defendants as follows:-

(a) That a declaration is hereby issued that the plaintiff is and continues to be the registered proprietor of all that property known as House No. M G 281 situated on LR NO. 209/20594 in Nairobi South B in Nairobi County and bearing Grant Number IR 141800 issued under the Registration of Title Act, Cap 281 and is entitled to the possession of the said property.

(b) That an order is hereby issued restraining the defendant whether by himself or by his servants, and/or agents or otherwise howsoever from trespassing on, alienating, constructing or continuing with the construction of any structures and/or in any way whatsoever interfering with the plaintiffs quiet possession over all that piece of property known as House No. MG 281 situated on LR No. 209/20594 in Nairobi South B in Nairobi County and bearing Grant Number IR 141800 issued under the Registration of Title Act, Cap 281.

(c) That an order is hereby issued directing the defendant to reconstruct the demolished wall that marks the boundary between the plaintiff's property house No. MG 281 situated on LR No. 209/20594 in Nairobi South B in Nairobi County and bearing Grant Number IR 141800 and the defendant's property. AND further that the defendant is hereby directed to remove such structures and foundations that he has erected on the plaintiff's property and restore the said property, its beacons and boundary marks to its original condition.

(d) General damages for trespass Kshs.200,000/-

(e) Costs of the suit and interest.

It is so ordered.

Dated, signed and delivered in Nairobi on this 11th June 2020.

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L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the plaintiff

No appearance for the Defendant

Kajuju – Court Assistant



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