



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CASE NO. 169 OF 2016

OSANO MECHA Suing as personal representative of

GWARO OSANO (Deceased).....PLAINTIFF

VERSUS

GABRIEL BICHAGE.....1ST DEFENDANT

THOMAS BICHAGE GISEMBA....2ND DEFENDANT

RULING

1. On 21st June 2016 the Plaintiff filed the present suit against the defendants alleging that the 2nd defendant on 03/12/1981 fraudulently caused the land registrar to insert his name on the land register in respect to land Parcel No. **Nyaribari/Cache/B/B/ Boburia/3413** ('Parcel 3413') which was wholly in the name of Gwaro Osano, the deceased. Subsequently on 20th May 2002 the 2nd Defendant transferred the entire suit property wholly to his name despite the deceased having died on 29th February 1988.

2. The Defendants denied the allegations of the Plaintiff in total and averred that the land parcel **3413** had belonged to Mokua Gwaro while the deceased had Parcel No. **Nyaribari/Cache/B/B/Boburia/ 3414** ("**parcel 3414**"). The defendants further averred that there was a determination of the issues raised in the present suit in a previous suit namely Kisii SRM Case No. 160 of 1984 and thus the instant suit was *res judicata*.

3. When the suit came up for directions on 6th October 2016 the court ordered that the parties maintain status quo whereby there would be no sale and or transfer of the suit property until the suit was heard and determined. Before the suit was heard and determined, the defendants filed a Notice of Motion dated 24th January 2018 seeking the dismissal of the plaintiff's suit for want of prosecution. The court on 7th March 2018 dismissed the defendant's said application and on the same day made an order directing the Chief Nyaura location to visit land parcels **Nyaribari Cache/B/B/Boburia 3413** and **3414** and to ascertain the portions of the land that were in use by the parties and to confirm whether the Plaintiff had encroached onto the portion used by the Defendant as it was evident the parties could not agree what the actual status was on the ground in relation to the parcels of land. The Chief filed his report with the court on 3rd April 2018 and the report in part read as follows:

"This is to confirm that the land parcel Nyaribari Cache/B/B/Boburia/3413 is shared equally by the parties or proprietors namely Thomas Bichage Gisembe and Gwaro Osano. Currently Gabriel Bichage (son of Thomas Bichage Gisembe) and Ragogi Mecha brother to Osano Mecha ID No. 6550112 (Grandson to Gwaro Osano) are the utilizers of the Land Parcel 3413. The problem within this plot is that one party led by Gabriel Bichage/Thomas Bichage Gisemba (Defendant/Applicant) have attained the title deed for the whole plot denying the other party Osano Mecha & the brother Ragogi Mecha their half share expected of them. I do not see where the Plaintiff has invaded or encroached on to the Defendant. It is the defendant who is supposed to surrender to the plaintiff their share (to them)."

4. It is this report that precipitated the 1st Defendant/Applicant to file the motion dated 24th April 2018 seeking that the report by the Chief Nyaura location be expunged from the court record and or be set aside on the basis that the Chief was biased when he prepared the report. The court gave directions that the application be canvassed by way of written submissions.

5. The applicant in their submissions submitted that the report did not ascertain who had been using land Parcel No. 3414 contrary to the court order and that the report merely indicated the plaintiff's interest in the property. The applicant further contended that the report did not consider that the plaintiff/respondent took possession of the suit premises as from 25th January of 2018. The applicant argued that the chief did not hear or summon the parties concerned to ascertain who had been in actual possession of the parcels of land which offended the principles of natural justice. It was the applicant's submission that there was bias on the part of the Chief considering that the Chief had participated in the resolution of a boundary dispute where it had been determined the defendant/applicant had exclusive possession of the property.

6. The plaintiff/respondent submitted that the applicant failed to meet the threshold required for setting aside the report by the chief and asserted there was no basis for setting aside the report.

7. The genesis of the chief's report was that the court was faced with two rival positions and therefore considered that the Chief Nyaura Location who had no interest in the suit after visiting the suit land would come up with appropriate finding as relates to the physical occupancies and use of parcels **3413** and **3414** so that the issue of status quo could be determined. The report by the Chief unfortunately is not clear and/or explicit on the portions the parties occupy of the suit property. The purpose of the court in directing the Chief to file a report was so as to ascertain the status quo that needs to be maintained pending the hearing of the suit.

8. I do not agree with the 1st defendant/applicant that the chief ought to have conducted a formal hearing to determine the issue of who was in occupation of the land. That should have been fairly evident. The applicant has alleged bias on the part of the chief for reasons that the chief did not hear both parties' cases. In his affidavit dated 24th April 2018 the applicant gave evidence that the report concealed the fact that the applicant had been in use of land parcel No. **3413** as far back as the year 2014 when he had a dispute with Fabius Mokora Keuya. He stated that the chief participated in the matter and attached a copy of the proceedings. In that case Gabriel Bichage was the applicant while Fabious Mokora Keuya, the respondent. The matter was concerned with a boundary dispute in regard to Parcel No. **Nyaribari Chache/B/B/Boburia/3154** and **3413**, the County Land Registrar made the following observations:

- **Both plots have boundaries and are properly fenced.**

- **The respondent's plot is fenced with post and barbed wire and have since remained like so after having purchased from the Banks.**

- **The applicant's plot which is just adjacent to the Respondent's plot is also fenced with shrub like features as shown by the maps.**

- **However, there are two houses/homes and a vacant portion which are being claimed by third parties, the parties who are not parties to this case.**

- **These parties who claim to live and cultivate this area says that they have been there for a period of more than 20 to 30 years even before the respondent came to be sold the parcel of his land.**

- **These people have different issue of ownership which either party to this case have not bothered to bring to this court's attention. (Emphasis added)**

9. The report by the Chief affirmed that indeed it was the defendants who were presently utilizing land parcel Nyaribari **Chache/B/B/Boburia/3413** which is the subject of the present suit. The other matters addressed in the Chief's letter concern issue of ownership of the land which issue will be determined by the court upon hearing evidence from the parties during the trial. There is no basis to expunge the report by the Chief and the same will remain part of the record as it was prepared pursuant to an order of the court. The report filed by the Chief has not disposed of the issue that the court sought to be resolved respecting what the obtaining status quo was, save that it confirmed it was the defendant who was using the land presently. The only way to settle the matter is to get the suit heard and determined on merit. The parties are implored to expedite compliance with Order 11 of the Civil Procedure Rules to facilitate the hearing of the suit. Pending the hearing of the suit, I reiterate this court's order of 6th October 2016 which required that the parties maintain the obtaining status quo and specifically barred any transfer and/or charging of the sale property until the suit is heard and determined.

10. In order to facilitate the finalization of this matter, it is directed that the suit be mentioned on 26th April 2019 for pretrial directions and taking of a hearing date. The costs of the application dated 24th April 2018 shall be in the cause.

11. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KISII THIS 20TH DAY OF MARCH 2019.

J. M. MUTUNGI

JUDGE

In the Presence of:

Mr. Nyambati for the plaintiff

Mr. Nyantika for the 1st and 2nd defendants

Ruth Court Assistant

J. M. MUTUNGI

JUDGE