



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 444 OF 2015**

**JOAKIM MOGENI MECHA .....PLAINTIFF**

**VERSUS**

**SAMWEL NYABUTI NYANUMBA .....1<sup>ST</sup> DEFENDANT**

**KENNEDY MOCHERE NYANUMBA.....2<sup>ND</sup> DEFENDANT**

**ROBERT ONGERI KIBWAGE .....3<sup>RD</sup> DEFENDANT**

**R U L I N G**

1. The Plaintiff instituted this suit by way of plaint dated 28<sup>th</sup> September 2015. His claim was that the Defendants had encroached onto his parcel of land **Mwongori Settlement Scheme/1031** (“**suit property**”). The Plaintiff sought an order of permanent injunction and eviction of the Defendants from the suit property.

2. The Defendants filed a joint defence dated 26<sup>th</sup> November 2015 and denied they had encroached onto the Plaintiff’s parcel of land. On 30<sup>th</sup> November 2015 when the matter was listed for hearing of the interlocutory application for injunction it became clear that the Plaintiff was claiming ownership of land parcel **Mwongori Settlement Scheme/1031** and the Defendants were claiming ownership of land parcel **Mwongori Settlement Scheme/274**. The issue having been deciphered as one of identifying the physical positioning of the two parcels of land, the court with the agreement of the parties inter alia made an order of reference to the land registrar Nyamira and County Surveyor in the following terms:-

**“That the land registrar, Nyamira and the County Surveyor Nyamira visit parcel No. Mwongori Settlement Scheme/1031 and 274 and identify their physical locations on the ground and their respective boundaries within the next 90 days and thereafter to file their report in court.”**

3. The land registrar and the surveyor filed their initial reports on 17<sup>th</sup> August 2016. Both the land registrar and the surveyor were agreed that land parcels **1031** and **274** were separate and distinct and did not share a common boundary. The defendants objected to the reports filed by the land registrar and the surveyor complaining they were not accorded a hearing.

4. The defendants sought a revisit to the site and on 17<sup>th</sup> July 2017. The court granted them their wish as the Plaintiff did not object. The court essentially varied the earlier order of reference to the land registrar and inter alia directed as follows:-

**(i) That the land registrar and County Surveyor, Nyamira do revisit land parcels LR Nos. Mwongori Scheme/1031 and 274 and to establish and fix their respective boundaries.**

**(ii) That during the exercise the parties to be at liberty to be represented by their surveyors.**

5. The land registrar’s report dated 27<sup>th</sup> April 2018 and the surveyor’s report dated 23<sup>rd</sup> April 2018 were filed in court on 27<sup>th</sup> April 2018. The parties were both present when the land registrar and the surveyor carried out the exercise. The land registrar’s report indicates that the parties when requested to point out their parcels of land, they both pointed to the same parcel of land which was identified to be land parcel **Mwongori/Settlement Scheme/1031**. However, when the Registry Index Map (RIM) was used and measurements taken it was established land parcel **Mwongori Settlement Scheme/274** and **1031** were separate and distinct and far apart. They were separated by several plots. The Land Registrar affirmed that they identified parcel **274** and it belonged to the Defendants. The report by the Land Registrar affirmed that the Plaintiff was the owner of land parcel **1031** while the Defendants were the owners of land parcel **274**. He stated no encroachment was noted.

6. The Surveyor’s report which incorporated a sketch diagram confirmed the content contained in the land Registrar’s report. He affirmed

the parcels of land **274** and **1031** did not border each other and were separated by land parcels **1104, 271, 272** and **273** as illustrated on the sketch diagram.

7. The parties made written comments/observations on the reports which I have duly considered. The Plaintiff urges the court to uphold the report by the Land Registrar and the Surveyor and to find that the Defendants had trespassed onto his land. The Plaintiff seeks judgment and the costs of the suit.

8. The Defendants for their part in their filed comments affirm that the Land Registrar and the Surveyor verified the physical positions of the parcels of land and found that parcel **274** and **1031** were separate and far apart from each other. The Defendants submitted that the said officers found no encroachment onto land parcel **Mwongori Settlement Scheme/1031** and therefore contended the Plaintiff was not truthful when he alleged the Defendants had encroached onto land parcel **1031**. The Defendants sought the dismissal of the Plaintiff's suit with costs.

9. Having reviewed and considered the reports filed by the Land Registrar and the Surveyor, I am satisfied the issues raised by the parties in the suit have been fully resolved. While the parties may have had initial difficulties of identifying their respective plots physically on the ground, particularly in the case of the Defendants who the evidence shows were pointing to the position of the Plaintiff's parcel **1031** as the position of their parcel **274**, the report by the Surveyor came as a relief as their Plot **274** was actually identified on the ground. Thus, even if the Defendants had pointed to the Plaintiff's plot as the site of their parcel **274**, that cannot be construed to be trespass. I do not suppose there was willful intention to trespass. Trespass entails a degree of willful intention to unlawfully enter onto someone else's land without their authority or permission. In the present matter, the Land Registrar stated they found no encroachment on land parcel **1031** meaning the Defendants were not on the land. If the Defendants had put up any structures thereon or were cultivating thereon no doubt the report would have noted.

10. In the result, I am persuaded to adopt the report of the Land Registrar and the Surveyor as the judgment of the court and as a consequence thereof make the following final order:-

**(i) That the Plaintiff's land parcel Mwongori Settlement Scheme/1031 is separate and distinct from land parcel Mwongori Settlement Scheme/274 owned by the Defendants.**

**(ii) That both the Plaintiff and the Defendants are each entitled to possession and exclusive use of their respective parcels of land as identified by the Land Registrar and the Surveyor without any interference from the other.**

**(iii) Each party to meet their own costs of the suit.**

**RULING DATED, SIGNED AND DELIVERED AT KISII THIS 29<sup>TH</sup> DAY OF AUGUST 2019.**

**J. M. MUTUNGI**

**JUDGE**