



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 280 OF 2014**

**THE CHAIRMAN, SCHOOL MANAGEMENT COMMITTEE**

**BONYAIGUBA D.O.K PRIMARY SCHOOL.....PLAINTIFF**

**VERSUS**

**YOAKIM MOGONDO MANYARA**

**Alia YUVINALIS MOGONDO MANYARA.....DEFENDANT**

**R U L I N G**

1. On 25<sup>th</sup> day of May 2017 the Hon. Justice Mohammed Kullow made an order in the following terms:-

**“That the county land surveyor and land registrar Nyamira do visit land parcel LR No. West Mugirango/Nyamaiya/363 and LR No. West Mugirango/Nyamaiya/426 and delineate and establish the boundary over the two parcels of land and file a report in court within 90 days.”**

This order of reference was precipitated by the plaintiff’s counsel’s contention that the matter involved a boundary dispute. To contextualize the matter, it is necessary to advert to the pleadings by the parties.

2. By the plaint filed on 17<sup>th</sup> July 2014 the plaintiff averred that they were the registered owners of land parcel **LR No. West Mugirango/Nyamaiya/363** having been so registered on 23<sup>rd</sup> June 2008. The plaintiff further averred that the defendant on or about the year 2008 unlawfully entered and trespassed onto the said property and constructed thereon two (2) houses where he continues to reside and in occupation. The plaintiff inter alia sought judgment against the defendant for:-

**(i) Declaration that the plaintiff is the lawful, bonafide and registered owner of LR No. West Mugirango/Nyamaiya/ 363.**

**(ii) An order of eviction against the defendant his agents and/or servants from LR No. West Mugirango/Nyamaiya/ 363.**

**(iii) Permanent injunction.**

**(iv) General damages for trespass and/or conversion.**

3. The defendant filed a defence and counterclaim on 21<sup>st</sup> October 2014 and inter alia denied he was a trespasser on land parcel **West Mugirango/Nyamaiya/363**. The defendant averred that he had since birth occupied the subject property and denied he only entered onto the suit property on or about 2008 as alleged by the plaintiff. The defendant further averred that land parcel **LR No. West Mugirango/Nyamaiya/363** belonged to his late father Kemuma Nyambego. The defendant stated that even though his late father had donated a portion of the land in 1970, he subsequently revoked the donation and resumed possession and occupation of the land until 1979 when he died and was buried thereon as was his wife when she also died. The defendant stated that he had occupied and resided on the land from the time he was born and that it was only in 2008 that the plaintiff started interfering with the suit land.

4. The defendant avers that the registration of the plaintiff as owner of land parcel **LR No. West Mugirango/Nyamaiya/363** was fraudulently procured by the plaintiff and by way of counter claim seeks inter alia:-

**(i) A declaration that he is the rightful owner of land parcel West Mugirango/Nyamaiya/363 that originally belonged to his father (deceased).**

**(ii) An order for the reversion and cancellation of the transfer and registration of part of LR No. West Mugirango/**

**Nyamaiya/363 that was originally in the defendant's father's name.**

**(iii) Permanent injunction to restrain the plaintiff from trespassing and/or interfering or dealing howsoever with land parcel LR No. West Mugirango/Nyamaiya/363.**

**(iv) A declaration that the plaintiff is holding land title LR No. West Mugirango/Nyamaiya/363 in which the defendant has been in possession of in trust of the defendant.**

5. On the basis of the foregoing pleadings, there is no disclosure that the suit raises an issue relating to boundary dispute and/or delineation of any two parcels of land. The defendant's assertion is that the plaintiff unlawfully and fraudulently acquired title to a portion of land that belonged to his deceased father. He therefore contends that the plaintiff holds such land in trust for the defendant. In the pleadings there was no mention of land parcel **LR No. West Mugirango/ Nyamaiya/426** that was made subject of the order of reference to the land registrar and the surveyor.

6. In the filed reports by the land registrar and the county surveyor, it is clear that the said officers only concerned themselves with the delineation of boundaries of land parcels **West Mugirango/Nyamaiya/ 363** and **426**. I do not think the making of the order of reference to the land registrar and the county surveyor was necessitated by the issues that were raised in the pleadings, as the pleadings do not raise any issue relating to boundary between any parcels. The suit raises issues that touch on fraud and whether or not the plaintiff holds a portion of land parcel **363** in trust for the defendant. The defendant asserts that the portion of parcel **363** that he occupies formed part of his late father's land which he disputes was infact donated to form part of the school land. He avers the school unlawfully and unprocedurally included the portion of the land which he has occupied all his life as part of the school land even though the defendant's father never donated the land and/or if he had expressed an intention of donating the same, he rescinded the intention to donate such that and hence the donation did not take effect.

7. Having reviewed the pleadings, the order of reference and the respective reports filed by the surveyor and the land registrar together with the submissions filed by counsel of the parties, I am satisfied the reports filed do not dispose of the issues raised by the pleadings. The issues as per the pleadings concerning whether or not there was fraudulent dealings on the part of the plaintiff and/or whether the plaintiff holds a portion of **LR No. West Mugirango/Nyamaiya/363** in trust for the defendant, are issues that can only be determined by taking direct evidence from the parties. While the reports by the surveyor and the land registrar affirms what the status is on the ground, they do not answer the issues whether there was fraudulent dealing and/or whether a trust exists in favour of the defendant in regard to the portion of land parcel **363** which he is in occupation of.

8. Accordingly, it is my determination that the reports filed by the surveyor and the land registrar on 28<sup>th</sup> February 2018 are incapable of disposing of the suit as the same only confirm what the status in regard to occupancies is on the ground. In the premises, it is my direction that the suit should be fixed for hearing on merits. Parties are directed to take a date for hearing at the court registry on a priority basis. Costs in the cause.

9. Orders accordingly.

**RULING DATED, SIGNED and DELIVERED at KISII this 28<sup>TH</sup> DAY of SEPTEMBER 2018.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

Mr. Ollando for the plaintiff

Ms. Muguche for the defendant

Ruth court assistant

**J. M. MUTUNGI**

**JUDGE**