



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC CASE NO. 324 OF 2013

JOYCE MOKEIRA MOMANYI.....PLAINTIFF

VERSUS

MARTHA NYABOKE.....DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff filed this suit vide a Plaint dated 22nd July, 2013 as the attorney of one Francis Kerongo Anyona, the registered owner of land parcel known as LR NO. NYARIBARI CHACHE/B/B/BOBURIA 6729 (herein after referred to as the suit property), seeking the following orders:

- a) A declaration that Francis Kerongo Anyona is the registered owner of land Parcel known as LR NO. NYARIBARI CHACHE/B/B/BOBURIA 6729.
- b) An order of permanent injunction restraining the Defendant either by herself or through her agents/servants/assigns from in any way whatsoever, entering, encroaching and doing anything on the suit property.
- c) An order of eviction and demolition of any structure on the aforementioned suit property or any structure that may exceed the actual acreage on the ground.
- d) That costs be provided for.
- e) Any other order this court may deem fit to grant.

2. In support of the above prayers, the Plaintiff in the plaint averred that she is the wife of Francis Kerongo Anyona currently residing in the U.S.A who has given her the authority to file suit on his behalf. The suit property known as NYARIBARI CHACHE/B/B/BOBURIA/6729 measuring 0.04 Ha is registered in the name of Francis Kerongo Anyona. The Defendant is the sole registered owner of that parcel of land known as NYARIBARI CHACHE/B/B/BOBURIA/6375 measuring 0.05 Ha situated at Mwembe estate within Kisii Town. The two aforementioned parcels of land are adjacent to another and share a common boundary on one side.

3. The Plaintiff alleges that in the month of May 2013, the Defendant or her agents/servants unlawfully entered upon the suit property, destroyed the fence, assembled construction materials and started constructing a septic tank. The Plaintiff further avers that the Defendant has put up a permanent structure on her land parcel known as NYARIBARI CHACHE/B/B/BOBURIA/6375, but has exceeded her ground acreage/measurement and encroached upon the suit property. It is her further contention that the Defendant's act of omission or commission is likely to alienate the interest of the registered owner of the suit property and interfere with the peaceful occupation of the same and may cause irreparable loss unless the Defendant together with her agents are restrained from further construction.

4. Together with the Plaint, the Applicant filed a Notice of Motion seeking a temporary injunction pending the hearing and determination of the suit which order was granted vide a ruling of this court dated 1st November, 2013.

5. In response to the suit filed by the Plaintiff, the Defendant filed a statement of Defence dated 22nd August 2013, wherein he denied all the Plaintiff's allegations. He stated that each of the parties had his or her own land. He also averred that the suit was bad in law as it involved a boundary dispute and that the same should be handled by the Land Registrar and Land Surveyor.

6. On 10th May, 2017 this court directed the District Land Registrar and the County Surveyor to visit parcels 6729 and 6375 in order to ascertain and fix their respective boundaries. The Land Registrar was thereafter ordered to file his report for further directions. The court also gave the parties the liberty of engaging their own private Surveyors.

7. The Land Registrar and the County Surveyor visited the suit properties and filed their joint report on 26th February, 2018. The court subsequently directed that the District Land Registrar and the County Surveyor attend court to shed more light on the report.

8. The County Surveyor, Mr. Tom Ongeru Orangi, appeared in court on 28th October, 2021 and testified in support of the report and was cross-examined by counsel for both parties.

9. During cross examination by learned counsel for the Defendant, Mr. Orangi testified that he did visit the parcels 6375 and 6729. He stated that during his visit he established that land parcel 6375 which measures 0.05 Ha emanated from parcel number 5524 which had also given rise to parcel 6373 measuring 0.60 Ha and parcel 6374 measuring 0.28 Ha. He stated that he established that land parcel 6729 measuring 0.04 Ha emanated from parcel 6373 which also gave rise to parcel 6726 measuring 0.23 Ha, parcel 6727 measuring 0.11 Ha and parcel 6728 measuring 0.10 Ha. He further testified that a road measuring 3 metres wide was created. He confessed that he did not get to walk upto the end of the road to establish its length but he estimated it to be 600 metres.

10. During the cross examination by learned counsel for the Plaintiff, Mr. Orangi testified that the access road runs along parcel 6729. He also confirmed that parcel 6729 was occupied by the Plaintiff while parcel 6375 was occupied by the Defendant. He testified that there is a storey building on parcel 6375 whose size he could not tell. The said building according to his testimony occupies a large portion of the land and leaves a small space for moving around. He testified that in their report they recommended that the parties share the space proportionately based on what is documented and what is available on the ground.

11. After the Surveyor concluded his testimony, counsel for the Plaintiff indicated that the Plaintiff was agreeable with the Surveyor's recommendations. On the other hand, counsel for the Defendant did not agree with the Surveyor's recommendation and proposed that the parties file written submissions on his comments on the report and the recommendations.

12. The court directed the parties to file their submissions within 30 days. The Plaintiff's filed their submissions on 30th November, 2021 while the Defendant filed his submissions on 4th November, 2021.

ISSUES FOR DETERMINATION

13. Having considered the joint report by the Land Registrar and County Surveyor, the testimony of the County Surveyor and the rival submissions, the sole issue for determination is whether the said report resolves the issues in dispute and whether this court should adopt the survey report as the judgment of the court.

ANALYSIS AND DETERMINATION

14. In the survey report it was observed that while on paper, the two parcels (6729 and 6375) which share a common boundary have a combined measurement of 0.09 Ha, on the ground they have a combined measurement of 0.06 Ha which means the ground measurements and the paper measurements do not tally. In the report it was also observed that there was a road that runs along parcel 6729 which measures 2 metres wide on the ground but on paper it measures 3 metres. It was equally observed that there was a storey building that was constructed on parcel 6375 which took a bigger portion of the property and which had left a small portion for movement.

15. According to the report and the testimony of the Surveyor, since there is a discrepancy in the ground measurements and the measurements on the map, the only solution available to resolve the dispute is for the parties to share the space available proportionately considering the measurements of each parcel both on the map and what is available on the ground.

16. In the interest of justice and in furtherance of the overriding objective of the Environment and Land Court Act which is to facilitate the just, expeditious, proportionate and accessible resolution of disputes governed by the said Act, I adopt the joint report of the Land Registrar and County Surveyor as a judgment of this court. The Land Registrar and County Surveyor, Kisii County shall ensure that the Registry Index Map and land register are amended accordingly.

17. Each party shall bear their own costs.

DATED, SIGNED AND DELIVERED AT KISII THIS 10TH DAY OF FEBRUARY, 2022.

J.M ONYANGO

JUDGE