



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT EMBU

EMBU ELC NO. 21 OF 2019

JOSEPH NYAGA NJERU.....PLAINTIFF

VERSUS

THOMAS NYAGA NJUKI (Substituting Njuki Rabuta (Deceased)).....DEFENDANT

RULING

INTRODUCTION AND BACKGROUND

1. This court is called upon to enforce a judgment of the court of Appeal decision in Nyeri Civil Appeal No. 143 of 2008. The plaintiff is **JOSEPH NYAGA NJERU**- who was the Respondent in the appeal while the defendant is **THOMAS NYAGA NJUKI** substituting **Njuki Rabuta** who was the Appellant. The plaintiff had filed a suit before this court seeking ownership by way of adverse possession of three (3) acres to hived off from suit parcel of land No. Evuvore/Nguthi/1507. The suit had been determined in the plaintiff's favour and declaratory orders had been issued to the effect that the plaintiff had become entitled by way adverse possession to three (3) acres of the suit parcel of land and further that the plaintiff be registered as owner of the said three acres.

2. The defendant, being aggrieved by the said judgment, preferred an appeal to the Court of Appeal challenging, among other things, the acreage occupied by the plaintiff. The Court of Appeal determined the matter and made the following orders;

a) A declaration is hereby made that the respondent is entitled by adverse possession to a portion of land that he occupies in relation to Land Parcel No. Evuvore/Nguthi/1507.

b) We hereby order and direct that this civil suit be and is hereby remitted to the High Court for purposes of ascertaining and determining the exact acreage/size of the portion of land occupied by the respondent, as at 2nd October 2002. We further direct and order that the portion of land occupied by the respondent shall be registered and title issued in his name.

c) Each party shall bear his own costs.

3. After judgment by the court of appeal, the matter was placed before this court and on 31.10.2019 the court gave directions for the regional land surveyor to survey and ascertain the land occupied by the plaintiff and to file a report within sixty (60) days. The parties were to be present and the plaintiff was to meet the costs of survey and preparation of the report.

4. The surveyor's report was filed on 8.7.2020 and the matter proceeded for hearing on 2.12.2021. PW1 was D.W. Gicheru. He said he is a surveyor and an assistant to the regional surveyor, Embu. He confirmed receiving the court order and summoning the parties to attend the visit at the suit parcel of land. He testified that he visited the land and during the visit, the plaintiff, the defendant and the owner of the neighboring land were present. He stated that the external boundary for the suit land was marked using GPS Technology with the participation of the parties.

5. He also testified that he informed the Plaintiff to show the portion of the land he occupies. He averred that the plaintiff and defendant disagreed and the defendant withdrew from the exercise. He further stated that they marked the area occupied by the plaintiff which as per appendix 3 of the survey report was Area B measuring 1.216Ha (3.005 acres), while the defendant's area of occupation was Area A measuring 1.666Ha (4.1 acres).

6. It is his testimony that the report also shows the relationship between the map and the ground, which is marked as appendix 1, and shape of the parcel marked as appendix 2. He produced the survey report and the three appendixes as his exhibits. He also testified that there were houses on the land.

7. In cross examination, he testified that the local administration had been represented by the area village elder. He confirmed that the area chief was not present as he had commitments elsewhere. He further confirmed the presence of other people including the defendant's family. He testified that he had considered the court of appeal decision which mandated them to only identify the portion of land the plaintiff occupied and that, that was the exercise they had carried out. He further testified that he was aware the plaintiff had not been the one originally occupying the land and he did not know whether the plaintiff lived on the land.

SUBMISSIONS

8. The court gave directions that the parties file written submission. The plaintiff filed his submissions on 17.12.2021. They are dated 16.12.2021. In his submissions, he basically urged the court to adopt the surveyor's report dated 16.3.2020 and order the Land Registrar to issue him with title deed for the 3 acres of land parcel Evuvore/Nguthi/1507 as stipulated in the surveyor's report.

9. The defendant on the other hand filed his submissions on 11.1.2022 and dated 10.1.2022. The defendant gave a history of the suit, which I have already set out in my introduction to this ruling. He submitted that under the evidence act it was required that he who alleges must prove. It was his case that the plaintiff has to give evidence to help in ascertaining and determining the acreage of the land. He argues that the plaintiff did not discharge that burden in the first instance and that the court could only act on solid evidence in ascertaining and determining the issue of the portion occupied by the plaintiff.

10. He submitted that the parties had entered into consent to send a surveyor to ascertain the portion occupied by the plaintiff. He avers that though this was done, the defendant wishes that the report had objectivity. He argued that the surveyor had confessed that the report was lopsided in the plaintiff's favor. In his view the appellate court had set aside and or varied the decree and the trial court had the responsibility of determining the matter on the issue of acreage.

11. He reiterated that the burden of prove lay with the plaintiff and that the plaintiff needed to give evidence within an acceptable threshold for the court to determine the issue in his favor. He argued that the defendant had no burden but only an evidential one to respond by cross examining and calling evidence in defence. He then submitted that the court would then determine the issue of acreage by credibility and cogency of the evidence adduced by the parties. He finally submitted that the proceedings before the appellate court had been set aside and varied but that the parties were at liberty to adopt excerpts that were in favor of the issue at hand.

ANALYSIS AND DETERMINATION

12. I have looked at the court of appeal order, the rival submissions by the parties and the entire court record. As earlier stated in the ruling, the plaintiff had filed a suit seeking ownership of three (3) acres of land from parcel No. Evuvore/Nguthi/1507 by way of adverse possession. The matter had been determined in the plaintiff's favour but the defendant preferred an appeal before the Court of Appeal challenging the said determination. The court of appeal, in determining the matter, gave orders that the suit be remitted back to the high court for purposes of ascertaining and determining the exact acreage/size of the portion occupied by the respondent as at 2.10.2002.

13. This court in executing the said orders mentioned the matter before it and ordered the regional surveyor to visit the land in the presence of the plaintiff and the defendant and to further prepare a report. The said visit was conducted and a report prepared and filed in court. The adoption of this report is what is essentially in contention, with the plaintiff seeking for the report to be adopted while the defendant seeks for the matter to be heard afresh to extent of determining the issue of acreage of land that the plaintiff occupies.

14. I therefore find that there are two issues for determination, the first being whether the surveyor's report dated 16.3.2020 should be adopted in ascertaining the parcel of land occupied by the plaintiff. The second is whether this court should conduct a hearing for purposes of ascertaining the area occupied by the plaintiff in land parcel Evuvore/Nguthi/1507.

15. I will start with the first issue. The court of Appeal tasked this court with the responsibility of ascertaining the acreage of land the plaintiff occupied as it was clear he did occupy a portion of land parcel Evuvore/Nguthi/1507. When this matter was mentioned before the court on 31/10/19 learned counsels for both parties agreed that the only way to ascertain the land occupied by the Plaintiff was by calling a government surveyor. To that effect an order directing the County surveyor to conduct the exercise was issued.

16. In accordance with the order of the Court, the County Surveyor proceeded to the site for the exercise. The parties presented themselves during the exercise. It is during the exercise when the plaintiff showed the area he occupied that the parties are said to have disagreed and the defendant left. From the evidence by the surveyor, he carried out the process as ordered and gave a report now before this court. The plaintiff is agreeable to the contents of the report but the defendant seeks for it not to be adopted and the matter to proceed for hearing.

17. As stated above the parties had agreed to have the surveyor ascertain the land occupied by the plaintiff. In fact, it was a suggestion by the Counsel for the Defendant, which was subsequently agreed upon by the other party. In my view therefore, the defendant not only consented but seemed satisfied with the mode for ascertainment as he is the one who even suggested it to the court. The defendant must have fully appreciated the nature and modalities of the exercise to be conducted by the surveyor. But this ruling shows a defendant who is now trying to change goal posts. He is running away from what he proposed.

18. The surveyor had testified that he summoned the defendant to appear at the exercise and the defendant duly appeared. Some of his family members are also said to have been present during the exercise. It is testified that all through the exercise, the defendant did not have any objection until the plaintiff showed the area of land he had occupied. It is at this point that the defendant decided not to participate any further. In my view, this was a serious blunder by the defendant. He should have waited for his turn to show where the plaintiff had occupied.

19. I am of the considered view that the defendant had left the exercise of his own volition despite the clear court order that the exercise was to be carried out in the presence of both parties. The defendant, despite not agreeing with the plaintiff regarding the area the plaintiff alleged

to have occupied, should himself have stated the area he perceived the plaintiff to occupy. Nothing prevented him from doing so. This would have been captured in the surveyor's report for the court's consideration. His acts of leaving the exercise can only be considered as non-compliance with the court order.

20. It has not been argued that the surveyor, in carrying out the exercise, committed a misconduct or failed to exercise due diligence or that the exercise and report were not done to the required standard. The only contention is that the court of appeal had not stipulated the modalities of ascertaining the acreage and the only way to ascertain is by conducting a hearing and having the parties give evidence with regard to the acreage occupied by the plaintiff. As already stated the parties had consented to the modalities and then a lawful court order had been issued for this purpose. The defendant blatantly disregarded the order and this court cannot aid him in that.

21. With regard to the issue of conducting a hearing by calling witnesses as suggested by the defendant, I find that this prayer is misplaced and has been made late in time. I say this for the reason that when this matter first came up for mention before this court after being referred from the court of appeal, the parties agreed to have the government surveyor visit the site and ascertain the acreage of land occupied by the plaintiff. In my view this would have been the opportune time for parties to inform the court that they wished to have a hearing and call witnesses to testify and be interrogated either at the site or after the report was prepared.

22. As already stated, the surveyor had been called to produce the survey report and was cross examined on it. After such cross examination none of the parties informed the court of their intention to call further evidence either by way of viva voce evidence or otherwise. This, too, was a lost opportunity by the parties. This issue of hearing has been raised in the submissions, which is at the tail-end of the case. I find that the defendant's prayer for a hearing is not tenable in the circumstances and has been overtaken by events.

23. In view of the above, I find that the surveyor lawfully executed the order of the court, which he had an obligation to. Further, the issue of ascertainment of acreage required expert evidence of a surveyor and evidence to be submitted by the parties on this issue would not, alone, be sufficient. It would require an expert, herein being a surveyor, to visit the ground and make such ascertainment and this was done. I find that the report filed by the surveyor is in order and sufficient to determine the acreage the plaintiff occupied. My considered view is that the defendant is un-necessarily trying to complicate an otherwise simple issue by calling upon the court to conduct what would amount to a mini-trial. Litigation must come to an end. Period.

24. Having stated as above, I need not proceed to consider the second issue, which is whether this court should conduct a hearing for purposes of ascertaining the area occupied by the plaintiff in land parcel Evuvore/Nguthi/1507. I hereby adopt the report by the surveyor and order that the plaintiff be registered as owner of 1.216Ha of suit parcel Evuvore/Nguthi/1507.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 23RD DAY OF MARCH, 2022.

In the presence of M/s Muriuki for plaintiff and Nderi for defendant.

Court Assistant: Leadys

A.K. KANIARU

JUDGE

23.03.2022