



No. 287

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 130 OF 2001

YOBENSIA KEMUNTO KEMONI.....1<sup>ST</sup> PLAINTIFF

MARGARET NYAITONDI GWOMA.....2<sup>ND</sup> PLAINTIFF

VERSUS

GEOFFREY MANGERA OMWOYO.....DEFENDANT

RULING

1. The plaintiffs brought this suit against the defendant on 14<sup>th</sup> August 2001 seeking the following reliefs:-

**a. A re-survey of parcels of land known as LR No. Matutu Settlement Scheme/214 and LR No. Matutu Settlement Scheme/215 to accord with the sub-division and transfer and mutation forms executed by the parties in 1980 by which LR No. Matutu Settlement Scheme/214 (“Plot No. 214”) measures 15.5 acres while LR No. Matutu Settlement Scheme/215 “Plot No. 215” measures 4 acres.**

**b. Damages for loss of user of 4.5acres illegally and forcefully being retained by the defendant.**

**c. Costs of the suit.**

**d. Any other or further relief as the court may deem fit to grant.**

In the plaint, the plaintiffs contended that Plot No. 214 and Plot No. 215 were previously part of one larger parcel of land known as LR No. Matutu Settlement Scheme/129 which measured 19.5acres. The then registered proprietor of LR No. Matutu Settlement Scheme/129 (“Plot No. 129”) one, Kemoni Ngiti Osano, deceased who was the 1<sup>st</sup> plaintiff’s husband and the 2<sup>nd</sup> plaintiff’s father caused the said parcel of land to be sub-divided into Plot No. 214 and Plot No. 215. According to the said sub-division, Plot No. 214 measured 15.5 acres while Plot No. 215 measured 4.0acres. Kemoni Ngiti Osano deceased thereafter transferred Plot No. 215 to the defendant while retaining Plot No. 214 to his name. Plot No. 214 was transferred to the plaintiffs by transmission after the death of Kemoni Ngiti Osano.

2. The plaintiffs averred that through acts of fraud and by design the defendant extended the boundary of

Plot No. 215 by 4.5 acres with the effect that Plot No. 215 measures 8.5 acres on the ground instead of 4 acres which is its lawful measurement according to; the registry index map for the area, the agreement for sale between the defendant and Kemoni Ngiti Osano and the mutation forms for the sub-division of Plot No. 129 that was executed in the year 1980. In his statement of defence that was filed on 20<sup>th</sup> September 2001 the defendant denied that Plot No. 215 measures 4.0 acres. The defendant contended that he purchased the suit property in 1978 and that the suit property measures 5.13 acres and not 4.0 acres as claimed by the plaintiffs. The defendant denied extending the boundary of Plot No. 215 as claimed by the plaintiffs and contended that the late Kemoni Ngiti Osano did not contest the boundary of Plot No. 215 during his lifetime. The plaintiffs amended their plaint on 22<sup>nd</sup> May 2008 which amendment did not make any changes in the reliefs that the plaintiffs had sought in the original plaint.

3. This case was heard before Makhandia J (as he then was). In a judgment that was delivered on 30<sup>th</sup> September 2010, Makhandia J entered judgment for the plaintiffs against the defendant as prayed in paragraphs (a) and (c) of the plaint. The court found that the defendant had purchased from the late Kemoni Ngiti Osano land measuring 4.0 acres only. The court found that the defendant had altered the mutation forms after the death of Kemoni Ngiti Osano to increase the measurement of Plot No. 215 from 4.0 acres to 5.13 acres which measurement he had further increased on the ground to 8.5 acres. The court found the defendant's evidence to be full of lies and termed the defendant "*a person who parted company with the truth long time ago.*" The effect of that judgment was that the defendant was only entitled to 4.0 acres of the original Plot No. 219 and no more. The court ordered Plot No. 214 and Plot No. 215 to be re-surveyed so as to accord with the sub-division, transfer and mutation forms executed by the defendant and the late Kemoni Ngiti Osano in 1980 by which Plot No. 214 was to measure 15.5 acres and Plot No. 215 was to measure 4.0 acres.

4. The defendant filed a notice of his intention to appeal to the Court of Appeal on 12<sup>th</sup> October 2010 against the said judgment of Makhandia J. On 25<sup>th</sup> April 2012 the defendant filed an application before this court for stay of execution of the said judgment of 30<sup>th</sup> September 2010 pending the hearing and determination of an appeal that he had lodged in the Court of Appeal. At the same time, the defendant filed a similar application for stay of execution of the same judgment in the Court of Appeal. This court granted the defendant temporary stay of execution. The Court of Appeal however declined to certify the defendant's application for stay of execution as urgent. When the attention of this court was drawn to the fact that the defendant had lodged another application for stay in the Court of Appeal, the court declined to extend temporary orders of stay that it had granted to the defendant. In the absence of an order of stay of execution, the survey proceeded on Plot Nos. 214 and 215 in accordance with the terms of decree issued herein.

5. According to the report that was prepared and submitted to the court by the District Land Registrar and District surveyor, Nyamira District who were tasked with the implementation of the court decree, Plot No. 214 and Plot No. 215 were re-surveyed in accordance with the terms of the court decree in the presence of the plaintiffs and the defendant and the new boundaries of the two (2) parcels of land were marked on the ground. According to the said report dated 29<sup>th</sup> February 2012, after the re-survey Plot No. 215 which now measures 4.0 acres according to the court decree covers only the lower part of the entire parcel of land which the defendant had occupied before the court decree that led to the re-survey. The said officers found the defendant's residence and other developments to be on Plot No. 214 outside his parcel of land namely Plot No. 215 and urged the court to determine the fate of the said developments. The boundaries were however marked on the ground and each party shown where their parcels of land starts and ends. To the said report was attached a sketch drawing showing Plot No. 214 and Plot No. 215 and their former and current boundaries after the re-survey. It seems that even after the re-survey was done and the defendant's residence and other developments found to be falling within the plaintiff's parcel of land (Plot No. 214), the defendant who has not secured an order of stay either before this court or before the Court of Appeal continued to stay put on Plot No. 214.

6. Unfortunately, on 13<sup>th</sup> June 2014 the defendant's beloved wife Naomi Mokeira Omwoyo (hereinafter referred to only as "**the deceased**") died and the defendant and other members of his family commenced preparations for interring her body. In the process of these preparations, the plaintiffs who are the

defendant's neighbours noted that the defendant is planning to inter the body of the deceased on Plot No. 214 more particularly on the portion measuring 116m by 188.3m and 37m by 227.8m which was placed as falling on Plot No. 214 by the District Surveyor and District Land Registrar Nyamira after a re-survey that was conducted pursuant to the decree of this court. The plaintiffs have now brought an application by way of Notice of Motion dated 19<sup>th</sup> June 2014 seeking not only to restrain the defendant from interring the remains of the deceased on the disputed portion of land but also for an order that the defendant be evicted from the disputed portion of land. The orders sought in the application are reproduced hereunder:-

**1. Spent**

**2. Spent**

**3. An order of injunction do issue restraining the defendant by himself, his agents, servants and/or employees or any of them from cultivating, clearing, removing the fences and/or conducting the funeral service, burying and/or interring the remains of one Naomi Mokeira Mang'era on any part of land parcel known as LR No. Matutu Settlement Scheme/214 and/or on that portion measuring 116m by 188.3m by 37m by 227.8m (i.e 147.4m + 80.40m) approximately 3 ½ acres (hereinafter called the disputed portion) which is part of land parcel known as LR No. Matutu Settlement Scheme/215 but which was adjudicated under the decree of this court herein dated 30/9/2010 to be part of land parcel known as LR No. Matutu Settlement Scheme/214.**

**4. An order of eviction do issue for the eviction of the defendant/respondent from the disputed portion.**

**5. The OCS Manga Police Station to give assistance and security in execution of this order and ensure compliance.**

**6. That all necessary directions and/or orders be given for the interest of justice as this honourable court may deem fit.**

**7. Costs of this application be provided for.**

7. The plaintiffs application was brought under sections 1A, 3A, 34 and 63 (e) of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 40 Rules 1, 2, 4 and 10 and Order 50 rule 1 of the Civil Procedure Rules, 2010, sections 13 and 19 of the Environment and Land Court Act, 2011 and Article 159 (1) (d) and (e) of the Constitution of Kenya 2010. The application was brought on the grounds set out in the body thereof and in the affidavit of the 1<sup>st</sup> plaintiff. The plaintiffs have contended that after the re-survey referred to hereinabove the plaintiffs took possession of the disputed portion of land save for the defendant's homestead that the defendant was asked to remove from that portion of land by himself. The plaintiffs have contended that they are now in the process of aligning the records in the survey office so that they may be in accord or in tandem with the outcome of the re-survey that was carried out by the District Land Registrar and District Land Surveyor, Nyamira. The plaintiffs have contended that when the deceased passed on there was all indication that the defendant would inter her remains on Plot No. 215 which measures 4.0acres. This changed when the defendant started clearing the disputed portion of Plot No. 214 and also caused a road to be made through it.

8. The defendant and his agents also commenced the destruction of the fences and/or boundary that the plaintiffs had placed around the disputed property following the re-survey. The plaintiffs have contended that the defendant intends to inter the remains of the deceased next to his house which is situated on the disputed portion of Plot No. 214 and has started plastering the said house and renovating the same for the purpose. The plaintiffs have contended that they have asked the defendant directly and through third parties to stop the planned burial of the body of the deceased on the disputed property but the defendant has declined to budge. It is on account of the foregoing that the defendant has sought an injunction to restrain the defendant from interring the body of the deceased on the disputed portion of land and an order

for the eviction of the defendant therefrom. The 1<sup>st</sup> plaintiff annexed to her affidavit in support of the application a copy of the judgment delivered herein on 30<sup>th</sup> September 2010, a copy of the decree that was extracted therefrom and a copy of the report by the District Land Registrar and District Land Surveyor Nyamira District dated 28<sup>th</sup> February 2012 on the implementation of this court's decree given on 30<sup>th</sup> September 2010 aforesaid.

9. The 1<sup>st</sup> plaintiff filed a further affidavit sworn on 27<sup>th</sup> June 2014 in which she exhibited a copy of the ruling of the court of appeal on the defendant's application for stay of execution made on 21<sup>st</sup> January 2012, a copy of the ruling of the court of appeal dated 14<sup>th</sup> June 2012 on the defendant's application to have his application for stay of execution certified as urgent and a copy of the ruling of this court made on 26<sup>th</sup> July 2013 on application by the plaintiffs to be assisted in executing the decree issued herein. The plaintiffs' application was opposed by the defendant through a replying affidavit sworn on 24<sup>th</sup> June 2014. In his affidavit in opposition to the application, the defendant admitted that judgment was entered against him herein and that he has appealed against the said judgment in the Court of Appeal. The defendant has contended that this court cannot grant the orders sought against the defendant because the court is *functus officio*. The defendant has contended that the court having delivered its judgment in the dispute between the parties which is now the subject of an appeal to the Court of Appeal the court has no power to make the orders in the nature sought by the plaintiffs. The defendant has contended that the plaintiffs should have brought a fresh suit for the reliefs sought in the present application. The defendant has termed the plaintiffs application an abuse of the court process. The defendant annexed to his affidavit a copy of a ruling of the Court of Appeal (single judge) dated 2<sup>nd</sup> April 2014 that granted the defendant leave to file a record of appeal out of time.

10. The plaintiffs' application was argued before me on 3<sup>rd</sup> July 2014 when Mrs. Asati advocate appeared for the plaintiffs while Mr. Sagwe advocate appeared for the defendant. In her submission in support of the application, Mrs. Asati relied on the 1<sup>st</sup> plaintiff's affidavits in support of the application. Mrs. Asati submitted that there is a lawful judgment in favour of the plaintiffs which is at the stage of execution and whose execution has only been effected in part. Mrs. Asati submitted that after Plot Nos. 214 and 215 had been re-surveyed and their boundaries adjusted, the defendant was duty bound to vacate the portion that he had hitherto occupied and that was now found to be part of Plot No. 214. Counsel submitted that the portion of Plot No. 215 which the defendant had occupied previously as part of Plot No. 215 and which after re-survey was found to be part of Plot No. 214 now belongs to the plaintiffs and the defendant has no right to inter the remains of the deceased thereon. Counsel submitted that this court has power under Order 40 rule 2 (1) of the Civil Procedure Rules to grant an injunction before or after judgment. Counsel submitted further that under section 34 of the Civil Procedure Act, Cap 21 Laws of Kenya, this court has the power to grant the prayers sought by the plaintiffs.

11. Counsel admitted that the defendant has an appeal pending before the Court of Appeal. She submitted however that the filing of an appeal does not grant to an appellant an automatic stay of the order or decree the subject of appeal. Counsel submitted that the court has power under section 13 (7) of the Environment and Land Act, 2012 to grant whatever order deemed fit. Counsel submitted that the court has power to make consequential orders that would facilitate the realization of the decree that was made in favour of the plaintiffs. Counsel submitted that if the orders sought are not granted the decree of this court would have been issued in vain. In his submission in reply Mr. Sagwe submitted that this court is *functus officio* and cannot grant or make the orders sought by the plaintiffs. Mr. Sagwe submitted that what the plaintiffs are trying to do is to re-open for trial a case which has been heard and determined and whose fate is now pending in the Court of Appeal.

12. Counsel submitted that the orders sought herein should have been sought in the appeal pending in the Court of Appeal or through a new suit. Counsel submitted that the deceased whose burial is sought to be restrained is not a party to this suit and as such no orders can issue in relation to her. Mr. Sagwe submitted that the decree of this court is very clear. The plaintiffs were not awarded a decree for the eviction of the defendant from the suit property and as such, this court cannot be called upon to grant such order. Counsel argued that no loss would be suffered by the plaintiffs if the body of the deceased is

interred on the disputed property.

13. I have considered the plaintiffs' application together with the two (2) affidavits filed in support thereof. I have also considered the defendant's affidavit in opposition to the application and the respective submissions that were made before me by the advocates for the plaintiffs and the advocate for the defendant. The plaintiffs' have sought two principal prayers in the application before me namely; an injunction to restrain the defendant from interring the remains of his deceased wife on the disputed property and an order for the eviction of the defendant from the property. What I need to determine is whether this court has power to grant the orders sought. Whereas the plaintiff has argued that this court has power under section 34 of the Civil Procedure Act, order 40 rule 2 (1) of the Civil Procedure Rules and Section 13 (7) of the Environment and Land Court Act, 2011 to grant the orders sought, the defendant has contended that this court having delivered its judgment in the dispute between the parties which is now on appeal to the Court of Appeal, the court is *functus officio* and has no power to grant the orders prayed for by the plaintiffs.

14. The plaintiffs have argued that the decree which was made in their favour herein is at the execution stage and that the same has been executed partly. The plaintiffs have argued that the re-survey of Plot No. 214 and Plot No. 215 has been carried out in accordance with the terms of the decree issued herein and that what is remaining is the alignment of the records at the lands office and the survey department so that they are consistent with the changes in the measurements and boundaries of the said parcels of land after the re-survey. The plaintiffs' complaint in the application before me is that while they are awaiting to accomplish the said process of aligning the records of the said parcels of land so that the same may be in accordance with the current position on the ground, the defendant with the full knowledge of the court decree and the re-survey of the two parcels of land which placed his entire residence and developments on Plot No. 214 now wants to inter the remains of the deceased in his said residence with the result that the said remains would be interred on land that belongs to the plaintiffs.

15. I am of the opinion that the issue as to whether the defendant is entitled to inter the remains of his deceased wife on the portion of land which after the re-survey was found to belong to the plaintiffs falls for determination under section 34 of the Civil Procedure Act, Cap 21 Laws of Kenya. It was not necessary for the plaintiffs to file a fresh suit for the determination of the issue. As far as that issue is concerned, I am not in agreement with the submission by the defendant's advocate that this court is *functus officio*. The decree issued by this court is in the process of being executed or realized. Any issue arising in the process can only be determined by this court. It is not in dispute that this court made an order on 30<sup>th</sup> September 2010 that Plot No. 214 owned by the plaintiffs and Plot No. 215 owned by the defendant be re-surveyed so that Plot No. 215 which measures 8.5 acres on the ground and 5.13 acres on the title is reduced to 4.0 acres and the measurement of Plot No. 214 which is 14.37 acres on the title and 11.0 acres on the ground is adjusted to 15.5 acres. There is no dispute that this decree has not been stayed or set aside. There is also no dispute that the re-survey has already been done on the ground and the new boundaries marked and shown to the parties.

16. The defendant has not denied the contents of the report by the District Land Registrar and District Surveyor Nyamira which is annexed to the 1<sup>st</sup> plaintiff's affidavit as exhibit YKK 2(a) to (d). There is no dispute that upon the said re-survey, the entire residence of the defendant which was hitherto on Plot No. 215 fell on Plot No. 214. It is also not in dispute that the defendant's wife is deceased and that the defendant plans to bury or inter her remains at his residence which now falls on land owned by the plaintiffs. The defendant has no legal or equitable rights over this parcel of land which has been found after the re-survey that was ordered by the court to belong to the plaintiffs subject to the outcome of the appeal pending in the Court of Appeal. The attempt by the defendant to inter the remains of the deceased on the disputed parcel of land is in the circumstances wrongful. There is 4.0 acres of land that belongs to the defendant which is now comprised in plot no. 215 which land is not in dispute. The defendant is at liberty to inter the remains of his beloved wife on this undisputed parcel of land.

17. That being my view of the matter, I am satisfied that the plaintiffs are entitled to the injunction sought. There is no law barring this court from issuing an injunction on proceedings brought under section 34 of the Civil Procedure Act. As submitted rightly by the plaintiffs' advocate, this court has

power under Order 40 Rule 2 (1) of the Civil Procedure Rules to make an order of injunction before or after judgment. The disposal of that prayer leads me to the next relief sought by the plaintiffs namely, an order for the eviction of the defendant from the disputed property. I am in agreement with the submission by the defendant's advocate that this court cannot make such order without re-opening the proceedings herein. The plaintiffs did not seek an order for the eviction of the defendant from Plot No. 214 and were not granted such order in the judgment of Makhandia J. This fact has been observed in the two Court of Appeal rulings which are attached to the 1<sup>st</sup> plaintiff's further affidavit sworn on 27<sup>th</sup> June 2014. The execution which is in progress and which this court has been called upon to facilitate cannot therefore involve the eviction of the defendant from the disputed property since the court did not make such order.

18. The plaintiffs have a right to occupy and use the disputed parcel of land as it has been found by the court to belong to the plaintiffs. This right is protectable by an injunction as I have held above. The plaintiffs would however require an express order of the court to evict the defendant from the disputed property which the defendant seems to be occupying unlawfully. This court cannot give such order in the present proceedings. The issue as to whether or not the defendant should be evicted from Plot No. 214 or from the disputed portion thereof cannot be termed as a question relating to the execution, discharge or satisfaction of a decree within the meaning of section 34 of the Civil Procedure Act, Cap 21 Laws of Kenya. Since the decree issued herein did not contain an order for the eviction of the defendant, the question as to whether the defendant should be evicted cannot arise for determination at least at the instance of the plaintiff/decreed holder. The plaintiffs have urged the court to grant the eviction order sought arguing that unless the order is granted the decree of the court issued herein would be in vain. Such order in my view could only be given by the trial court and if it was not sought at that stage, I see no reason why the plaintiffs cannot seek the same through a fresh suit as suggested by the defendant.

19. The upshot of the foregoing is that the plaintiffs' application dated 19<sup>th</sup> June 2014 succeeds only in part. The same is allowed in terms of prayers 3 and 5 thereof. The plaintiffs shall have the costs of the application.

**Delivered, signed and dated at KISII this 18<sup>th</sup> day of July, 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

Mrs. Asati for the plaintiffs

Mr. Bigogo h/b for Mr. Sagwe for the defendant

Mr. Mobisa Court Clerk.

**S. OKONG'O**

**JUDGE**