



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

OF KISII

Civil Suit 122 of 1993

CHARLES NYANGAI SEME PLAINTIFF

VERSUS

JAMES ONG'ERA..... 1ST DEFENDANT
STEPHEN MOSIMA 2ND DEFENDANT

JUDGMENT

The plaintiff claimed that on/or about July 1992 the defendants trespassed into his commercial plot No. 2 situated at Bogonta market and erected thereon some structures. He further claimed that the defendants used about 3,000 bricks belonging to him to construct the said illegal structures. He prayed for a declaration that he is the legal owner of Plot No. 2 Bogonta Market, hereinafter referred to as “**the suit plot**”. He further prayed for an eviction order against the defendants, their agents and/or servants from the suit plot and an order directing the defendants to remove all the illegal structures unlawfully constructed thereon. He also sought general damages for trespass plus costs of the suit and interest.

The defendants filed a joint statement of defence. The 1st defendant stated that the 2nd defendant sold to him the suit plot sometimes in 1991 or thereabout. The 2nd defendant averred that he was the original owner of the suit plot which is situated on land that was donated to Gusii County Council for setting up the said market. He further stated that himself and other members of the public applied to Gusii County Council to be allocated plots at the said market but the said county council allocated plots in a discriminatory manner. The defendants denied having ever used the plaintiff’s 3000 bricks or any of the said bricks or at all and said that they used their own bricks to construct a shop on the suit plot.

During the hearing, the plaintiff testified that in 1981 Gusii County Council advertised plots for allotment at Bogonta market. He applied for one and was allotted plot No.2. Bogonta

market falls within two main parcels of land registered as Parcels No. 1174 and 1175. The two parcels of land are divided by a road which passes through the market. The plaintiff said that the suit plot was on parcel No. 1175. The plot was shown to him by a County Council Surveyor and thereafter he was issued with a Plot Card which he produced as **P. Exhibit 1**. The same is dated 17th December 1992. Between 1981 and 1992 the plot remained undeveloped but sometimes in 1992 the plaintiff delivered some bricks and sand to his site. At that time the 2nd defendant claimed that the plot was his. The plaintiff reported the dispute to the County Council of Gusii and he was assured that the plot had lawfully been allocated to him. He produced several receipts showing that he had been paying plot rent to the said county council between 1992 to the year 2000. The receipts are marked **P. Exhibits 2 (a) to 2 (e)**.

The plaintiff further alleged that the 2nd defendant sold half of the plot to the 1st defendant. The initial size of the plot was 50 x 100 feet. Sometimes in 2002 while this case was still pending in court, a certain clerk of the Gusii County Council purported to allocate to the 2nd defendant the suit plot, the plaintiff alleged.

The plaintiff further alleged that the defendants developed the suit plot and used the bricks and sand which he had deposited thereon. In the year 2002 the Gusii County Council allocated to the plaintiff another plot which he later realized belonged to someone else. The court ordered the parties and their respective surveyors to visit the suit plot and the other plot which had allegedly been allocated to the plaintiff and prepare their reports and submit them to court.

The plaintiff produced a report that was prepared for him by J.R.R. Aganyo & Associates, Licensed Land Surveyors. The report showed that:

1. **As per the 1981 allocation plan, Plot No. 2 Bogonta Market “is shared out between plots No. 12 & 13 (the disputed parcel)”.**
2. **There exists permanent structures on the disputed plot.**
3. **The county council which is a custodian of all county council plots in the District failed to produce the part development plan/allocation plan which was used in the year 2001 to issue plots 1 to 14 for proper identification of their positions on the ground.**
4. **The surveyor’s efforts to question actions of the allocation plan of the area were frustrated by the county council surveyor.**

In cross examination, the plaintiff conceded that the suit plot is within parcel No. 1174 and that plot Nos. 13 and 14 which

belong to the defendants are on parcel No. 1175. He however denied that the defendants developed the suit plot in 1974.

The plaintiff called **Henry Ogeto, PW2**, who was working with the Gusii County Council as a Clerical Officer since 1991. He produced the Council minute book which showed that the plaintiff was the allottee of **plot No. 2B** in Bogonta market. The same was allotted to him on 7th July 1981 vide council **Minute No. 28/81 (C) (7)**. However, the plot card that was given to him shows plot No. 2 and not 2B as reflected in the minute book. PW2 produced a register for plot allottees in the said market. The register shows that plot No. 2 belongs to the plaintiff. The register has no plot No. 2B. The register shows that plot No. 13 belongs to James Ongera, the 1st defendant, same having been allotted to him on 12th September 2001 vide minutes No.104/2001(c) (13). The register further shows that plot No. 14 belongs to Stephen Mosima (2nd defendant) and Okinyi Mosima. The same was allotted to them on 12th September 2001.

The defendants called **Robert Ombaso Magare, DW1**, who is a surveyor working with the Gusii County Council. He testified that Bogonta Market occupies parcels Nos. 1174 & 1175 which were registered as market plots in 1968. On 7th March 2003 DW1 visited the market in the company of two other surveyors pursuant to a court order that required them to determine the exact position of the suit plot as well as plots Nos. 13 and 14. His findings were that plot Nos. 13 and 14 are on parcel No. 1175 whereas plot No. 2 is situated on parcel No. 1174. The witness produced a sketch map which he drew as well as a report that accompanied the same. According to DW1, plot No. 2, which is undeveloped, belongs to the plaintiff whereas Plot Nos. 13 and 14 belong to the defendants respectively and are developed with permanent structures.

In cross examination, DW1 said that the report by J.R.R. Aganyo & Associates was not in agreement with his report. He said that he was not able to avail the plot allocation plan to the said surveyors because at the time when they went to Bogonta market the plan was not in existence.

The 2nd defendant, DW2, said that plot No. 14 was jointly registered in his name and that of his son, **Hezron Mosioma**. He produced the plot card (**D. Exhibit 3**) in support thereof. He said that the 1st defendant owns plot No. 13. He also produced a plot card for the same as **D. Exhibit 4**. DW2 lives on his parcel of land known as Nyaribari Masaba/Bomobea/48. A certificate of official search in respect of the said plot (**D. Exhibit 5**) shows that DW2 is the registered absolute proprietor of Nyaribari Masaba/Bomobea/48 since 14th May 1970. DW2

added that plot Nos. 13 and 14 were carved out of Nyaribari Masaba/Bomobea/48. The area map (**P. Exhibit 4**) also shows that parcel No. 1175 was carved out of Nyaribari Masaba/Bomobea/48.

DW2 further testified that he developed his plot in 1974 when he put up a permanent building thereon. He produced a licence dated 3rd May 1974 that was issued to his son, **Charles Nyamweya** by the Gusii County Council. The plot card in respect of the plot was issued in the year 2001. He produced receipts for payment of plot rents in respect of plot Nos. 13 and 14 by himself as well as the 1st defendant. He said that the plaintiff owns plot No. 2 which is on parcel No. 1174 situated across the road that separates that parcel and parcel No. 1175. He denied that he used the plaintiff's bricks and sand to develop his permanent building.

In cross examination, DW2 stated that he sold a portion of his plot to the 1st defendant before the plaintiff filed this suit.

The 1st defendant adopted the evidence of the 2nd defendant in full.

Mr. Koina Onyantha for the plaintiff and Mr. Momanyi Aunga for the defendants filed their clients' written submissions which I have perused and taken into consideration.

From the evidence on record, there is no dispute that the plaintiff was allotted the suit plot by the Gusii County Council on 7th July 1981. It is also not in dispute that Bogonta market occupies parcels No. Nyaribari Masaba/Bomobea/1174 and 1175 which are divided by a road that traverses the market. Parcel No. 1175 appears to have been carved out from the original parcel No. 48.

The plaintiff alleged that when he was allotted the suit plot the same was identified on the ground by a surveyor from the Gusii County Council. However that surveyor was not called as a witness.

According to me, this dispute centers on the exact location of the suit plot. The plaintiff's contention was that the suit plot stood where the current plot Nos. 13 and 14 stand. On the other hand, the defendants contend that the suit plot is on parcel No. 1174 while their plots Nos. 13 and 14 are on parcel No. 1175.

On 4th March 2003 a consent order was issued on the following terms:

“By consent the clerk to council shall detail the council surveyor to produce a sketch of all plots on Bogonta market within 60 days. The parties to the case shall engage their own surveyors to be present during that exercise. Hearing is adjourned to 8/5/2003.”

Following the said order, the plaintiff retained M/s J.R.R. Aganyo & Associates, Land Surveyors. The defendants instructed James A. Nyachwaya, a private surveyor, and the Gusii County Council was represented by Robert Ombaso, DW1. I have already highlighted the findings of both J.R.R. Aganyo & Associates as well as those of DW1.

The findings of James A. Nyachwaya were that plot Nos. 13 and 14 which belong to the defendant are situated on parcel No. 1175 whereas plot No. 2 (the suit plot) is situated on parcel No. 1174. The findings by DW1 and those of the defendant's surveyor are the same in all material aspects. It is difficult to comprehend how J.R.R. Aganyo & Associate concluded that plot No. 2 "**is shared out between plots No. 12 and 13.**" A plot cannot be shared out between two other plots. There is a possibility that the surveyor who identified plot No. 2 to the plaintiff in 1981 made a mistake by pointing out a wrong location within parcel No. 1175 instead of 1174 across the road.

It is instructive to note that plot No. 2 is undeveloped todate whereas plots Nos. 13 and 14 are developed. It appears to me that the plaintiff acted on honest but mistaken belief that the suit plot was on parcel No. 1175 and not on 1174.

From the evidence on record, I find that the plaintiff's suit is not supported by the reports filed by the three surveyors who went to Bogonta market following the aforesaid court order.

Whereas the defendants did not expressly state in their statement of defence that they were the owners of plot Nos. 13 and 14, the issue regarding the said plots came to the fore following the orders made on 4th March 2003 and it cannot therefore be said that the plaintiff was taken by surprise. In **ODD JOBS -VS- MUBIA** [1970] E.A. 476, it was held by the Court of Appeal that a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision. It is clear to me that in determining this dispute the parties left it to the court to decide the exact location of the suit plot. That cannot be done without reference to parcels No. 1174 (**on which plot No. 2 lies**) and 1175 (**on which Plots Nos. 13 and 14 lie**).

There is also no evidence that the defendants used the plaintiff's bricks and sand in putting up their permanent structure. All in all in find no merit in the plaintiff's case and dismiss the same with costs to the defendants.

DATED, SIGNED AND DELIVERED AT KISII THIS 24TH DAY OF MARCH, 2010.

D. MUSINGA
JUDGE.
24/3/2010

Before D. Musinga, J.

Mobisa - cc

Mr. Onyancha for the Plaintiff

Mr. Momanyi for the Defendant

Court: Ruling delivered in open court on 24th March, 2010.

D. MUSINGA
JUDGE.