



**Miroro & 2 others v Marieta (Suing as A Legal Representative of The Estate Joyce Mokeira - Deceased) & 2 others (Environment & Land Case 135 of 2014) [2022] KEELC 2489 (KLR) (14 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2489 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 135 OF 2014**

**JM ONYANGO, J**

**JULY 14, 2022**

**BETWEEN**

**DISMAS NYANTIKA MIRORO ..... 1<sup>ST</sup> PLAINTIFF  
JOHANA OMONDE NYABOGA ..... 2<sup>ND</sup> PLAINTIFF  
JAMES H. OBAGA ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**NELSON MOMANYI MARIETA (SUING AS A LEGAL REPRESENTATIVE OF THE ESTATE JOYCE MOKEIRA - DECEASED) ..... 1<sup>ST</sup> DEFENDANT  
DAISY KWAMBOKA MARIETA (SUING AS A LEGAL REPRESENTATIVE OF THE ESTATE JOYCE MOKEIRA - DECEASED) ..... 2<sup>ND</sup> DEFENDANT  
KENEDY OMBESE ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. On 8<sup>th</sup> July, 2014, the Plaintiff filed this suit against the Defendants seeking the following orders:
  - a. A declaration that the Plaintiffs are the lawful and *bonafide* registered owners of Plot Number 9 Menyinkwa Market (hereinafter referred to as the suit property).
  - b. An order of eviction against the Defendants from the suit property.
  - c. A permanent injunction restraining the Defendants either by themselves or their agents and/or servants from entering into or re-entering, trespassing onto, building structures, interfering with, depositing building materials, converting the suit plot or abusing the Plaintiffs' rights, interfering with or in any manner dealing with the suit property.
  - d. General damages for trespass and/or conversion.



- e. Interest on (d) above of the court rates.
  - f. Costs.
  - g. Any other order that this court may deem fit and expedient to grant.
2. In his Plaintiff, the Plaintiff averred that on October 2013, the Defendants without any colour of right entered into his suit property which is registered in his name and commenced to excavate the top soil and sunk trenches thereon.
  3. The Plaintiff made a complaint to the Town Administrator, Kisii County so that he could investigate and ascertain the basis of the unlawful entry into the suit property by the Defendants. The Town Administrator summoned the Defendants for a meeting on 28<sup>th</sup> November, 2013 but the said meeting failed to take off.
  4. Despite several warnings by the Town Administrator, the Defendants continued with the unlawful activities over and in respect of the suit property forcing the Plaintiff to file this suit.
  5. Upon being served with the Plaintiff and Summons to enter appearance, the Defendants filed a Defence which was further amended on 1<sup>st</sup> November, 2018 denying all the Plaintiff's allegations. The Defendants averred that the 2<sup>nd</sup> Defendant is the registered owner of parcel number Nyaribari Chache/b/b/boburia/9170 which is separate and distinct from the suit property. It was their averment that, the 2<sup>nd</sup> Defendant sold a portion of his property (parcel number Nyaribari Chache/b/b/boburia/9170) to the 1<sup>st</sup> Defendant. They stated that the said parcel was separate and distinct from the suit property. The Defendants contended that contrary to the Plaintiff's claim that they were in possession of Plot number 9, there a was a government building thereon and thus the suit against them could be malicious.
  6. On 12<sup>th</sup> October, 2015, when this suit came up for hearing, parties were in agreement that the issue in contention related to delineation of the Physical boundaries of the parcels of land on the ground and thus they agreed to refer the matter to the Land Registrar and County Surveyor who has the mandate under the [Land Registration Act](#) to establish and fix boundaries in respect of any registered land.
  7. The court thus directed the Land Registrar, Kisii and the County Surveyor in the terms of section 16 to 19 of the [Land Registration Act](#) to visit land Title No. Nyaribari Chache/b/b/boburia/9207 and delineate and fix the boundaries of the same. The Land Registrar and the Surveyor were also to confirm whether the Defendant has encroached into the Plaintiff's Plot No. 9 Menyinkwa Market.
  8. On 22<sup>nd</sup> March, 2016, the two officers filed their separate reports. On 19<sup>th</sup> December, 2016 when the suit was listed for mention for consideration as to whether the two reports could be adopted by the court, learned counsel for the Defendants expressed reservation observing that it was inconclusive. Learned counsel for the Plaintiff sought the adoption of the said reports by the court. Given the divergent opinions of the parties on the report, the court invited written comments/observations on the same for consideration by the court before making a ruling and/or issuing further directions.
  9. On 31<sup>st</sup> May, 2019 after considering the comments filed by both parties, the court delivered a ruling in which it observed that the report was inconclusive and ordered the two officers to revisit the sought property. The court stated as follows:

“.....So that this matter is finally resolved, I direct that the Land Registrar and the Surveyor to revisit the parcels of land, the subject of the dispute and to in particular delineate and fix the boundaries of land parcel Nyaribari Chache/b/b/boburia/9207. I am emphasizing the boundaries of parcel 9207 since this is a parcel that is registered and must have mutation



forms that resulted in its subdivision. The Registry Index Map (RIM) should also assist in having the boundaries fixed. I am also mindful that if the boundaries of parcel 9207 are fixed the boundaries of Plot No. 9 invariably will fall in place. In case there are neighbours who may be affected when the exercise is being undertaken, the Land Registrar can properly invoke the provisions of Section 19(1) of the *Land Registration Act*, 2012 and give them notice to attend during the exercise. The Land Registrar and the Surveyor should file their report within the next 90 days from the date of this ruling."

10. The two officers did visit the suit properties and they filed a survey report dated 28<sup>th</sup> November, 2019. In the report which was prepared by the County Surveyor, Mr. David Lemayian it was stated that;
  - a) Parcel No. 9207 was created from the sub-division of parcel No. 9170 and it measures approximately 0.04 ha, while Plot No. 9 is a market plot allotted to Johana Omonde Nyaboge, Didmas Nyantika and James H. Obaga.
  - b) The position of the old Kisii-Kilgoris road has slightly shifted from its original position.
  - c) The position of parcel No. 9707 on the map does not tally with the position being claimed by the Defendant.
  - d) The position being claimed on the ground by the Defendants and the Plaintiff corresponds to title No. Nyaribari Chache/b/b/boburia/6066 registered in the name of one Peter Ombese Ochiengi.
  - e) In the view of the different position of the parcels the Plaintiff vis-a-vis their map, the market lay-out plan and mutation form, it is not tenable to fix the boundaries of the two parcels of land.
11. On 29<sup>th</sup> January, 2021 this court directed that witness summons be issued to the Land Registrar to appear in court to explain why they were unable to implement the court's order issued on 31<sup>st</sup> May, 2019.
12. On 20<sup>th</sup> May, 2021 both the officers appeared in court and the County Surveyor explained the report dated 28<sup>th</sup> November, 2019 highlighted above. He stated that he visited the suit properties on 23<sup>rd</sup> July, 2019 in the presence of the parties. He stated that upon going through their records he realised that the portion under controversy fell on a property registered in the name of a third party (parcel 6066), one Peter Ombese who was not a party to this suit. He clarified that the Defendant who was the registered owner of parcel 9207 had constructed a house on parcel 6066. He further stated that both the Plaintiff and the Defendant were laying claim to a portion of parcel 6066 yet none of them was the registered owner of the same.
13. He clarified that Parcel 9 to which the Plaintiff was laying claim was adjacent to parcel 6066, though the same had a government building constructed thereon. He also clarified that market plots are normally within a registered title such that plot number 9 was within parcel 3053 which was registered in the name of the County Government of Kisii.
14. He stated that if they were to adhere to the court order and establish a boundary between plot 9 where a government building exists and parcel 9207, the said boundary for Plot No. 9 would fall within an existing building constructed by Kisii County Government. The boundary for Parcel No. 9207 would interfere with a neighbouring parcel which in this case is parcel 6066.
15. Having considered the explanation by the County Surveyor, the court observed that the order issued on 31<sup>st</sup> May, 2019 needed to be revisited for its full implementation. The court therefore directed that



suit property be visited by the court in the presence of the Land Registrar, County Surveyor, the parties and their counsels for purposes of ensuring that that the order of the court is fully implemented. The court directed that the said visit be conducted on 30<sup>th</sup> July, 2021 and the OCS, Kisii Central Police Station was to provide security during the said visit.

16. The Deputy Registrar, Kisii High Court who conducted the site visit on behalf of the court filed a report dated 17<sup>th</sup> September, 2021 on her observations especially on why it was difficult for the Land Registrar and County Surveyor to implement the order of the court issued on 31<sup>st</sup> May, 2019. Her observations and findings were that;
  - a) Plot 9 is a market place adjacent to parcel 6066.
  - b) Parcel 9207 has an absolute title.
  - c) Both the plaintiff and the Defendant are claiming parcel 6066
  - d) Parcel 9207 has mabati structures and according to the records it is owned by the Defendant.
  - e) On the ground the Defendant stays on parcel 6066
  - f) It is difficult to delineate on the ground the boundary between plot 9 and Parcel 9207, because the Defendants occupy parcel 6066 while parcel 9207 is occupied by a different person.
  - g) The Defendant bought 9207 but on the ground they are on parcel 6066.
  - h) Owing to the different positions of plot 9 and 9207 in the map and in the market layout plan it will be difficult to delineate the boundary.
17. The matter was mentioned on 16<sup>th</sup> February, 2022 when counsel for the Plaintiff indicated that they wished to file comments on the report. On their part counsel for the Defendants indicated that they were satisfied with the report.
18. The court therefore directed that the parties shall file and exchange their comments on the Land Registrar's report within 30 days and both parties filed their comments for consideration.

#### **Plaintiff's Comments**

19. Learned counsel for the Plaintiff chose not to comment on the report by the Land Registrar but instead argued that the Deputy Registrar did not have jurisdiction to write and recommend a report touching on a boundary dispute.
20. Counsel contended that the court order made on 20<sup>th</sup> May, 2021 was clear that the Land Registrar and County Surveyor to revisit the suit property and generate a report. He argued that it was the legal mandate of the Land Registrar to delineate, fix the boundary as well as generate a report and thus the Deputy Registrar was usurping the mandate of the Land Registrar.

#### **Defendant's Comments**

21. Learned counsel for the Defendants in his comments on the report submitted that the Defendant agreed with the findings in the Survey report and the observations by the Deputy Registrar. He submitted that it was true as observed by the County Surveyor and the Deputy Registrar that it was impossible to delineate the boundary between parcel 9207 and plot No. 9 because the two were not adjacent to each other. He further submitted that the Plaintiff had wrongly sued claiming ownership of Plot number 9 which was developed by the County Government of Kisii.



22. Counsel also contended that the records indicated that Plot number 9 that was being claimed by the Plaintiff had nothing to do with either parcels 9707 registered in the name of the Defendant and parcel 6066 registered in the name of a third party. He submitted that the survey report and that of the Deputy Registrar ought to be adopted as an order of the court.

### **Issues For Determination.**

23. The main issue for determination is:-
- a) Whether the Deputy Registrar's report should be declared invalid.
  - b) Whether the court should adopt the survey report dated 28<sup>th</sup> November, 2019 as the judgment of the court.

### **Analysis And Determination**

#### **Whether the Deputy Registrar's report is invalid.**

24. Before determining whether the report by the Deputy Registrar is invalid as submitted by the learned counsel for the Plaintiff, it will be necessary to consider the directions of the court on 20<sup>th</sup> May, 2021. From the record before this was the order of the court;

“Having considered the explanation by the county surveyor, it is clear that the court order issued on 31<sup>st</sup> May, 2019 needs to be revisited for its full implementation. I am in agreement with the Land Registrar that the court visits the suit property in the presence of the Land Registrar, County Surveyor, the parties and their counsel for purposes of ensuring that the said order is fully implemented. The site visit will be take place on 30<sup>th</sup> July, 2021 at 10.00. The OCS Kisii central shall provide security”

25. The above directions required that the Deputy Registrar represents the court to ensure that the court order made on 31<sup>st</sup> May, 2019 was fully implemented. The Deputy Registrar's report did not amount to a Survey report nor did it in any way usurp the role of the Land Registrar as prescribed under section 18 and 19 of the *Land Registration Act*. The Deputy Registrar in her report confirmed what Mr. Lemaiyan had told the court, that given the situation on the ground, it was not possible to implement the court order dated May 31, 2019.
26. There is therefore no need to declare the Deputy Registrar's report invalid as proposed by counsel for the Respondent.

#### **Whether the court should adopt the Surveyor's report dated 28<sup>th</sup> November, 2019 as the judgment of the court.**

27. As noted hereinabove, this court had the opportunity to visit the suit property through the Deputy Registrar who made the same observations as those made by the Land Registrar and the County Surveyor. From the report, it is clear the boundary could not be fixed as the two parcels in dispute that plot 9 (registered in the joint names of the Plaintiffs) and parcel 9207 (registered in name of the Defendants) are not adjacent to each other and therefore it is impossible to delineate the boundaries of parcels 9207. While issuing the order 31<sup>st</sup> May, 2019 the court observed that it was being mindful that if the boundaries of parcel 9207 were delineated and fixed the boundaries of Plot No. 9 invariably would fall in place.



28. In the report, the County Surveyor observed that the portion of the property being claimed by both parties forms part of parcel 6066 registered in the name of one Peter Ombese, a third party who is not a party to this suit. The said parcel is the one that is adjacent to plot 9. It therefore means that if there was to be a boundary dispute, the same would have been between the Plaintiff's and the third party who is not a party to this suit. This therefore means that the suit filed against the Defendants has no basis.
29. In the final result therefore, it is my finding that Survey report dated 28<sup>th</sup> November, 2019 resolves the issues in dispute as it is clear that the Defendant has not encroached on the Plaintiff's land known as Plot No. 9 Menyinkwa market and the reliefs sought by the Plaintiff cannot be granted. The said report is hereby adopted as the judgment of the court. The upshot is that the Plaintiffs' suit has no merit and the same is dismissed with costs to the Defendants.
30. It is so ordered.

**DATED, SIGNED AND DELIVERED AT KISII THIS 14<sup>TH</sup> DAY OF JULY, 2022.**

.....

**J.M ONYANGO**

**JUDGE**

