



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
OF KISII**

Civil Case 132 of 1992

THOMAS CHACHA MATIKO PLAINTIFF

VERSUS

MAKOMERE RIOBA)

MAGINGA RIOBA) DEFENDANTS

MAHONI RIOBA)

RIOBA BURURE)

JUDGMENT:

The plaintiff's claim is that on 4th January, 1990 the defendants trespassed on his parcel of land known as **NYABASI/BOMERANI/25**, hereinafter referred to as "**the suit property**" and destroyed the boundary between that parcel of land and parcel No. **NYABASI/BOMERANI/26**, registered in the name of the 4th defendant. The plaintiff further alleged that on 22nd May, 1991 and 27th May, 1991 the defendants excised approximately 1¹/₄ acres from the suit property and the same now forms part of the 4th defendant's land aforesaid.

The plaintiff sought a permanent injunction to restrain the defendants from further interfering with his parcel of land, eviction of the defendants from the disputed portion of land, special damages as well as general damages.

The defendants filed a statement of defence and denied the plaintiff's claim. They alleged that the plaintiff had brought the suit with an intention of causing delay in finalization of Kisii PMCC No. 383 of 1991 where the plaintiff was sued as one of the defendants.

On 21st July, 1994 the following order was made.

"By consent the District Land Registrar, Homa Bay and District Surveyor, Migori, to visit the disputed land and do the following:-

1. Establish the correct boundary between plot No. Nyabasi/Bomerani/25 and Nyabasi/Bomerani/26.

2. Establish whether any and if so which party has trespassed into the others plot.

3. Establish extent of trespass, if any.
4. Report to be filed within 60 days.
5. Expenses to be shared equally.
6. Mention 19.10.94.”

Following the said consent, a site visit was done on 17th October 1994. A report was filed on 18th October, 1994. The salient part of it reads as follows:

“MEASUREMENTS”

The District Surveyor, Kuria, took the measurements of both boundaries from point A to B and C to D and also on the upper and lower side of the portion in dispute. There was an indigenous (sic) tree locally called ‘Esebee’ along the boundary marked CD, and a dry spring called ‘keburure’ some of the physical features which the elders present identified as the original boundary between the two plots.

The boundary bends slightly westwards downstream as appears on P.I.D. (Preliminary Index Diagram) sheet No. 54. The shaded portion which was found to measure approximately 0.135 of an Hectare had been extended into plot NO. NYABASI/BOMERANI/26 belonging to the Defendants.

(signed)

J.K. LUKANGO

DISTRICT LAND REGISTRAR

MIGORI/KURIA DISTRICT.”

On 24th May, 1995 the court, pursuant to the aforesaid report by the District Land Registrar, gave judgment as follows:

“(a) That the judgment (sic) be entered in terms of the award i.e. the plaintiff has encroached onto the defendants’ land parcel No. Nyabasi/Bomerani/26 measuring 0.135 Hectares or thereabout and the plaintiff is hereby ordered to vacate the said measurement of land forthwith.

(b) The District Surveyor and the Land Registrar are hereby ordered to redemarcate the land parcel No. Nyabasi/Bomerani/25 and 26 by using original registry Index Map and fix the same personally, the boundary between the two parcels of land.

(c) The plaintiff to pay to the Defendants the costs of this suit.”

Thereafter the boundary in dispute was re-established in terms of the aforesaid orders.

The plaintiff applied to set aside the said judgment, arguing that the Land Registrar’s report was not an award which was to be adopted as a judgment. The said application was granted on 29th May, 1997 and the judgment was set aside. Parties were ordered to maintain the status quo. However, the earlier report by the District Land Registrar was not interfered with, it is still valid.

The hearing of the case after the judgment was set aside started on 13th November, 2008. The plaintiff testified and called three witnesses. Their evidence was to the effect that prior to the site visit by the area District Land Registrar and the Surveyor in 1994 and redemarcation of the boundary in 1995, there was an old existing boundary that was there at the time of land adjudication. The same had been

fixed by the plaintiff and the third defendant's father. The plaintiff further stated that the defendants had uprooted 62 sisal plants and 152 trees sometimes in 1991. The plaintiff alleged that the Land Registrar hived off a portion of his land measuring about 1.4 acres and gave it to the defendants.

In cross examination, the plaintiff stated that the defendants had crossed over the boundary that was fixed by the District Land Registrar in 1995.

The first defendant is a son of the 4th defendant, the owner of parcel No. Nyabasi/Bomerani/26. He said that he had not trespassed upon the plaintiff's parcel of land. He stated that there were some bushes which were growing along an access road between the two parcels of land leading to Reiboruke River. All they did was to clear those bushes because they were blocking the access road. The plaintiff made a report to the police and the defendants were arrested on 27th July, 1991. The police then investigated the complaint and being satisfied that the same was not justified released the other defendants. The defendants proceeded to file a case for unlawful arrest – Kisii PMCC No. 383 of 1991. Thereafter the plaintiff filed this case to forestall the defendants' case, it was alleged. And following the filing of this case by the plaintiff, the Land Registrar and the Surveyor were ordered to visit the two parcels of land and establish whether there had been any trespass. The boundary was re-established following the report by the Land Registrar but the plaintiff did not agree with the said boundary. The first defendant asserted that they had remained within the confines of their land boundary as then re-established. The 4th defendant testified that the boundary between the two parcels of land was fixed on 2nd March, 1953 by his father and the plaintiff's father. There was an access road (path) from their common boundary from Sakori Road to Reiboruke River. Sometimes in 1986 or thereabout the plaintiff called the District Land Registrar and Surveyor, Homa Bay, and they planted sisal plants along the said access road to the river, the 4th defendant stated. After the plaintiff filed this case, the District Land Registrar went to the site and redemarcated the land as per a court order and the boundary was still intact. No complaint was filed against the Land Registrar if at all the plaintiff was dissatisfied with the same, the 4th defendant contended.

In cross examination, the 4th defendant stated that there was no official access road from Sakori Road to Reiboruke River but there were sisal plants that were planted from the road upto the river by the District Land Registrar.

Following closure of the defendant's case, the court directed Kuria District Land Registrar and Surveyor to visit the area in dispute in the presence of the parties and confirm the actual position on the ground, that is, whether there was any access road from Sakori Road to Reiboruke River and file a report accordingly.

On 25th February, 2009, the District Land Registrar and Surveyor accompanied by the area Chief, Security Officers and an assisting staff went to the area in dispute. The parties were present. The District Land Registrar and the Surveyor had the area Registry Index Map (R.I.M.) and Sheet No. 54 for Nyabasi/Bomerani. Measurements were taken all around the two parcels of land in presence of the parties. The findings were as follows:

- **“There was no road of access from Sakori Road to Reiboruke River.**
- **The measurements taken from all round the two farms were found to be in excess of the map measurements.**
- **The boundaries and boundary marks were all in stable condition and bore no marks of interference.”**

The report concluded as follows:

“After analyzing the above findings, the Land Registrar ordered that status quo be maintained and the boundaries were left as they were existing on the ground. There was no need

for a boundary dispute.”

The said report and a certified official survey map of the area are on record. The report was read to the parties and their respective advocates on 27th February, 2009. However, Mr. Masese for the defendants informed the court that the third defendant passed away on 6th February, 2009. None of the advocates made any submissions.

The two parcels of land aforesaid are registered under the **Registered Land Act** Cap 300 Laws of Kenya.

Section 21 of the said Act states that except where it is noted in the register that the boundaries of a parcel of land have been fixed, the registry map and any filed plan shall be deemed to indicate the approximate situation only of the parcel. Where any uncertainty or dispute arises as to the position of any boundary, the Registrar, on the application of any interested party, proceeds to determine and indicate the position of the uncertain or disputed boundary. The Registrar does so on such evidence as he may consider relevant. Thereafter the Registrar makes a note to that effect on the registry map and in the register and files such plan or description as may be necessary to record his decision.

Both the plaintiff and the 4th defendant stated that the boundary between their parcels of land was fixed by their respective fathers. That boundary is what existed during the land adjudication exercise in the area. It was not specified when the initial adjudication exercise in the area was carried out. The plaintiff was issued with a title deed to the suit property on 13th February, 1989. It is evident that the title deeds were issued pursuant to the area demarcation map and records that were prepared pursuant to the provisions of the **Land Adjudication Act**. The demarcation map was produced as **P. Exhibit 2**. The same was drawn in September, 1975. According to that map there is no access road from Sakori Road across the plaintiff's parcel of land to Reiboruke River. Both parcels numbers 25 and 26 extend upto the said river.

When the District Land Registrar and the District Surveyor, Migori/Kuria District went to the site together with the parties and two elders, they were shown the original boundary between the two parcels by the two elders. The details have already been reproduced herein. It was established that the plaintiff had encroached into the 4th defendant's parcel by 0.135 Hectares. The basis of the plaintiff's complainants are acts of trespass by the defendants which were allegedly committed in 1990 and 1991. However, the boundary was re-established in 1995. The elders pointed out where the original boundary was. It is the Land Registrar who is vested with jurisdiction of fixing boundaries between disputing parties under the Registered Land Act. This court cannot interfere with the report that was filed on 18th October, 1994 unless it is established that the report was incorrectly prepared, which was not demonstrated. The earlier judgment was set aside simply because it had not been agreed that the said report was to be adopted as a judgment of the court.

Regarding the clearance of the common boundary from the said road to the river, it was confirmed that there is no access road there and therefore it was not right for the defendants or any other person to attempt to create one.

The report made on 25th February 2009 made reference to the existing boundaries and concluded that they should be left as they are.

From the foregoing, the plaintiff's case against the defendants cannot succeed and is dismissed with costs. The boundaries between the two parcels of land shall remain as they are. That in effect means that the report by the District Land Registrar filed on 18th October, 1994 is upheld.

DATED, SIGNED AND DELIVERED AT KISII THIS 23RD DAY OF APRIL, 2009.

D. MUSINGA

JUDGE.

23/4/2009

Before D. Musinga, J.

Mobisa – cc

Mr. Anyona HB for Mr. Soire for the Plaintiff.

Mr. Masese for the Defendants.

Court: Judgment delivered in open court.

D. MUSINGA

JUDGE.