



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**ELC CASE NO. 272 OF 2013**

**BEATRICE MATOYA.....1<sup>ST</sup> PLAINTIFF**

**TABITHA BONARERI MATOYA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**ATTORNEY GENERAL.....1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR, KISII.....2<sup>ND</sup> DEFENDANT**

**COUNTY SURVEYOR, KISII.....3<sup>RD</sup> DEFENDANT**

**DIRECTOR, PUBLIC ROADS KISII COUNTY.....4<sup>TH</sup> DEFENDANT**

**HENRY MANYANGE OBIRI alias**

**HENRY MATOYA MANYANGE (Administrator of the estate of**

**FRANCIS OBAGA MATOYA-Deceased).....5<sup>TH</sup> DEFENDANT**

**JAMES MANYANGE OBIRI (Legal Representative of the estate of**

**ZACHARIAH OBIRI MATOYA- Deceased).....6<sup>TH</sup> DEFENDANT**

**DAVID NYAKERIGA BOSIRE.....7<sup>TH</sup> DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Plaintiffs Beatrice Matoya and Tabitha Bonareri Matoya filed suit against the Defendants on 19<sup>th</sup> June 2013 seeking an order for re-beaconing of land parcel No. CENTRAL KITUTU/DARAJA MBILI/508 as per the Daraja Mbili Registration Diagram No. 8 of 1972 in the presence of the area Chief Kisii Township Location and an Order of Injunction to restrain the Defendants and their co-beneficiaries in respect of the parcels of land known as L.R NO. CENTRAL KITUTU/DARAJA MBILI/507, 2031 and 2139 hereinafter referred to as “Plot No. 2031” and “Plot No. 2139” (respectively) from tampering, wasting or encroaching on the Suit Property. The Plaintiffs also filed an Application for Injunction but the same was dismissed on 4<sup>th</sup> April 2014. In his Ruling, Justice Okong’o held that the order seeking re-beaconing and demarcation of the boundaries of the Suit Property was one of the prayers in the Plaint and could not be granted at the interlocutory stage and further that the order was directed at the Land Registrar and the District Surveyor, who were not parties to the suit and hence the orders could not be issued against them without being heard.

2. The Plaintiffs subsequently filed an Application dated 7<sup>th</sup> December 2016 under Section 80 of the Land Registration Act seeking *inter alia* an order that the Court directs the Land Registrar to forthwith reclaim any part of the land known as CENTRAL KITUTU/DARAJA MBILI/508 that has been encroached by the estates of CENTRAL KITUTU/DARAJA MBILI/507, CENTRAL KITUTU/DARAJA MBILI/2031, CENTRAL KITUTU/DARAJA MBILI/2139 and Director of Public Roads back to CENTRAL KITUTU/DARAJA MBILI/508 so as to reinstate it to its original size as held in the map sheet No. 8 of Central Kitutu/Daraja Mbili as adjudicated on 12<sup>th</sup> March 1971 and recorded on 16<sup>th</sup> March 1971 under the Land Adjudication Act No. 35 of 1968 as held in adjudication record no. 255308;

3. An order that the court orders the Land Registrar and Surveyor Kisii to permanently define the missing boundaries of CENTRAL KITUTU/DARAJA MBILI/508 on the ground with beacons as held in the title deed issued in 1973 in the name of Walter Otworu Matoya at their own cost, since this omission was caused by the criminal negligence to duty as committed by the respondent civil servants in the office of the Land Registrar and Surveyor in Kisii District/County respectively and successively being abetted by the officers through the years and: also to correct the record on the Map Sheet Diagram no. 8 by marking CENTRAL KITUTU/DARAJA MBILI/508 with actual boundary lines .....

4. The Plaintiffs further sought general damages for destruction of their property by the Director of Public Roads, Kisii committed during the up-grading of the access road.

5. The Application was heard by Justice Mutungi who delivered his Ruling on 29<sup>th</sup> September 2017, dismissing the same on the grounds that the 1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondents named in the Notice of Motion were not parties to the Plaint and they could be properly enjoined in the suit without the leave of the court. He observed that the Application had erroneously been converted to a Miscellaneous Application yet the suit had been commenced by way of Plaint. He further held that the orders sought in the Notice of Motion were final orders that could not be made at an interlocutory stage without a formal hearing and proof by way of evidence at the trial. The court observed that the Plaintiffs needed to relook at their pleadings to determine whether or not they needed to amend the same.

6. On 8<sup>th</sup> July 2019 the Plaintiffs filed a Notice of Motion dated 5<sup>th</sup> July 2019 seeking the following orders:

1. *“Judicial review of Ruling 203 in Misc. application 272 of 2013 filed in ELC 272 of 2013 to reinstate the pleadings as it did not consider material and legal facts which amounts to error on the face of the record; presenting the substantive matters in the Application which matters were :-*

*(a) Only repeats and further violations committed and; which violations are the issued in Notice of motion dated 18<sup>th</sup> June 2013 against our inherent and unalienable rights as protected by the Constitution of Kenya under its Bill of Rights*

*(b) The material and legal fact that the Respondents therein were properly served with notice to sue, some of whom were new entrants in the offensive and criminal violations of our inherent and unalienable rights claimed therein*

*(c) Which claims are a legal fact that they cannot be wished away by dismissing them for whatever reasoning and ruling as reasoned out and protected by the Constitution of Kenya under its Bill of Rights and Article 159.*

2. *Seeking leave to enjoin the parties in Misc. Application 272 of 2013 to the main suit ELC 272 of 2013 which is supported with either material /legal facts that: -*

*(a) That claims in Misc. Application 272 of 2013 are actual violations against the jealousy protected rights to property for every citizen under the operating Constitution of Kenya which the constitution has no respect to any violator's social stature.*

*(b) Misc Application 272 of 2013 dated 7<sup>th</sup> December 2016 was not filed as a new suit but was filed in ELC 272 of 2013.*

*(c) Leave to enjoin 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> Respondents in Misc Application 272 of 2013 dated 7<sup>th</sup> December 2016 had been directed by ruling dated 4<sup>th</sup> April 2014 so application dated 18<sup>th</sup> June 2013 in ELC 272 of 2013 is only two extra respondents.*

*(i) The Director of Public Roads Kisii County for the criminal and malicious damage of property in CENTRAL KITUTU/DARAJA MBILI/508 and which he has now as it stands encroached because we are not allowed to use the part of land he has encroached into.*

*(ii) James Manyange Obiri as the only 1<sup>st</sup> line surviving bonafide beneficiary of the estate of ZACHARIA OBIRI MATOYA (Deceased) for enabling the effecting of orders that will be issued against the estate.*

3. *Consolidation of Misc Application 272 of 2013 to be part of Notice of Motion dated 18<sup>th</sup> June 2013 in ELC 272 (yet to be set for hearing ) as:*

*(a) It presents a continuation of continual violation of our inherent and unalienable rights which cannot be deprived by what presents itself as an inadequately misinformed court ruling.*

*(b) Have the file ELC 272 of 2013 ride on the date 25<sup>th</sup> July 2019 which date is already assigned for hearing of ELC 124 of 2014 because: -*

*(c)*

*(i) It claims part of the estate of WALTER OTWORU MATOYA (Deceased).*

*(ii) The parties are the same respondents in Misc. Application 124 of 2014*

4. Costs.”

7. I have reproduced the prayers in the Application dated 8<sup>th</sup> July 2019 in order to put the matter into perspective. Although the said Application was filed under Certificate of Urgency, on 8<sup>th</sup> July 2019, my predecessor Justice Mutungi did not certify it as urgent and directed that the Application be served on the Respondents. When the matter came up for hearing on 12<sup>th</sup> November 2019, the 7<sup>th</sup> Respondent had not been served and the same was put off to 27<sup>th</sup> November 2019. On the said date, Mr. Nyauma the Senior Litigation Counsel from the Attorney General’s office indicated that he had no objection to the 1<sup>st</sup>-3<sup>rd</sup> Respondents being enjoined to the suit. However, Mr. Mosota representing the County Government objected to the joinder of the 4<sup>th</sup> Respondent and requested for 14 days to file a Replying Affidavit, which the court granted.

8. When the matter came up next on 19<sup>th</sup> December 2019, the 4<sup>th</sup> Respondent had not filed its Replying Affidavit and the court exercised its discretion under order 1 Rule 10 (2) of the Civil Procedure Rules and enjoined the 4<sup>th</sup> Respondent to the suit. The Plaintiffs were directed to serve the 4<sup>th</sup> Respondent with all the relevant documents to enable them file their defence. Before the first limb of the Application dated 8<sup>th</sup> July 2019 could be heard, the Plaintiffs filed a Certificate of Urgency dated 13<sup>th</sup> February 2020 seeking the following orders:

1. *“Dropping of ELIZABETH OMWENGA DAVID as 7<sup>th</sup> Respondent but leaving DAVID NYAKERIGA BOSIRE as 7<sup>th</sup> Defendant/Respondent.*

2. *URGENT PLEA FOR PRAYER NO. 1 of the Plaint dated 18<sup>th</sup> June 2013 and prayers no. 1 and 4 in the Notice of Motion dated 7<sup>th</sup> December 2016 which prayers seek to define the boundaries of the suit property CENTRAL KITUTU/DARAJA MBILI/508 to be done before the next date of 11<sup>th</sup> March 2020.*

3. *However, if there was no title that issued from all the documents as held by me on the position that we occupy, then let the court direct the Land Registrar, Kisii and his counterpart the Surveyor to geographically place the documents on whichever part of the world that the Adjudication record of 12<sup>th</sup> March 1971 issued on 16<sup>th</sup> March 1971 (as held in page 77 of the Plaintiff’s List of documents dated 18<sup>th</sup> June 2013).”*

9. When the matter came up for hearing of the Application on 11<sup>th</sup> March 2020, counsel for the 4<sup>th</sup> Respondent indicated that he had no objection to the prayer seeking to have the boundary of the Suit Property defined. He however prayed that the Surveyor be provided with security as previous attempts to have the boundary marked had been disrupted by the 1<sup>st</sup> Plaintiff.

10. The Court therefore recorded a consent between the Plaintiffs and the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants that the Land Registrar and County Surveyor Kisii County visit the Suit Property and mark the boundaries. The court directed the O.CS Nyanchwa Police Station to provide security during the said exercise. The Land Registrar and County Surveyor were required to file their report in court within 45 days. This was not done.

11. On 13<sup>th</sup> October 2020 the Land Registrar responding to summons to appear and explain why the report had been delayed informed the court that they had visited the Suit Property on 4 occasions but they were met with hostility from the 1<sup>st</sup> Plaintiff. However, he explained that they had finally managed to ascertain the boundaries though they were unable to mark the same on the ground. He informed the court they had filed their report in court on 12.4.2019 (sic). A copy of the said report had also been served upon the Plaintiffs.

12. On her part the 1<sup>st</sup> Plaintiff indicated that she did not agree with the findings of the report. The court then directed that the parties file and exchange their comments on the report within 7 days. The Plaintiffs filed their comments dated 19<sup>th</sup> October 2020 on 9<sup>th</sup> November 2020 while the 4<sup>th</sup> Defendant filed its comments on 20<sup>th</sup> January 2021.

13. The Plaintiffs are vehemently opposed to the County Surveyor’s report dated 12<sup>th</sup> April 2019 and have set out several reasons for their objection. Firstly, the Plaintiffs contend that the report that was filed in court was prepared by the former County Surveyor and is not a joint report of the Land Registrar and County Surveyor as ordered by the court. Secondly, it is the Plaintiffs’ contention that the suit property does not border a public road as the alleged public road is a private road that was developed by the late Walter Otworu Matoya in 1971 to enable him access his home. Fourthly, the Plaintiffs have taken issue with the fact that the report has no annexures or references such as aerial photographs, maps or diagrams and minutes to corroborate the Surveyor’s findings. Fifthly, the report does not state what methodology was used to ascertain the findings. Sixthly, the Plaintiffs deny that there are clear boundary features on the suit property and finally that the variation or deficit in the acreage on the ground *vis a vis* the registered area of the suit property is not explained.

14. In his submissions dated 24<sup>th</sup> October 2020 learned counsel for the 4<sup>th</sup> Respondent started by decrying the Plaintiffs’ trend of filing similar Applications even after the court has made orders in respect of the same issues thus rendering her Applications *res judicata* and depicting the Plaintiffs as vexatious litigants. Counsel then submitted that the question that is substantially in issue and which wholly captures the concern of the Plaintiffs has been addressed by the Surveyor’s report dated 12<sup>th</sup> April 2019 and similar reports filed by the Land Registrar more than four times regarding the Suit Property.

15. Counsel agreed with the findings of the report that there is no encroachment to the Suit Property whatsoever and that the road that bypasses the suit property is a public and not a private road. He further submits that the 4<sup>th</sup> Respondent agrees with the finding that all the four parcels of land which border the road being land parcels no.CENTRAL KITUTU/DARAJA MBILI/ 508, 507,2031 and 2032 have a deficit in their acreage meaning that in all of them the aerial map does not tally with the ground measurements. However the physical occupation, layout and shape is consistent with the Registry Index Map (RIM) though shorter longitudinally and this feature is common to Daraja Mbili and Bogiakumu registration sections. He contends that the report indicates that the boundaries were fixed proportionately and the same was

based on the ratio between the total registered area and the ground area. He further notes that the report indicates that the alleged road by-passes the suit property and the neighbouring parcels of land on the lower side and on the upper side yet it is only the Plaintiffs who are complaining. It is his contention that public interest overrides private interest and the Plaintiff's claim is therefore frivolous.

16. Counsel submits that in view of the remarks made by the Land Registrar when he appeared before court on the 13<sup>th</sup> October 2020 to the effect that the 1<sup>st</sup> Plaintiff made it difficult for the County Surveyor to mark the boundaries by insisting on having things done according to her wishes, the 4<sup>th</sup> Respondent has continued to suffer prejudice owing to the pendency of the multiple suits filed by the Plaintiffs in respect of the same subject matter. He urged the court to adopt the report as a judgment of the court so that litigation could come to an end.

## ISSUES FOR DETERMINATION

17. Having considered the pleadings, Applications, previous Rulings and the totality of documents filed in this matter but more particularly the County Surveyor's report dated 12<sup>th</sup> April 2019 as well as the submissions thereon by the Plaintiffs and the 4<sup>th</sup> Respondent, the issues that emerge are twofold:

1. Whether the orders sought by the plaintiffs are res judicata
2. Whether the said report should be adopted as judgment of the court.

## ANALYSIS AND DETERMINATION

18. The doctrine of *res judicata* in Kenyan Law is embodied in Section 7 of the Civil Procedure Act CAP 21. This section provides as follows: -

### ***“7. Res judicata***

*No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”*

19. In **Joshua Ngartu v Jane Mpinda & 3 Others (2019) eKLR** Lucy Mbugua J relying on the case of Attorney General & Another v ET (2012) eKLR held as follows:

*“The courts must be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the Court in another way an in form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of **Omondi v National Bank & Others (2001) EA 177** the court held that “parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit” In that case the court quoted Kuloba J (as he then was) in the case of **Njanju v Wambugu & Another HCCC No. 2430 of 1991 ( unreported )** where he stated : *If parties are allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift win every occasion when he comes to court then I don't see the use of the doctrine of res judicata...*”*

20. By their own admission the Plaintiffs have filed several suits against some of the Defendants seeking the determination of the boundaries of the Suit Property. In their submissions the Plaintiffs have submitted that in HCCC NO. 255B of 2009 (TABITHA BONARERI AND BEATRICE MATOYA V HENRY MANYANGE MATOYA AND TERESIA KEMUNTO OBIRI) which was referred to the Kisii Municipality Land Disputes Tribunal vide Case No. 11 of 2011 the Tribunal at the Plaintiffs' request visited the Suit Property in the presence of the District Surveyor, Chief, Kisii Township location and parties with view to determine the boundary between the Suit Property, parcel no. 507, 509 and 2031 but the Plaintiffs disagreed with the Surveyor's report and the exercise did not result in the marking of the boundaries. The Land Registrar advised the parties to seek redress in the Environment and Land Court.

21. Subsequently the Plaintiffs filed the instant suit in which they sought an order for re-beaconing of the suit property both in the substantive suit and in an interlocutory Application which was dismissed by Justice Okong'o. A second Interlocutory Application seeking similar orders and a raft of other orders filed by the Plaintiffs on 7<sup>th</sup> December 2016 was similarly dismissed by Justice Mutungi on 29<sup>th</sup> September 2017.

22. The instant Application is therefore the 4<sup>th</sup> attempt by the Plaintiffs to have the boundary of the Suit Property determined. My understanding of the matter thus far is that there have been no conclusive findings that have been adopted by a court of competent jurisdiction with regard to the boundaries of the Suit Property and to that extent the matter is not *res judicata*.

23. Having arrived at the finding that the suit is not *res judicata*, the next issue for determination is whether the County Surveyor's report dated 19<sup>th</sup> April 2019 should be adopted as a judgment of the court. I must start by acknowledging the efforts of the Land Registrar, County Surveyor and their team and I appreciate their frustrations, having been directed to visit the suit property on various occasions for purposes of marking the boundaries to the Suit Property by both this court and the Land Tribunal.

24. By the Plaintiffs' own account and the Land Registrar's statement when he appeared in court on 30<sup>th</sup> October 2020, it has been a difficult and emotive exercise as the Plaintiffs have not been very cooperative and have treated the land officers with contempt. Be that as it may, it is not lost to me that the said officers have partly implemented the Court Order and all that remains is the ground marking of the boundaries. The Plaintiffs however, contend that they do not agree with the Surveyors' findings as in their view the tools and methodology used to

measure the acreage of the suit property were not upto standard and they did not make reference to the relevant maps, aerial photographs and other documents. What is surprising is that in a complete departure from the issues at hand, the Plaintiffs have included the following untoward averments in their submissions:

*“I expected the Land Registrar – Kisii Mr. Mokaya to produce his own report in court and not the Surveyor’s report which to my understanding could have been earlier filed if the current crop of surveyors in the Survey office found it worth the ink used on it.. The airs that propel Mr. Mokaya in his oversized shoes in the office he occupies does not allow him to dispense his services by the profession he claims to belong to. ...I expected Mr. Mokaya’s own report to include and end at the arrangements he initiated to get the surveyors on the ground and minutes that he was present... MR. MOKAYA IS PLAYING POLITICS IN COURT. HE FILLS (sic) GOOD TO ATTEND COURT thanks to the office he did not compete (sic) for but crafted in for a purpose...”*

25. My reading of the Plaintiffs’ submissions is that they are challenging the competence of the County Surveyor and Land Registrar as well as their ability to objectively determine that boundaries of the Suit Property. The Plaintiffs have made spurious allegations against the two officers ostensibly because they refused to conduct the exercise in accordance with the 1<sup>st</sup> Plaintiff’s demands.

26. The court will not be drawn into the side-shows exhibited by the Plaintiffs both in their submissions and their statements in court, which border on insults directed at officers of the court. Suffice is to say that the court takes great exception to the said unsavory remarks.

27. It is a mandatory requirement of the law that boundary disputes be determined by the Land Registrar in accordance with section 19 (1), (2) and (3) of the Land Registration Act 2012 as read with section 18 (1) of the said Act.

The said sections provide as follows:

#### Section 18

**1) “Except where in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.**

**2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.**

**3) Except where it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may in any proceedings concerning the parcel receive such evidence as to its boundaries and situation as may be necessary:**

**Provided that where all boundaries are defined under section 19(3), the determination shall be done as stipulated in the Survey Act.**

#### Section 19

**1) If the Registrar considers it desirable to indicate on a field plan approved by the office or authority responsible for the survey of land, or otherwise to define the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.**

**2) The Registrar shall after giving all persons appearing in the register an opportunity of being heard, cause to be defined, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed and the plan shall be deemed to accurately define the boundaries of the parcel.**

**3) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register and the parcel shall be deemed to have had its boundaries fixed under this section”**

28. From the foregoing provisions of the law, it is clear that the court has very little to do with the fixing of boundaries as this is the mandate of the Land Registrar and the Surveyor. The Plaintiffs having recognized the role of the said officers and opted to have the matter referred to them for determination of the boundaries are bound by their findings unless they can demonstrate that the said findings are tainted with impropriety. Having read the report dated 19<sup>th</sup> April 2019 and the submissions of both parties, I am unable to conclude that the report is inept as implied by the Plaintiffs. In the circumstances, I am of the view that the report determines the issues in controversy in this suit and I adopt the said report and further direct that the Land Registrar and County Surveyor do proceed to the Suit Property and fix the boundaries on the ground within 30 days.

Each party shall bear their own costs.

It is so ordered.

**Dated, Signed and Delivered at Kisii this 27<sup>th</sup> day of January 2021.**

**J.M ONYANGO**

**JUDGE**