



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELC CASE NO. 76 OF 2017

(Formerly Kisii Elc case No. 636 of 2016)

SETH OWAWA.....PLAINTIFF/APPLICANT

Versus

PETER OBIERO NYAGUMBA.....1ST DEFENDANT/RESPONDENT

THE LAND REGISTRAR-

MIGORI COUNTY.....2ND DEFENDANT/RESPONDENT

THE COUNTY SURVEYOR-

MIGORI COUNTY.....3RD DEFENDANT/RESPONDENT

RULING

1. The instant ruling is in regard to an application that Migori County Surveyor's report dated 3rd December 2018 and duly filed in this court on 12th April, 2019, (The report herein) be adopted. Indeed, on 18th April 2019, Mr. Adawo holding brief for Mr. H. Obach, learned counsel for the plaintiff, Seth Owawa orally prayed thus;-

“The report dated 3rd December, 2018 may be adopted by court”

2. Upon hearing the plaintiff's counsel and the 1st defendant in person, this court directed the parties to extract the report, file and serve submissions on the same within thirty (30) days from 18th April, 2019. That the 2nd and 3rd defendants' counsel be served by the plaintiff's counsel.

3. The report was originated by this court's orders made on 20th July, 2017. The orders read, inter alia,

a) “The Land Registrar and County surveyor, Migori County to visit land parcel No. Kanyamkago/Kajulu/669 and establish and fix boundaries with proper measurements on the land”

b) The parties to this suit and Chief West Kanyamkago Location to attend the exercise”

4. The 1st, defendant opposed the report by way of grounds of opposition dated 15th November 2019 and filed in court on even date. He termed the same an abuse of the court process, lacks merit and that it should be dismissed with costs to the defendants.

5. On 10th March 2020, learned counsel for the plaintiff filed submissions dated 5th March 2020 urging the court to adopt the report. That all interested parties to the suit property, LR NO. Kanyamkago/Kajulu/669 have agreed and are satisfied with it's subdivisions on the ground.

however, none of the parties complied thus, precipitating this ruling; See Order 51 Rule 16 of the Civil Procedure Rules, 2010.

6. The 2nd and 3rd defendants did not file any submissions on the report or the grounds of opposition in the application.

7. I have carefully noted the report in it's entirety, the 1st defendant's grounds of opposition thereto and the plaintiff's submissions on the report. So, is the report adoptable in the manner sought in the application?

8. It is worthy to note that the present suit was commenced by way of a plaint dated 10th November 2016 and duly filed in court on 29th November 2016. The plaintiff is seeking, inter alia, that the sub division of the suit property into LR numbers Kanyamkago/Kajulu/2195,296 and 297, was illegal and a nullity. That the 2nd defendant be compelled by an order of the court to rectify the register by removing the new numbers and replace the same with the original number of the suit property.

9. Notably, the way forward as captured in the report reads:-

“Following the deliberations above as conducted by the Land Registrar, it unanimously decided that :-

1. The parties led by the plaintiff be given ample time to agree on how to sub-divide the suit land at family level. They were to demarcate and erect physical sub-divisional boundaries by clearing respective lines and planting either Sisal or Euphobia Stems

2. A surveyor to re-visit the scene on 21st November 2018, in order to survey the demarcated boundaries in (1) above. The survey data would then be used in generating an accurate plan indicating the surveyed boundaries, measurements and corresponding acreage for each beneficiary.

3. With the blessing of the honourable court and full approval of all interested parties, the survey work in (2) above will then be used as the basis of drawing the mutation and generating title deeds for each respective interested party, beginning with the plaintiff.” (Emphasis added).

10. A survey plan showing subdivision of the suit property is attached to the report. By its character, the report is an opinion of an expert as envisaged in **sections 48 to 54 of the Evidence Act Chapter 80 Laws of Kenya**, the decision in **Andrew Marigwa =vs= Joseph Ondieki Kebati (2017) eKLR** and this court’s decision in **Registered Trustees, Legio Maria Africa Church Mission =vs= Simon Nyamweya Obwocha (2018) eKLR**, among other pronouncements.

11. It is settled law that as a general rule evidence by experts being opinion evidence is not considered binding on the court. The court has to consider it along with other evidence and form its own opinion on the matter in issue. The court is at liberty to accept or reject evidence of experts depending on the facts and circumstances of the case before it; see **CD Desouza =vs= BR Sharma (1953) 26 KLR 41 at page 42** applied in **Amosam Builders Development Ltd =vs= Gachie & 2 others (2009) KLR 648 at page 654**.

12. Besides, did a surveyor revisit the suit property as stated in way forward No. 2 contained in the report to enable this court deal accordingly as envisioned in way forward No. 3 therein? Furthermore, did a surveyor file a report of the revisit to the suit property as envisaged in the report?

13. Quite clearly, there is no report or outcome of the proposed revisit discernable from the documents filed in this matter. This court is conscious of its special and inherent powers under **sections 3 and 3A of the Civil Procedure Act Chapter 21 Laws of Kenya (The CPA)**. Nonetheless, the parties in this matter have the right of access to justice which include the report of the surveyor’s revisit to the suit property as visualized in the report and stipulated at Article 48 of the Constitution of Kenya, 2010. No doubt, the parties have the uncurtailed right to fair hearing as provided for under **Article 50 (1) as read with Article 25 (c) of the same Constitution**.

14. To that end, I find that without surveyors’ report regarding the scheduled revisit to the suit property as revealed in the report, the same is not adoptable at this stage. I therefore, proceed to disallow the plaintiff’s application seeking the adoption of the report dated 3rd December 2018 duly filed herein on 12th April, 2019.

15. In order to give effect to the overriding objective under sections 1A, and 1B, of the Civil Procedure Act (Cap 21 Laws of Kenya) and section 3 of the Environment and Land Court Act, 2015 (2012), it hereby ordered thus:-

a) The Land Registrar and County Surveyor Migori to file herein, a report of the revisit to the suit property within the next sixty (60) days from this date.

b) All the parties to this suit to file and serve their respective submissions on the report of the first visit and the revisit within thirty (30) days from date of the expiry of the timelines in No. (a) hereinabove.

c) The matter is fixed for 13th May 2021 to confirm compliance and for directions.

DELIVERED, DATED and SIGNED at MIGORI this 10th day of February, 2021

G.M.A. ONGONDO

JUDGE

In presence of :-

Tom Maurice - Court assistant