



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA

ELC CASE NO. 21 OF 2021

{Formerly of Environment and Land Court at Kisii Case No. 254 of 2014}

HOSEA NYANDIKA MOSAGWE.....1ST PLAINTIFF

MILTON NDEGE ONYANCHA.....2ND PLAINTIFF

MARTIN KAPSERI ONSASE.....3RD PLAINTIFF

=VRS=

THE COUNTY GOVERNMENT OF NYAMIRA.....DEFENDANT

RULING

This suit was filed on 02/07/14 for an injunction to permanently restrain the Defendant from forcefully alienating the Plaintiffs' property known as **WEST MUGIRANGO/SIAMANI/1561 and WEST MUGIRANGO/SIAMANI/1912** or any part thereof and also an order declaring the acts of the Defendant unjustified, unreasonable, illegal and unconstitutional. The Plaintiffs also simultaneously made an Application for injunction to preserve the suit properties pending the hearing and determination of the suit. The Plaintiffs' claim was based on the ground that the Defendant had earmarked their properties/buildings for alienation to pave way for the construction of a road by the Defendant through the Plaintiffs' parcels of land. The Application was certified urgent by my brother Justice S. Okongo and temporary relief was granted on 03/07/2014.

On 22/04/16, the Honourable Mr. Justice S. Okongo held that the Plaintiffs having painstakingly put up the buildings which evidence shows had been approved by the Defendant, the Plaintiffs would suffer irreparable damage if the said buildings were demolished. He therefore granted an injunction against the forceful demolition of **WEST MUGIRANGO/SIAMANI/1561 and 1912** until the Hearing and determination of this matter. However, he declined, and rightly so, to grant the second order which sought a declaration that such acts of demolition of the suit premises are unjustified, unreasonable, illegal and unconstitutional on the ground that such prayers would be unavailable at the interlocutory stage.

On 21/07/14, and before the aforesaid Application was heard and determined, the Plaintiffs amended their Complaint to include a prayer for damages against the Defendant for trespassing on the suit parcels. The declaratory prayer fizzled out unprocedurally. Why do I say unprocedurally? Because the same should have been included in the Amended Complaint and struck through. However, the Plaintiffs will be spared the negligence this time.

On 25/11/2020, both parties recorded a Consent in Court before Lady Justice J.M. Onyango on the following terms: -

- a) By consent of the parties the County Land Registrar and county Surveyor Nyamira shall visit land parcel No. WEST MUGIRANGO/SIAMANI/1561 and WEST MUGIRANGO/SIAMANI/1912 to establish the position on the ground and file their Report in court.**
- b) The Plaintiff is at liberty to engage his private Surveyor who will be present during the exercise. The Private Surveyor and Government Surveyor shall file a joint report.**
- c) The costs of the exercise shall be shared equally by the parties.**
- d) The Report shall be filed in court within 60 days.**
- e) Mention on 2nd February 2021.**

On 22/03/21, the Land Registrar visited the suit land in the presence of both parties and established the following: -

- 1. Both WEST MUGIRANGO/SIAMANI/1561 and 1912 existed on the ground bordering each other and had fences all around.**
- 2. Both parcels of land are well presented on the area Registry Index Map (RIM) Sheet 6.**
- 3. There exists an access road passing on the right side down across the boundary of the two parcels which doesn't exist on the RIM.**
- 4. These two parcels of land have a different road on their left as is shown on the Surveyor's Sketch. The same doesn't exist on the ground.**
- 5. These two parcels of land were adversely affected at their common boundary by the creation of a 9 Meters road running across them.**
- 6. This road although necessary should have been excavated as per the RIM.**

The County Surveyor also condensed his Report by making the following observations: -

- 1. Land parcels WEST MUGIRANGO/SIAMANI/1912 and 1561 are adjacent to each other.**
- 2. The Registry Index Map (RIM) DIAGRAM No. 6) doesn't show existence of a road in the disputed area.**
- 3. The ground measurements showed that 9 Meters access road in dispute was created by the Respondent excavating sections of Plot Nos. WEST MUGIRANGO/SIAMANI/1912 & 1561.**
- 4. The service road serving the Plots has been diverted from its true position as per the RIM to the present position that is being disputed.**

The Report speaks for itself in a very clear and unequivocal language. All the parties were given audience before the Report was compiled. After the same was filed in court on 22/04/21 both parties were served with the Report and on 27/05/21 both were invited to file and exchange their comments on the Report within 30 days and the matter was mentioned in court on 14/07/21 with no party filing any comments as directed earlier. When the matter came to court on 21/09/21 the story was the same and so was the case on 12/10/21 and on 28/10/21, the Plaintiffs' Advocates filed their comments, though belatedly. I have considered the same and since the Defendant never poked holes on the Report the court can only conclude that the Report is uncontested.

As this court has held in various occasions, the law is very clear on a matter such as this where boundary dispute is an issue for determination. Having considered the Report, the court would wish to invoke the Provisions of Section 18(2) of the Land Registration Act, 2012:

"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."

It follows that the Resolution of boundary disputes has always been in the purview of the Land Registrar. **Section 21 (4)** of the repealed Registered Land Act [Cap 300 Laws of Kenya] reads as follows:

(4) No court shall entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in this section.

From the above, the provisions of **Section 18 (2)** of the Land Registration Act is a replica of **Section 21(4)** of the repealed Registered Land Act. It was not in vain that this provision was left intact in the new Act since the Land Registrar is endowed with the expertise that the Court doesn't have which enables it to resolve the conflicts expeditiously.

In the Case of Andrew Marigwa =Vrs= Josphat Ondieki Kebati ELC NO. 1163 of 2016 Justice Mutungi stated as follows: -

"Recognizing the instant suit related to a boundary dispute which definitely the court lacked the technical ability to deal with, the court made a reference of the matter to the Land Registrar and the County Surveyor who are the persons mandated under the Act to deal with disputes relating to boundary. The Land Registrar is the custodian of the records relating to land, has the technical ability or capacity to determine, establish and fix boundaries of parcels of land as required under the Land Registration Act, 2012."

I echo with appreciation the words of Justice Mutungi and ask myself what the court would proceed to hear once the Land Registrar has established the boundaries on the ground.

The Report of the Land Registrar, Nyamira dated 26/03/2021 has finally partly disposed of the matter particularly on the boundary dispute. The Report is hereby adopted and I give a determination based on the same as the Judgment of the court in terms of Prayer (a) of the

Amended Plaintiff dated 21/07/2014 as follows: -

- 1. Both WEST MUGIRANGO/SIAMANI/1561 and 1912 existed on the ground bordering each other and had fences all around.**
- 2. Both parcels of land are well presented on the area Registry Index Map (RIM) Sheet 6.**
- 3. There exists an access road passing on the right side down across the boundary of the two parcels which doesn't exist on the RIM.**
- 4. These two parcels of land have a different road on their left as is shown on the Surveyor's Sketch. The same doesn't exist on the ground.**
- 5. The service road serving the Plots has been diverted from its true position as per the RIM to the present position that is being disputed.**
- 6. The ground measurements showed that 9 Meters access road in dispute was created by the Respondent excavating sections of Plot Nos. WEST MUGIRANGO/SIAMANI/1912 & 1561.**
- 7. This road although necessary should have been excavated as per the RIM.**
- 8. The Registry Index Map (RIM) DIAGRAM No. 6) doesn't show existence of a road in the disputed area.**

I further direct that the same be implemented forthwith and the parties herein do comply with the Provisions of **Section 20 (1)** of the Land Registration Act, 2012 by maintaining in order any feature that demarcates the boundaries of the adjoining parcels of land. Failure to which the perpetrator will face the consequences of **Sec. 21 (1)** of the Land Registration Act 2012, and will be liable on conviction to imprisonment for a term not exceeding two (2) years or to a fine not exceeding Kshs. 200,000/= or to both.

As to the prayers Nos. (b) and (c) in the Amended Plaintiff, parties are invited to make Submissions to pave way for the final judgment. The Plaintiff is given 14 days from today's date to file and serve his submissions and the Defendant 14 days thereafter to file and serve his Submissions.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 4TH DAY OF NOVEMBER, 2021.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Mobisa

Plaintiffs: Mr. Nyamwange holding brief for Mr. Momanyi

Defendant: Mr. Nyachiro