



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISII**

**ELC CASE NO. 265 OF 2014**

**HEBISIBA BOSIBORI ANGWENYI.....PLAINTIFF**

**VERSUS**

**HELLEN OGAKE AONDO.....1<sup>ST</sup> DEFENDANT**

**THE SEVENTH DAY ADVENTIST CHURCH (E.A UNION LTD).....2<sup>ND</sup> DEFENDANT**

**COUNTY SURVEYOR NYAMIRA COUNTY.....3<sup>RD</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. The Plaintiff filed suit against the Defendants alleging that the 1<sup>st</sup> and 3<sup>rd</sup> Defendants had fraudulently created L.R NO NYANSIONGO SETTLEMENT SCHEME/1072 out of her land parcel NYANSIONGO SETTLEMENT SCHEME/16. In the said Plaintiff she seeks inter alia a declaration that she is the lawful owner of land parcel number NYANSIONGO SETTLEMENT SCHEME/16 measuring 8.5 acres and a declaration that the creation of L.R NO NYANSIONGO SETTLEMENT SCHEME/1072 currently belonging to and registered in the name of the 2<sup>nd</sup> Defendant was irregular, illegal, fraudulent and thus void.

2. The 2<sup>nd</sup> Defendant filed its statement of Defence dated 8<sup>th</sup> August 2014 denying the Plaintiff's claim. She averred that her parcel was curved out of land parcel number NYANSIONGO SETTLEMENT SCHEME/17 which shares a boundary with land parcel no. NYANSIONGO SETTLEMENT SCHEME/16 and which boundary has been in existence since the 1960s. The 2<sup>nd</sup> Defendant avers that she has been in occupation of parcel 1072 since 1968 without any complaint from the Plaintiff and if the Plaintiff had any claim against her, the claim is statutorily time barred. In any event the 2<sup>nd</sup> Defendant denies that the creation of parcel 1072 was irregular, illegal or fraudulent.

3. When the matter came up for hearing on 9<sup>th</sup> November 2019, the parties entered into a consent as follows:

That the County Land Registrar and County Surveyor Nyamira do visit the suit property namely L.R NO NYANSIONGO SETTLEMENT SCHEME/16 as well as L.R NO NYANSIONGO SETTLEMENT SCHEME/17 to ascertain the following:

- i. Establish the boundary positions of the original parcels of land
- ii Upon establishment of the boundaries, to fix the established boundaries fix the boundaries.
- iii Confirm whether Reisune S.D.A Church has been constructed on a portion of L.R NO NYANSIONGO SETTLEMENT SCHEME/16.

4. Pursuant the said consent order, the Land Registrar and County Surveyor visited the suit property on 3<sup>rd</sup> March 2020 and filed their reports in court.

5. In his report the Land Registrar observed that the Plaintiff has been living on parcel no. 16 since the early 60s. On the other hand, the 2<sup>nd</sup> Defendant was given a portion of land by the 1<sup>st</sup> Defendant's late husband who was the original owner of parcel no.17 in the 60s. However, upon taking ground measurements, it was established that the 2<sup>nd</sup> Defendant's portion falls within parcel 16.

6. The owners of parcel 16 and 17 have been leaving on their portions of land since the 60s without any problem. The report also confirmed that the ground measurements did not tally with the measurements in the Registry Index Map.

7. The findings of the County Surveyor are similar to those made by the Land Registrar. Both the Plaintiff and the Defendants filed their comments on the report.

8. The Defendants faulted the Land Registrar and County Surveyor for solely relying on the Registry Index Map which only provides guidelines and instead submitted that they ought to have considered the mutation forms which were used to sub-divide parcel number 17. They were of the view that the reports acknowledged that the parties had lived in harmony since the 60s.

9. The reports also noted that the newly established boundaries would interfere with the situation on the ground. In essence they were of the view that the report as presented could not conclusively resolve the dispute between the Plaintiff and the Defendants as the Defendants failed to raise their complaint for a period of over 40 years and their claim is therefore time barred.

10. On the other hand, the Plaintiff was of the view that the report was accurate as it captured the nature and extent of encroachment by using her Registry Index Map as per the annexed sketch map. He submitted that the report ought to be adopted as judgment of the court.

11. Having considered the pleadings, the Nyamira County Surveyor's report and the rival comments on the report, I am of the view that the dispute is not solely one concerning boundaries as it is necessary to understand the history of the land and how the Defendants acquired their titles in addition to the issue of trespass and fraud. That being the position, I find and hold that the report does not resolve the issues in dispute and therefore it is necessary for the case to proceed to full hearing. The County Surveyor's report will form part of the court record and either party may call the County Surveyor as a witness to shed more light on his findings. The case shall be set down for hearing.

**Dated, signed and delivered at Kisii this 8<sup>th</sup> day of June, 2021.**

**J.M ONYANGO**

**JUDGE**