



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC CASE NO. 21 OF 2018 (consolidated with ELC CASE NO. 807 OF 2016)

HELLEN NYABOKE NYABIOSI.....PLAINTIFF

-VERSUS-

GEORGE NYARIKI.....1ST DEFENDANT

LAND REGISTRAR KISII.....2ND DEFENDANT

ATTORNEY GENERAL.....3RD DEFENDANT

RULING

1. By a plaint dated 5th September, 2018 the Plaintiff filed suit against the Defendants seeking the following orders;

- a) An order of permanent injunction against the 1st Defendant either by himself, servants' assigns and/or whosoever is claiming through him from continuing to forcefully occupy the Plaintiff's property LR. NO KEROKA TOWNSHIP/PARCEL/148 and from, trespassing, occupying and/or using the subject property.
- b) An eviction order to evict the 1st Defendant from the subject land.
- c) A declaration be issued to the effect that the Plaintiff is entitled to protection under the constitution.
- d) Payment of damages arising from the illegal and void actions by and/or at the instance of the 1st Defendant and none usage of the suit property.
- e) An award of mesne profits
- f) Cost of the suit and interests.

2. In support of the aforementioned prayers, the Plaintiff averred that she was the registered proprietor of the suit property, the same having been transferred to her on 8th August, 2013 pursuant to the completion of the succession proceedings in respect of the estate of the late Joseph Nyabiosi Nyakundi-deceased. She further averred that on or around mid-2010, the 1st Defendant without any color of right trespassed into the suit property while she was away in the United States of America and constructed a storey building thereon. She contended that the actions of the 1st Defendant amounted to trespass and a violation of her constitutional rights to property which she sought to be protected by this Honourable court.

3. The Plaintiff's suit was opposed by the 1st Defendant vide a statement of Defence dated 26th September, 2018 and filed in this court on 28th September, 2018. In the said Defence the Defendant denied all averments of the Plaintiff and claimed that his storey building was on land parcel number 43A and parcel 148.

4. In ELC CASE NO. 807 OF 2016, which was consolidated with this suit, the Plaintiff filed a suit against one Philes Moraa seeking similar orders as the ones sought in this suit save for the fact that the suit property is LR. NO KEROKA TOWNSHIP/PARCEL/147. Philes Moraa in her defense denied all the allegations by the Plaintiff and claimed that her house was constructed on her property LR. NO KEROKA TOWNSHIP/PARCEL/43B and not LR. NO KEROKA TOWNSHIP/PARCEL/147.

5. When the matter came up for mention on 24th September 2018, the Court on its own motion directed that the Land Registrars, Kisii and Nyamira counties, the County surveyors, Kisii and Nyamira Counties together with the Physical Planners for both Counties to visit parcels NO KEROKA TOWNSHIP/PARCEL/43A and LR. NO KEROKA TOWNSHIP/PARCEL/148 delineate their physical boundaries on the

ground, establish the owners of the buildings on the said parcels of land and file a joint report.

6. The report was filed in court on 9.7.2019. Having noted that the same was inconclusive, the court directed the Land Registrars, Kisii and Nyamira counties, the County surveyors, Kisii and Nyamira Counties together with the Physical Planners for both Counties to revisit the two properties and present to court a conclusive report. The court also ordered that the report ought to cover Land Parcel NO. KEROKA TOWNSHIP/43B and LR. NO KEROKA TOWNSHIP/PARCEL/147 which was the subject of ELC CASE NO. 807 OF 2016. Further the surveyors were directed to supply the court with Registry Index Maps (RIM) illustrating the location of the aforementioned parcels of land on the ground together with a sketch showing the ground location of each of them.

7. The survey report dated 26th October, 2020 and filed in court on 3rd November, 2020 was presented before this court on 15th March, 2021 for directions and the Court directed all parties to file their written submissions on the report. Both parties complied with the court's directions by filing their submissions.

ISSUES FOR DETERMINATION

8. From my analysis of the pleadings filed by the parties, the survey report filed, the written submissions/comments filed by both parties, I deduce the following as the main issues for determination;

- i. Whether the report filed is conclusive enough to be adopted as the judgment of the court.
- ii. Whether the issues of fraud on the part of the Plaintiff raised by the Defendants ought to be considered.

ANALYSIS AND DETERMINATION

Whether the report filed is conclusive enough to be adopted as the judgment of the Court.

9. Before delving into the argument of the parties on this issue, it will be important to highlight the finding contained in the report. The report indicated that the Defendants had built structures on the suit properties that belonged to the Plaintiff and that parcels 43 A and 43 B could only be subdivisions of parcel 43 which was discovered to have been 200m away. Attached to the Report was a Registry Index Map (RIM) illustrating the location of all the aforementioned parcels on the ground.

10. In his submissions, learned counsel for the Plaintiff basically reiterated the findings contained in the report and prayed for the reliefs sought by the Plaintiff in his plaint. He asked the court to consider the said reliefs alongside this report in determining the suit in favor of the Plaintiff.

11. Learned Counsel for the 1st Defendant (in this suit) on his part submitted that despite order of the court being directed to the Land Registrar, Kisii and Nyamira Counties, County Surveyors Nyamira and Kisii Counties together with the Physical Planners for both Counties, the Land Registrar Kisii and County Surveyor Kisii County who were critical parties did not participate in the process and their absence was not explained. He contended that the report could not be adopted as a judgment of the court without an explanation as to why the crucial players to whom the order of the court was directed did not participate.

12. Without delving into the issues raised by learned counsel for the 1st Defendant in this suit and the Defendant in ELC Case No. 807 of 2016, on the report it will be essential for the court to get an explanation as to why the two crucial parties did not participate in the process.

13. In the interest of justice, it will be critical that the Land Surveyor be summoned to this court to give an explanation as to why the Land Registrar Nyamira County and County Surveyor, Nyamira County did not participate in the exercise and also to give an explanation on the various issues raised by counsel for the 1st Defendant.

Whether the allegations of fraud on the part of the Plaintiff raised by the Defendants ought to be considered at this stage.

14. Learned counsel for the 1st Defendant submitted that that the Plaintiff was registered as the owner of the property three years before she became the Administrator of the estate of her father and as such her registration as the proprietor of the property was fraudulent. He was of the view that only a full hearing could unearth some contradictions in her averments. With all due respect to learned counsel for the 1st Defendant, the directions of the court were restricted to comments on the report. The issues of fraud ought to have been raised in the 1st Defendants Defence. I have considered the Defence filed by the 1st Defendant and I cannot see any Counterclaim raising the issue of fraud on the part of the Plaintiff or the locus standi of the Plaintiff.

15. It is therefore my finding that issues of fraud on the part of the Plaintiff and questions relating to how she became the registered owner of the suit properties ought not to be considered at this stage.

CONCLUSION

16. In the light of the foregoing, I am of the view that the report does not resolve all the issues in dispute and cannot be adopted as a judgment of the Court. In order for the parties to appreciate the report, the Land Surveyor, Kisii County is hereby summoned to appear before this court to give an explanation as to why the Land Registrar Kisii County and County Surveyor, Nyamira County did not participate in the process as ordered by the court on 3rd March, 2020 and to also to give a comprehensive explanation of all the findings contained in the report dated 26th October, 2020 and filed in this Court on 3rd November, 2020.

DATED, SIGNED AND DELIVERED AT KISII THIS 29TH DAY OF JULY, 2021.

J.M ONYANGO

JUDGE