



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 476 OF 2015**

**ALICE CHEPNGETICH KIMATI.....PLAINTIFF**

**VERSUS**

**TOM MONGARE NYARIKI.....1<sup>ST</sup> DEFENDANT**

**CHARLES KEMIGO KIMATI.....2<sup>ND</sup> DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Plaintiff filed suit against the Defendants seeking inter alia an eviction order and an order of injunction restraining the Defendants from trespassing, entering into or interfering with land parcel of L.R NO. NYAMIRA/NORTHMUGIRANGO/IKONGE/1642. He also sought an eviction order against the Defendants.

2. The 2<sup>nd</sup> Defendant filed a Defence and Counterclaim dated 12<sup>th</sup> November 2015, in which he claimed that the Plaintiff was entitled to Land Parcel No. NYAMIRA/NORTH MUGIRANGO/IKONGE/1642 measuring 3.3 Ha only. He prayed for an order directed at the Land Registrar Nyamira directing him to rectify the titles owned by the Plaintiff and the 1<sup>st</sup> Defendant being NYAMIRA/NORTH MUGIRANGO/IKONGE/1642 to measure 3.3 Ha, instead of 5.458 Ha and NYAMIRA/NORTH MUGIRANGO/IKONGE/1643 to measure 4.5 Ha instead of 4.74 Ha.

3. When the matter came up for mention on 20<sup>th</sup> July 2017, the court noted that the issues in dispute arose out of the sub-division of land parcels 1436 and 1437 (now 1642 and 1643). He therefore directed that the Land Registrar and County Surveyor, Nyamira visit the suit properties and delineate the boundaries thereof in accordance with the provisions of section 18 and 19 of the Land Registration Act, 2012 and file a report in court within 90 days.

4. Pursuant to the said order, the Land Registrar and County Surveyor visited the suit properties and filed their report dated 8<sup>th</sup> December, 2020. In the said report the said officers noted as follows:

*“The measurements taken on the said parcels of land were not tallying with the area map and the areas on the ground were smaller than the registered areas. Despite this and our earlier report, we managed to fix the boundaries of the above parcels and the Plaintiff was satisfied with the said process. See the Surveyor’s sketch and report for the said discrepancies and actual ground sizes) There is need for a Government mutation to correct the exaggerated sizes during the sub-division once the court process is done or ordered.”*

5. The court directed that the parties file their submissions on the said report and the Plaintiff and 2<sup>nd</sup> Defendant duly filed their submissions.

6. In his submissions, the Plaintiff agreed with the finding of the County Surveyor and Land Registrar and urged the court to adopt them as he was of the view that they had resolved the issues in dispute.

7. On the other hand, the 2<sup>nd</sup> Defendant contended that the report did not address all the issues in dispute. In particular, he noted that only the mutation form and area map that was used in the sub-division of parcel no. NYAMIRA/NORTH MUGIRANGO/IKONGE/407 had been annexed whereas the mutation form that created parcels 1642 and 1643 had been left out. He wondered where the 2.87 Hectares that had initially been allocated to the 2<sup>nd</sup> Defendant had disappeared to. He questioned the lack of the mutation form and cadastral maps used to sub-divide parcel 437 into parcels 1643 and 1642. 8. He wondered when the boundaries to the suit properties had changed and questioned the extent to which the 2<sup>nd</sup> Defendant had encroached on the Plaintiff’s land.

9. Having considered the report of the County Surveyor and the divergent views adopted by the Plaintiff and the 2<sup>nd</sup> Defendant and noting that the 2<sup>nd</sup> Defendant has raised the issue of fraud in his Counterclaim, the justice of the case would be served if the case goes for full hearing as the report does not resolve all the issues in dispute. The report shall form part of the court record and either party may call the Land Registrar and County Surveyor as witnesses to shed more light on the contents of the report.

**Dated, signed and delivered at Kisii this 13<sup>th</sup> day of July, 2021.**

**J.M ONYANGO**

**JUDGE**