



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELC NO. 28 OF 2017

ESTHER NJERI NDUNGU.....1ST PLAINTIFF

MILKA WANJIRU GIBSON.....2ND PLAINTIFF

VIELINA MUKAMI NDUNGU.....3RD PLAINTIFF

VERSUS

DISTRICT LAND SURVEYOR, MURANGA.....1ST DEFENDANT

DISTRICT LAND REGISTRA, MURANGA.....2ND DEFENDANT

THWE REGISTERED TRUSTEES OF PCEA - GITIBA CHURCH...3RD DEFENDANT

BOG- MUGECHA PRIMARY SCHOOL.....4TH DEFENDANT

BOG – MUGECHA SECONDARY SCHOOL.....5TH DEFENDANT

THE HON ATTORNEY GENERAL.....6TH DEFENDANT

JUDGMENT

1. The Plaintiffs' case herein as enumerated in the plaint dated 21/9/2012 was initially filed at the Nyeri High Court before the establishment of this Honorable Court. They *inter alia* sought a prohibitory order and/or permanent injunction against the Defendants by themselves, nominees or agents from transferring, interfering and/or in any way dealing with all those properties identified as Tile Nos. LOC.4/NAARO/1460, 1461, 1462, 1463 & 1464 (original being parcel LOC4/NAARO/433) hereinafter called the suit land.

2. Vide an application dated 9/3/2020, the 3rd Defendant sought leave to file an amended statement of defence and counter claim which was allowed on 21/9/2020. In it, the 3rd respondent raised a counter claim against the Plaintiffs for orders that;

a. That the proper boundary between parcels LOC.4/NAARO/865, 866 and 433 (now parcel 1460, 1461, 1462, 1463 and 1464) be established on the ground and the Registry Index Map (RIM) be amended accordingly such that the 0.6145 hectares or 1.53 acres of land belonging to parcel LOC.4/NAARO 865 and 866 be returned thereto.

b. Costs of the suit and the counterclaim.

3. The suit was opposed. Pretrial directions were taken and the matter set down for hearing. After numerous adjournments, the Plaintiffs' case was dismissed for want of prosecution/non-attendance on 22/6/2021.

4. Despite service the Plaintiffs did not file any reply to the Amended Defence and Counter claim. The Plaintiffs suit was therefore dismissed for want of prosecution/non attendance despite service of the hearing notice.

5. The counter claim was heard on 22/6/2021 in the presence of the Plaintiffs' Counsel. The 3rd respondent called 3 witnesses in support of his claim.

6. DW1- Joseph Karanja Kiruri, testified as the chairman of the Gitiba Cutch. He adopted his witness statement dated 7/6/2021. He relied on his List of Documents dated 4/6/2021 marked as DEx.1. He informed the Court that the Land Registrar had visited the subject suit land 3 times and reached conclusion that the Plaintiffs had encroached on the church land by 0.6145 hectares which is equal to 1.53 acres. He highlighted the Land Registrar's findings and recommendations on pages 2-3 of the report.

7. DW2 – Grace Nyamangu Njogu, the principal of the 5th Defendant informed the Court that she learnt of the instant dispute through the school Board of management and the Church leaders. She acknowledged the Land Registrar's and surveyor's visits to resolve the impasse and urged the Court to consider their reports as filed in its determination.

8. In cross examination by the learned Counsel Mr Ajulu on behalf of the Plaintiffs, the witness reiterated her evidence and stated that the Plaintiffs have encroached onto the 3rd Defendants land.

9. DW3- Alice Gisemba, the Murang'a County Land Registrar testified that she visited the suit land on 15/10/2019 and filed reports dated 30/11/2018 and a recent one dated 8/6/2021. She explained that the disputed boundary being the church's perimeter fence had been uprooted. In support of the counter claim, she recommended alignment of the ground position as per the surveyor's report who also attended the site visit.

10. Insisting that there was evidence of encroachment as per her report the witness in response to questions from Mr Ajulu for the Plaintiffs urged the Court to uphold the report and order that the boundary be aligned accordingly.

11. That marked the end of the 3rd Defendant's case.

12. Parties undertook to file their rival submissions and by the time of writing this judgement only the 3rd Defendant filed his submissions dated 27/7/2021.

13. The 3rd Defendant submitted that it was the registered owner of land parcel No. LOC.4/NAARO/865 whilst parcel no. LOC.4/NAARO/866 belonged to the 4th and 5th Defendants. That the said two parcels of land bordered LOC. NAARO/433 owned by the Plaintiffs and currently subdivided into parcels 1460 to 1464 both inclusive.

14. That sometime on 8/11/2011, the 3rd Defendant and School committees of the 4th and 5th Defendants held a meeting to determine boundaries of their respective parcels. They jointly approached the then DC Kandara to enable them commence the exercise. That all concerned parties were summoned and heard thereon and it was agreed that the Land Registrar and District Surveyor visit the subject properties on 19/4/2012 to establish physical boundaries on the ground.

15. That upon undertaking the site visit as agreed, the boundaries were established and beacons placed thereof. It is their contention that however, the Plaintiffs later uprooted the beacons and continued to trespass on the 3rd Defendants' land. That thereafter the Plaintiff's filed their suit and another site visit was ordered by this Court on 14/11/2018. The 3rd Defendant argued that his counter claim was necessitated by the finding that the Plaintiffs' had continued to encroach on their land requiring a remedy from this Court.

16. The 3rd Defendant relied on section 19 (1) of the Land Registration Act (LRA) that deals with Registrar's powers to determine of fixed boundaries. Reliance was placed on the case of **Fredrick Wainaina Njoroge & 2 other vs Stephen Kariuki Ndungu & 2 others [2021] eKLR** on Court's powers to determine boundaries disputed where the impugned boundaries have been fixed in accordance with section 20 of Land Registration Act. In view of the foregoing therefore, the 3rd Defendant is emphatic that the Plaintiffs cannot claim that their land was compulsorily acquired without compensation. The 3rd Defendant beseeched the Court to allow its counter claim as drawn.

17. The main issue for determination is whether the 3rd Defendant has proven its counter claim.

18. Section 107 of the Evidence Act requires that he who alleges must prove. It is trite that the burden of proof in civil matters as this one is on a balance of probabilities.

19. The 3rd Defendant's counter claim was not opposed. Further 3 witnesses adduced uncontroverted evidence in support of the counter claim. Among the witness was DW3 an expert witness who referred the Court to the report she compiled in the presence of all affected parties in this case. This was rightly so in compliance with Sections 16-19 of the Land Registration Act that is the applicable law herein that;

16. Power to alter boundary lines and to prepare new editions;

“(1) The office or authority responsible for the survey of land may rectify the line or position of any boundary shown on the cadastral map based on an approved subdivision plan, approved combination plan or any other approved plan necessitating the alteration of the boundary, in the prescribed form, and in accordance with any law relating to subdivision of land that is for the time being in force.

(2) Whenever the boundary of a parcel is altered on the cadastral map, the parcel number shall be cancelled and the parcel shall be given a new number.

(3) The office or authority responsible for the survey of land may prepare new editions of the cadastral map or any part thereof, and may omit from the new map any matter that it considers obsolete.

(4) Any rectification to the cadastral map in accordance with this section shall be notified to the Registrar by the submission

of the rectified cadastral map and all the approvals that necessitated the amendments”.

17. Approval for further surveys

“(1) Further surveys may be made for any purpose connected with this Act, but such surveys shall be used to amend the cadastral map only if it is approved by the office or authority responsible for the survey of land.

(2) This section shall not preclude the Registrar from keeping in the registry records of cadastral information and maps approved by the office or authority responsible for survey.

(3) The office or authority responsible for the survey of land shall submit to the Commission a copy of the cadastral maps relating to public land and the Commission shall be a depository of the maps”.

18. Boundaries

“(1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.

(2) 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.

(3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary: Provided that where all the boundaries are defined under section 19(3), the determination of the position of any uncertain boundary shall be done as stipulated in the Survey Act (Cap. 299)”.

19. Fixed boundaries

“(1) If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.

(2) The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.

(3) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section”.

20. The bundle of reports produced as DExh 1 are explicit that indeed the Plaintiffs encroached on the 3rd Defendant’s land by 0.6145 hectares or 1.53 acres. The 3rd Defendant urged the Court to be guided by the said reports in making its determination. Section 86 of the Land Registration Act empowers this Court to consider the Registrar’s opinion and in this case it was DW3’s opinion that indeed there is encroachment of the subject property.

21. In the case of **Azzuri Limited v Pink Properties Limited [2018] eKLR** the Learned Judges upheld the trial Court decision dismissing the appellants’ case for want of engaging the Land Registrars to determine a boundary dispute as outlined in the above provisions.

22. In the end, the 3rd Defendant’s claim succeeds. I enter judgement in favour of the 3rd Defendant as follows;

c. The Plaintiffs suit was dismissed on the 22/6/2021 for want of prosecution/non attendance.

d. That the proper boundary between parcels Loc.4/Naaro/865, 866 and 433 (now parcel 1460, 1461, 1462, 1463 and 1464) be established on the ground and the Registry Index Map (RIM) be amended accordingly such that the 0.6145 hectares or 1.53 acres of land belonging to parcel 865 and 866 be returned thereto.

e. The Land Registrar be and is hereby ordered to amend the boundaries in line with the Land Registrars and surveyor’s reports dated the 15/3/2019, 25/8/16, 30/11/2018 and 19/4/12; the Registry Index Map be and is hereby amended to reflect the ground position and the areas of the affected land parcels to be rectified accordingly.

f. I order each party to bear their costs.

23. It is so ordered.

DATED, SIGNED AND DELIVERED ONLINE AT MURANG'A THIS 15TH DAY OF SEPTEMBER 2021

J G KEMEI

JUDGE

Delivered online in the presence of:

1-3rd Plaintiffs – Absent

Mwambani for the 1st & 2nd Defendants

Jessee Kariuki for the 3rd Defendant

Mwambani for the 4th – 6th Defendants

Court Assistant: Alex/Kuiyaki