



REPUBLIC OF KENYA

IN ENVIRONMENT AND LAND COURT

AT KISII

ELC CASE NO. 17 OF 2019

GEOFREY MEKENYE OMOSA *Suing as the Administrator of the estate of*

KASMIR MEKENYE OMETE*.....**PLAINTIFF*

VERSUS

COUNTY GOVERNMENT OF KISII.....DEFENDANT****

RULING

INTRODUCTION

1. The Plaintiff filed this suit against the Defendant claiming that the Defendant had trespassed into his late father's property known as WEST KITUTU/BOGUSERO 1403 (hereinafter referred to as "*the suit property*") and commissioned the construction of Raganga Market thereon.
2. The Plaintiff complained that the Defendant's intentions were to take over the suit property without due regard to the rights and beneficial interests of the Plaintiff and other beneficiaries of the estate of the late Kasmir Mekenye Omete.
3. He averred that no notice of compulsory acquisition had been served upon them by the Defendant as required by law nor had any compensation been paid. He therefore prayed for a permanent injunction against the Defendant restraining her from interfering with the Plaintiff's ownership of the suit property or in the alternative, that the Defendant be compelled to compensate him.
4. On 13th June, 2019 when the matter came for inter-partes hearing of the Plaintiff's application for conservatory orders dated 23rd May, 2019, the court directed that the Land Registrar Kisii County, the Land Surveyor together with the County Physical Planner, Kisii to visit the suit property with a view to confirming whether there was any encroachment by the market on the suit property. The Surveyor was also ordered to furnish the court a sketch diagram depicting the layout of the suit property *vis-a-vis* the market plot on the ground.
5. On 25th January, 2021, a survey report dated 21st January, 2021 was filed in court by the County Surveyor. On 18th February, 2021 the court directed the parties to file their written comments on the report and both parties have filed their comments on the report.

ISSUES FOR DETERMINATION

6. The main issue for determination is whether the survey report is conclusive enough to determine this suit.

ANALYSIS AND DETERMINATION

7. In order to determine whether the County Surveyor's report resolves the issues in dispute, it will be necessary to reproduce the observations and the findings therein. The Report indicates as follows;

OBSERVATIONS

§ *The parcel of the Plaintiff West Kitutu/Bogusero/1403 borders parcel no. Kitutu/Bogusero/1403 which is reserved for Raganga market.*

§ *The market parcel cuts off across the Plaintiff's parcel of land to the east i.e. full width.*

§ The market parcel exists on both sides of a 20M road.

§ There is no definite boundary separating the two parcels.

FINDINGS

The market plot next to the Plaintiff's land is partly claimed and utilized by the Plaintiff's family. This is well is illustrated by the sketch attached where by:

- i. D=Part of market land that the Plaintiff's family has built a homestead on this comprises two permanent houses and one semi-permanent house. It measures 0.10Ha (approximately)
- ii. C=Where the market structure is built and the Plaintiff is laying a claim on.
- iii. B= This part of the market land is not disputed by the Plaintiff.

CONCLUSION

- The market plot has not encroached into the said parcel of the Plaintiff.
- The Plaintiff's family has encroached into the market plot as per findings above.
- The market structure is well within the market plot.

8. While the Defendant's agrees with the report since it vindicates its actions, the Plaintiffs disagree with it completely. Learned counsel for the Plaintiff argues that the report is inadequate as the same does not clearly outline the issue of boundaries between the disputed properties and that according to the observations made by the Surveyor, there is no definite boundary dividing the two properties. Counsel wondered how the Surveyor made a finding that the Plaintiff's family had encroached onto the market land while he had earlier found that there was no definite boundary dividing the properties.

9. Counsel further criticised the County Surveyor for failing to measure the acreage of the two properties in order to make a determination on the extent of encroachment by the Plaintiff to the market land. It was counsel's further submission that the Surveyor's report was so inconclusive that it could not determine the issues in dispute and therefore there was need for the matter to proceed to full hearing.

10. I have considered the submissions of the parties and the report by the Surveyor and my views are not different from those made by counsel for the Plaintiff. The purpose of referring this matter to the Land Registrar, County Surveyor and County Physical Planning Officer was for the said officers to establish whether there was encroachment by either party so as to the assist the court in arriving at a just decision.

11. In order to arrive at its conclusion, one would have expected the Surveyor to take the ground measurements of the two parcels of land, establish the boundaries and fix the beacons. Apparently this was not done. The report is not supported by the evidence on the ground and it therefore provides no assistance to this court in solving this dispute. It is surprising that the Surveyor would observe that there was no defined boundary between two disputed properties and go ahead to conclude that the Plaintiff had encroached to the Defendant's property. The extent of encroachment is also not indicated as the attached sketch map is bare and the explanation about the structures on the outlined portions is unclear and unhelpful.

12. In the premises, the report is inconclusive and cannot be adopted as a judgment of the court. Instead it shall form part of the court record. The case shall proceed for hearing so that both parties present their evidence and either party is at liberty to call the County Surveyor who prepared the report to shed more light on his findings.

Dated, signed and delivered at Kisii this 27th day of October, 2021.

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J.M ONYANGO

JUDGE