



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NYAMIRA
ELC CASE NO. 35 OF 2021

{Formerly at Environment and Land Court at Kisii Case No. 6 of 2016}

JOHN NYANG'AU MONYENCHE.....PLAINTIFF

- VERSUS -

NYAMUSI NYAMBOGA.....1ST DEFENDANT

NACKSON ONYANCHA MOMANYI.....2ND DEFENDANT

PERIS KEMUMTO MONYENYE.....3RD DEFENDANT

RULING

This matter was commenced by way of a Plaint dated 12/01/16 and filed in court on 14/01/16 for orders:

- a. of eviction of the defendant from piece of Land Parcel No. WESTMUGIRANGO/BOMANONO/135.
- b. Damages for illegal compensation of the same plus mesne profits.
- c. A permanent injunction restraining the Defendants from illegal occupation and/or cultivation of the suit land;
- d. Costs and interest.

The Defendants denied encroaching onto the Plaintiffs' parcel of land through their joint Defence dated 15/02/16 and filed in court on 17/02/16. The Plaintiff and 3rd Defendant have since died and on 04/04/19, the Plaintiff was substituted with **YUNUKE NYABOKE NYANGA'U**. The action against the 3rd Defendant abated since there was no substitution.

On 19/06/18, this court ordered that the Land Registrar, Nyamira and the County Surveyor do visit land parcel WEST MUGIRANGO/BOMANONO/1134,1135 and 1137 and delineate and fix boundaries on the parcels and the access road serving the Parcels and file a Report within 90 days. This Report was prepared on 2nd January 2019 and filed in court on 3rd January 2019.

Parties were thereafter invited to file and exchange their comments on the Report within 28 days with effect from 14/07/21. The Plaintiff's observation dated 18/08/21 were filed on 01/09/2021 while the 1st and 2nd Defendants filed theirs on 18/03/21 the same being dated 16/03/21 and another one dated 19/07/21 was filed in court on 26/07/21. Having considered the rival observations, the court would wish to invoke the Provisions of Section 18(2) of the Land Registration Act 2012:

“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.”

In the Case of *Andrew Mariqwa =Vrs= Josphat Ondieki Kebati ELC NO. 1163 of 2016 Justice Mutungi* stated as follows: -

“Recognizing the instant suit related to a boundary dispute which definitely the court lacked the technical ability to deal with, the court made a reference of the matter to the Land Registrar and the County Surveyor who are the persons mandated under the Act to deal with disputes relating to boundary. The Land Registrar is the custodian of the records

relating to land, has the technical ability or capacity to determine, establish and fix boundaries of parcels of land as required under the Land Registration Act, 2012.”

I echo with approval the words of Justice Mutungi and ask this Question. Once the Land Registrar has established the boundaries on the ground, what would the court proceed to hear? The defendants in their comments and observations mentioned above are in a way seeking that the Land Registrar's Report be disregarded and the matter fixed for hearing. They even appeared in court on 06/10/21 and pleaded with the court that the matter be referred to the elders of the community for arbitration and that the said elders do determine the correct boundaries. Should the court allow this plea what would the arbitration achieve? The matter would still remain a boundary dispute which the court cannot entertain under the Provisions of Section 18 (2) of the Land Registration Act, 2012. My view is that the Land Registrar's Report has finally disposed of the matter. I hereby endorse the Land Registrar's Report dated 2nd January 2019 as the Judgment of the court and direct that the same be implemented.

Having said so, what are the contents of the land Registrar's Report dated 2nd January 2019:

- That, the parcels of land are separated by two horizontal roads, one on the upper part and another on the lower part. After the lower road the land extends to the river.
- That, from the upper part of the road the boundaries were intact and the sizes on the map corresponded to the ground. But towards the lower road, the size of parcel No. 1135 was drastically reduced (encroached) by the proprietor of parcel No. 1134. This part is shaded in the Surveyor's Report.
- After the lower road towards the river, only parcel Nos. WEST MUGIRANGO/BOMANONO/1134 and 1137 have been occupying the region since the land was adjudicated on 14th August, 1973 to date.
- All the boundary lines were established for three proprietors on the upper part and two on the lower part as they had been utilizing the ground. On the map, it showed that three portions existed to the river which was contrary to the ground occupation. Since maps are not authorities in boundary determination I am of the view that the map should be amended to correspond with the ground.
- The proprietor of parcel No. WEST MUGIRANGO/BOMANONO/1134 should get out of the encroached part (shaded) region which belong to the Plaintiff WEST MUGIRANGO/BOMANONO/1135.
- The major borne of contention in the whole exercise was the claim of the Plaintiff (Parcel No. 1135) to occupy part of the land towards the river of which the court can arbitrate on.

The proposed verdict of the Land Registrar Nyamira in his Report dated 2nd January 2021 is adopted as the judgment of the court in terms of Prayer No. (a) of the Plaint dated 12/01/16 and I further order that the parties herein do comply with the Provisions of Section 20 (1) of the Land Registration Act, 2012 by maintaining in order any feature that demarcate the boundaries of the adjoining parcels of land. Failure to which the perpetrator will face the consequences of Sec. 21 (1) Land Registration Act 2012, and will be liable on conviction to imprisonment for a term not exceeding two (2) years or to a fine not exceeding Kshs. 200,000/= or to both.

As to the prayers Nos. (b) and (c) in the Plaint, parties are invited to make Submissions to pave way for the final judgment. The Plaintiff is given 14 days from today's date to file and serve his submissions and the Defendants 14 days thereafter to file their Submissions.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 21ST DAY OF OCTOBER, 2021

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Mobisa

Plaintiff: Present in person

Defendants: Present in person