



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAMIRA

ELC NO. 23 OF 2021

{Formerly at Environment and Land Court at Kisii Case No. 269 of 2014}

WILFRED OMWANSA.....1ST PLAINTIFF

JOHN NYARIKI BWONDIEKI.....2ND PLAINTIFF

JARED ABNER ISABOKE.....3RD PLAINTIFF

NELSON GWARO.....4TH PLAINTIFF

JULIUS TENDEKA.....5TH PLAINTIFF

SAMWEL ONDIEKI NYAKANGU.....6TH PLAINTIFF

VERSUS

JOYCE BONARERI MOGAKA.....1ST DEFENDANT

HON. ATTORNEY GENERAL OF KENYA.....2ND DEFENDANT

RULING

In this suit the Plaintiff sued the Defendants by way of a Plaint dated on 10/07/14 and filed the following day. They sought the following orders:

- 1) There be a permanent injunction restraining the 1st and 2nd Defendants, their agents, servants, and/or persons acting under them from calling a meeting, disposing, damaging, wasting, partitioning and intermeddling with land portion known Plot Numbers Mwangori Settlement Scheme/152, 201, 334, 468, 469 and 541 and from interfering with the peaceful occupation, possession, quite enjoyment and use of the land by the P**
- 2) A declaration that the Plaintiffs are the lawful registered owners of the aforesaid Plot Numbers Mwangori Settlement Scheme/152, 201, 334, 468, 469 and 541.**
- 3) Costs and interest.**
- 4) Any further relief this court would deem mete and just to grant.**

While only admitting that she is the registered proprietor of L.R. NO. NYAMIRA/ MWONGORI SETTLEMENT SCHEME/467 that neighbours the Plaintiffs' parcel of land known as NYAMIRA/MWONGORI SETTLEMENT SCHEME /152, 201, 334, 465, 469 and 541, the 1st Defendant denied the Plaintiff's claim. The 1st Defendant averred that the Plaintiffs occupy an area that is bigger on the ground than the actual measurements and/or acreage on the map and that the court cannot issue the orders sought in so far as they relate to the performance of the duties of the Public Officers. On 30th October, 2014 a temporary injunction was issued by this court restraining the Defendants from interfering with the Plaintiffs' proprietary rights over L.R. MWONGORI SETTLEMENT SCHEME/152, 201, 334, 468, 469, and 541 until the Hearing and determination of this suit. Issues were exchanged and Order 11 of the CPA eventually complied with and on 26/07/2016 the court certified the matter as ready for Hearing. Parties were then directed to take a Hearing date at the court registry. Before such Hearing, the Court was told from the Bar that the 4th and 5th Plaintiffs had passed on. On 20/05/19, the court directed that the

Land Registrar, Nyamira and County Surveyor do visit the locus quo to confirm the dimensions/boundaries on the ground. The Land Registrar was directed to also confirm who was/were in occupation of land parcel No. NYAMIRA/MWONGORI SETTLEMENT SCHEME/467. The Report was to be filed in court within 90 days and the matter was to be mentioned in court on 26/09/19. The said Report was duly filed on 07/11/19. When the Report was perceived by the Defendants' Advocate not to comply with the court order, the court summoned the Land Registrar to appear in

court on 27/01/20. He did not do so but when he finally appeared in court on 19/02/20 the court ordered the Land Registrar and the County Surveyor to re-visit the suit premises to ascertain whether indeed L.R. NO. NYAMIRA/MWONGORI SETTLEMENT SCHEME/467 exists on the ground and ascertain its boundaries, dimensions as well as the occupants thereof. Parties and their counsel were also allowed to be present during the visit. The Report was to be filed within 90 days. However, due to hostility on the ground this exercise was delayed. Mr. Mutua, the Land Registrar finally appeared in court on 27/10/21 after being summoned and undertook to file the Report by 03/11/21 and the matter was to be mentioned on 09/11/21. The same was filed on 03/11/21. On 09/11/21 the parties were allowed to file their comments on the Land Registrar's Report. The Report dated 02/11/21 by the County Surveyor states as follows: -

“Since all the above mentioned Title Numbers (i.e. MWONGORI SETTLEMENT SCHEME/467, 152, 201, 334, 468, 469 and 641) are a result of Sub-division of original No. 90 we used subsequent mutation forms.....After taking ground measurements, we came up with the provided sketch showing ground positions of all mentioned parcels of land and their acreages (we attached sketch.)”

The Land Registrar concluded that

“After taking the ground dimensions it was established that all these parcels exist on the ground and on the parcel although there were encroachments. Parcel MWONGORI SETTLEMENT SCHEME 467 exists on the ground and was very well provided for by the records and it had all the set out dimensions intact although it has been encroached onto by the proprietors of

parcels MWONGORI SETTLEMENT SCHEME 152 and MWONGORI SETTLEMENT SCHEME 541 leading to full destruction of its boundaries.....Having established the above, beacons were placed on the ground and the parties were shown and we informed them of the same which they acknowledged.”

I invited the parties to file and serve their comments on the Report and the 1st Defendant and 1st Plaintiff filed their Reports on 15/11/21 and 16/11/21 respectively. The 1st Plaintiff disputes the genuineness of the Land Registrar's Report and claims that the Land Registrar did not even do the actual assessment but remained in his Motor Vehicle sending his staff to carry out the measurements. And so was the case with the County Surveyor, Mr. Abuga. The 1st Defendant on the other hand concluded that the Land Registrar's Report is conclusive and urged the court to adopt the same.

I wish to address the concerns of the 1st Plaintiff as documented in his Affidavit sworn on 16/11/21. The first issue that the 1st Plaintiff raised under paragraph 5 is that since no representation of the deceased Plaintiffs Nos. 4, 5 and 6, no proceedings could be handled over their properties as the same would amount to intermeddling with their estate contrary to the law. The deponent proceeds to say;

“.....it is unfortunate that regardless of the Notice they proceeded to indicate that they were present and participated in the proceedings.”

When are the above Plaintiffs said to have died? On 16/10/18 the Plaintiffs' Advocate Mr. Nyambati informed the court that the 4th and 5th Plaintiffs were already deceased. Nothing was done about it. We are not told when the 6th Plaintiff died. If indeed the said parties died as Counsel for the Plaintiffs told the Court, the suit in favour of the 4th and 5th Plaintiffs must therefore have abated latest by 16/10/19. No evidence has been brought to the attention of the Court that any of the Plaintiffs herein is deceased and the court cannot infer it from the bar or through unsubstantiated sworn submissions. Parties have been in court severally since and no substitution was ever sought. If the beneficiaries of their Estate slept on their rights then they should not raise it now after the Report seems not to have favoured them. I wonder whether this would have been an issue had the Report gone their way.

On the issue of the Surveyors forbidding the 1st Plaintiff from taking measurements over his land on the ground, this was not the work of the Plaintiff. This was purely the business of the Land Registrar and the County Surveyor and the order is very clear on this. All that the parties and their advocates were to do is to be present and witness the exercise. Otherwise, if the 1st Plaintiff was to do what he was denied by the County Surveyor, this would have amounted to interference with the latter's work.

On the issue that this is not a boundary dispute the parties herein agreed that it was such a dispute and if it was indeed not so then the Plaintiffs should have said so before they acquiesced to the visit. In fact, it is the 1st Defendant who had brought up this issue in his Defence filed on 04/09/14 and the Plaintiffs did not file a Reply to Defence either to admit it or to insist that it was not a boundary issue as raised in the Plaint. Under paragraph 19 of the said Plaint the Plaintiffs claim that there was a boundary dispute raised by others but that to them it was not so. This thought is carried through to paragraph 25 of the Plaint. The same thought is evident under paragraphs 5 and 6 of the First Plaintiff's statement dated 10th July 2014 and

paragraphs 6 and 7 of Eric Omwenga Ondieki's statement of even date. And in court before the matter was referred to the Land Registrar, it was unanimously agreed that there was a boundary dispute.

On the issue of Adverse Possession this is not a case for adverse possession at least from the pleadings.

On measurements of the land, if indeed the measurements on the ground are different from what is on record, then which one should carry the day? Certainly the paper acreage will not help anyone. We should go by what is on the ground because the acreage in the documents will not translate into land.

As this court has held in a number of occasions, the law is very clear on an issue such as this where there is a boundary dispute. Having considered the Report, the court invokes 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 Marigwa =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.”

What would the court achieve by visiting the locus quo as suggested by the First Plaintiff under paragraph 30 of his Affidavit or by proceeding to hear the case once the Land Registrar has established the boundaries on the ground.

It follows that the Resolution of boundary disputes has always been in the purview of the Land Registrar. Section 21 of the Repealed Act reads as follows:

21. (1) Except where, under section 22, it is noted in the register that the boundaries of a parcel have been fixed, the registry map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.

(2) Where any uncertainty or dispute arises as to the position of any boundary, the Registrar, on the application of any interested party, shall, on such evidence as the Registrar considers relevant, determine and indicate the position of the uncertain or disputed boundary.

(3) Where the Registrar exercises the power conferred by subsection (2), he shall make a note to that effect on the registry map and in the register and shall file such plan or description as may be necessary to record his decision.

(4) No court shall entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in this section.

(5) Except where, as aforesaid, it is noted in the register that the boundaries of a parcel have been fixed, the court or the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as it is or he thinks fit.

The provisions of **Section 18 (2)** of the Land Registration Act are a replica of **Section 21(4)** of the Repealed Registered Land Act. It was not in vain that this provision was left intact in the new Act since the Land Registrar is endowed with the expertise that the Court doesn't have which enables it to resolve the conflicts expeditiously.

The Report of the Land Registrar, Nyamira dated 02/11/2021 has finally disposed of the matter. The Report is hereby adopted and I give a determination based on the same as the Judgment of the court and I further direct that the same be implemented forthwith and 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. And since the Report finally disposes of this matter the Ruling translates as the Judgment of the Court.

Ruling dated, signed and delivered at Nyamira this 30th day of November, 2021.

MUGO KAMAU

JUDGE

In the Presence of: -

Sibota – Court Assistant

Mr. Nyambati for 1st, 2nd & 3rd Plaintiffs

Mr. Bosire/Mr. Ongeri holding brief for Mr. Ochoki