



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT HOMABAY

ELC CASE NO. 6 OF 2021

(FORMERLY MIGORI ELC CASE NO 15 OF 2020)

AMOS MWAI OYOO.....PLAINTIFF

VERSUS

THE HON. ATTORNEY GENERAL.....1ST DEFENDANT

PAUL MBUYA OCHIENG.....2ND DEFENDANT

RULING

1. This ruling is in respect of a report reference number RACH/LND/CO/VOL.1/20 dated 7th September 2020 prepared by the Land Registrar Rachuonyo East, South and North Sub Counties (the report herein) and the same reads in part:

“This number parcel 4406 is not captured anywhere on the area map but the original number 3098 is still on the map, it has never been subdivided (Emphasis laid)

2. Moreover, the report concludes thus:

“Land parcel number Central/Kasipul/Kamuma/4406 (the suit land herein) was and fraudulently created and exists only on paper and not on the ground or map. (Emphasis mine)

Parcel numbers Central Kasipul/Kamuma/5882 and 5883 (the other land parcels herein) properly exist on the ground and the map and were properly and legally processed by the survey office.”

3. Notably, the report was prompted by this court’s orders given on 22nd July 2020 upon hearing counsel for the respective parties. The orders read, inter alia;

a) “The Land Registrar, Rachuonyo based at Kosele and the County Surveyor, Homa Bay to visit the suit Land, LR No. Central Kasipul/Kamuma/4406 and other Land Parcels namely LR Nos. Central Kasipul Kamuma/5882 and 5883 to establish if there is any encroachment into the said Parcels of Land and whether the same exist and file report(s) in this court within the next 75 days form this date”.

4. It is important to note that the plaintiff through Rachuonyo and Rachuonyo Company Advocates commenced this suit by way of a plaint dated 14th April 2020 seeking the following orders;

i) A declaration that the Plaintiff is the absolute proprietor of LAND REFERENCE NUMBER CENTRAL KASIPUL/KAMUMA 4406. (The suit land herein)

ii) A declaration that the alleged Title Deed issued (if any) to Paul Mbuya Ochieng naming him as the absolute proprietor of the suit land or any part thereof is null and void.

iii) An order directed at the 1st Defendant for the immediate restoration of the suit land in the names of the Plaintiff.

iv) An order permanently restraining the Defendants by themselves, servants and/or agents from entering upon, selling, alienating or otherwise disposing or in any other way dealing in the suit property without the express written consent or authority of the Plaintiff.

v) General damages

vi) Costs of the suit.

5. Briefly, the plaintiff's lamentation is that he is the registered owner of the suit land upon purchase for valuable consideration. That he had been enjoying peaceful and quiet possession of the same until March 2020 when the 2nd defendant invaded the suit land, demolished structures which had been erected thereon and fenced it using iron sheets hence preventing him from accessing and or enjoying the suit land. That immediately, he established that the 2nd defendant had been registered as the owner of the suit land by the Land Registrar, Rachuonyo through fraud and he pleaded particulars of fraud at paragraph 10 of the plaint. Thus, it precipitated the instant suit.

6. The 1st defendant was duly served herein. He neither entered an appearance nor filed a statement of defence in this suit.

7. The 2nd defendant filed his statement of defence dated 4th May 2020 on 6th May 2020 through the firm of O M Otieno and Company Advocates. He denied the plaintiff's claim and prayed that it be dismissed with costs to him. He stated in part that the creation of the title and registration of the suit land in the name of the plaintiff was fraudulent and proceed to set out particulars of fraud on the part of the plaintiff at paragraph 4 of his pleading.

8. On 17th August 2021, this court ordered and directed thus;

"...the parties to extract copies of the report and file and serve comments thereon within the next 60 days from this date..."

9. As a result, the plaintiff filed no submissions herein

10. The 2nd defendant filed submissions dated 15th June 2021 and urged the court to dismiss this suit with costs. Counsel relied on the contents of the report especially the conclusion part of it, **sections 18 and 9 of the Land Registration Act, 2016 (2012)** and **section 27 of the Civil Procedure Act Chapter 21 Laws of Kenya. (The CPA herein)**.

11. Learned counsel for the 2nd defendant filed issues for determination as perceived by the 2nd defendant together with the statement of defence. The issues include whether the plaintiff is entitled to orders sought in the plaint.

12. I have thoroughly considered the report, the parties' respective pleadings and the submissions of the 2nd defendant in their entirety. On that score, has the report finally determined all the issues in this suit?

13. It is pretty clear from the report that the suit land does not exist on the ground or the map as stated in paragraphs 1 and 2 herein above. The other land parcels are contained in Registry Map Sheet number 24 and they are located in Kasipul within Homa Bay County.

14. This court's orders as stated in paragraphs 3 and 8 hereinabove were made in the spirit of Article 159 (2) (b) of the Constitution of Kenya, 2010 which stipulates;

"Justice shall not be delayed."

15. Sections 18 and 19 of the **Land Registration Act, 2016 (2012)**, provide for establishment of approximate boundaries and approximate situation of registered parcels of land. I note the said provisions accordingly.

16. It is noteworthy that, the report herein is an opinion evidence as provided for under **sections 48 to 54 of the Evidence Act Chapter 80 Laws of Kenya**. The same is persuasive in nature,

17. On that account, the court is at liberty to accept or reject expert/opinion evidence depending on the facts and circumstances of the case; see **CD Desouza-vs-BR ShaRMA (1953) 26 KLR 41 at 42**.

18. In the case of **Andrew Marigwa vs Josephat Kebati Ondieki (2017) eKLR**, John Mutungi J made an observation hereby endorsed, that the Land Registrar and Surveyor had the technical ability and capacity to deal with the issues of land boundaries of registered land. That, in that case, they had implemented the court's orders and presented their reports which finally determined the dispute; see also my decision in the case of **Registered Trustees, Legio Maria Africa Church Mission versus Simeon Nyamweya Obwocha (2018) eKLR**.

19. Plainly, the parties were accorded their rights under Articles 48 and 50 (1) of the Constitution of Kenya, 2021 as discerned at paragraphs 1, 2, 3 and 8 hereinabove; see also the Court of Appeal decision in the case of **James Kanyũta Nderitu and another vs Marios Philotas Ghikas and another (2016) eKLR**.

20. The report is not challenged by the plaintiff. It is cogent, instructive and I find no reason to reject the same. The plaintiff was given an opportunity to respond to it but failed to do so.

21. It is thus, the finding of this court that that report has demonstrated that the suit land does not exist on the ground or the area map. Clearly, the suit land is foam in character and not favourable to the plaintiff's claim.

22. In that scenario, the plaintiff's claim is a bubble. He is not entitled to the reliefs sought in the plaint as the report has finally determined

all the issues in this dispute.

23. Wherefore, the plaintiff's suit originated by way of a plaint dated 14th April 2020 and filed herein on 15th April 2020, be and is hereby dismissed.

24. Costs of the suit to be borne by the plaintiff given the outcome of the suit as noted in paragraph 23 hereinabove and by dint of the proviso to section 27 (1) of the CPA.

DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 9TH DAY OF DECEMBER 2021.

G M A ONG'ONDO

JUDGE

In the presence of;

Parties – absent

Mr. J.O Oumo holding brief for O.M Otieno for the 2nd defendant.

Okello, court assistant.