



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**ELC CASE NO. 491 OF 2013**

**GILBERT AGATA NYAMWAYA.....1<sup>ST</sup> PLAINTIFF**

**AGATA NYAMWAYA.....2<sup>ND</sup> PLAINTIFF**

**GAUDENCIA ALARO NYAMWAYA.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**CLIFF NYABUTI NYAKUNDI.....1<sup>ST</sup> DEFENDANT**

**ALFRED NYAMWAYO MATAGARO.....2<sup>ND</sup> DEFENDANT**

**PETER MOSE MATAGARO.....3<sup>RD</sup> DEFENDANT**

**JOEL B. MATAGARO.....4<sup>TH</sup> DEFENDANT**

**WILLIAM NYAMWAYA MATAGARO.....5<sup>TH</sup> DEFENDANT**

**LAND REGISTRAR NYAMIRA.....7<sup>TH</sup> DEFENDANT**

**HON. ATTORNEY GENERAL.....8<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiffs filed suit against the Defendants alleging that the 1<sup>st</sup> to 5<sup>th</sup> Defendants had trespassed onto the Plaintiff's land parcel number WEST MUGIRANGO/BOSAMARO EAST/1055 (hereinafter referred to as the suit property) and interfered with the common boundary between the suit property land parcels number WEST MUGIRANGO/BOSAMARO EAST 614 and 616 which are registered in the names of Stephen Nyakundi and Matagaro Tiesoi (both deceased), who were the fathers of the 1<sup>st</sup>-5<sup>th</sup> Defendants. The Plaintiffs also claimed that the Defendants had interfered with a road of access which runs on the boundary of parcels number 614 and 616 and leads to the suit property. The Plaintiffs filed a complaint with the Land Registrar Nyamira who visited the properties in dispute and prepared a report whose contents the Plaintiffs disputed. The Plaintiffs therefore seek the following reliefs against the Defendants jointly and severally:

- i. A declaration that L.R No. WEST MUGIRANGO/BOSAMARO EAST/1055 measures 0.46 Hectares as lawfully registered and reflected in the Green Card and not 0.38 Hectares as alleged and/or contained in the offensive report dated 15.11.2012 albeit given under the seal of 6<sup>th</sup> Defendant on the 21.12.2012.
- ii. A declaration that the report dated 15.11.2012 albeit given under the seal of the 6<sup>th</sup> Defendant is illegal, unlawful and void for all intents and purposed
- iii. An order compelling the 6<sup>th</sup> Defendant to revisit the concerned parcels of land herein that is L.R No. WEST MUGIRANGO/BOSAMARO EAST/614, 616 and 1055 and while thereat to demarcate the boundaries thereof, in accordance with the records held/and or kept at the District Land Registry, Nyamira County and to reopen the road of access leading to the suit land, which has since been restricted and/or encroached upon by the 2<sup>nd</sup>-5<sup>th</sup> Defendants.
- iv. An order of eviction and demolition of the structures built and/or constructed on the road of access by the 2<sup>nd</sup>-5<sup>th</sup> Defendants, which has since been reduced to 2 metres in lieu of 6 metres demarcated on the Registry Index Map.

v. Permanent injunction restraining the 1<sup>st</sup>-5<sup>th</sup> Defendants either by themselves, their servants and/or anyone claiming under the Defendants from entering upon, re-entering, trespassing onto, building structures on, cultivating, interfering with an/or in any other manner dealing with the portion of the suit land, that is L.R No. WEST MUGIRANGO/BOSAMARO EAST/1055 measuring 0.8 Hectares and/or any portion thereof.

vi. General damages for trespass.

vii. Interest on (vi) above at court rates.

viii. Costs of this suit be borne by the Defendants.

ix. Such further or other relief that the Honourable Court may deem fit and expedient to grant.

2. Upon being served with Summons to enter appearance, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Defendants entered appearance and filed their joint statement of defence denying the Plaintiffs' claim that they had trespassed onto the suit property or interfered with the common boundary. They further denied that they have encroached on any portion of the road of access leading to the Plaintiffs' land. The 6<sup>th</sup> and 7<sup>th</sup> Defendants entered appearance but did not file any defence.

3. On the 6<sup>th</sup> day of March 2017, the Court with the consent of the parties directed the Land Registrar and County Surveyor to visit the properties in dispute for purposes of establishing if there was any encroachment and file their report in court within 90 days. The said Land officials visited the suit property and filed their report dated 23<sup>rd</sup> May, 2018.

4. Thereafter, the parties were directed to file their comments on the said report. The court noted that the dispute centered on a pathway that the parties had used for a long time which runs along land parcels number 615, 616 and 1055. The report indicated that the Registry Index Map did not provide for the said access road. However, the Land Registrar and Surveyor recommended that since the footpath had existed for a long time it ought to be provided for on the map. The court noted that since this case is merely one of trespass and none of the parties had claimed an easement over the other's land, the report did resolve the issues in dispute. The court therefore directed that the report forms of the court record. The suit was subsequently set down for hearing and the parties were advised that they were at liberty to call the Land Registrar and Surveyor to shed more light on their report.

#### **PLAINTIFF'S CASE**

5. The 1<sup>st</sup> Plaintiff testified as PW1. He stated that he, together with the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs were jointly registered as proprietors of land parcel number WEST MUGIRANGO/BOSAMARO EAST/1055 measuring 0.46 Hectares. He told the court that he shares a boundary with the 1<sup>st</sup> Defendant who was his nephew and the owner of land parcel no. WEST MUGIRANGO/BOSAMARO EAST/614 and the 2<sup>nd</sup> Defendant who was the registered owner of land parcel No. WEST MUGIRANGO/BOSAMARO EAST/616. He explained that there was no road of access between his land and the Defendants' land as parcels number 614 and 616 were supposed to access the main road on the lower part of their land. He told the court that the access road that existed terminated at his home. He complained that sometime in 2003 the Defendants had interfered with the common boundary between parcels 1055, 614 and 616, entered his land and put up structures on a portion of the road leading to his land. As a result of the said encroachment, he was unable to access his land using a motor vehicle.

6. He testified that he reported the matter to the Land Registrar who visited the land on 24<sup>th</sup> October 2012 and prepared a report dated 15<sup>th</sup> November 2012. He contested the accuracy of the report which indicated that his land measures 0.38 Hectares instead of the registered acreage of 0.46 Hectares. He also complained that the Land Registrar failed to mark the boundary between his land and the Defendants' land.

7. The Plaintiff called Solomon Njoga, a Private Surveyor as PW2. He testified that he visited parcels no. 1055, 614 and 616 on 5<sup>th</sup> April 2018 in the company of the Land Registrar and County Surveyor and the parties herein pursuant to a court order. He stated that according to his observation, there was no encroachment by the Defendants onto the Plaintiff's parcel no. 1055. However, the Defendants had created a road measuring 3m wide and 160m long on parcel no. 1055 which did not exist in the Registry Index Map. It was his evidence that the owners of parcels 614 and 616 did not need to create a road on the parcel no. 1055 as they could access the main road using the road on the lower side of their land.

8. Upon cross examination, he stated that there was a slight discrepancy in the acreage on the ground and what was in the map. He confirmed that apart from the road that had been created on parcel 1055, there was no other form of encroachment. In re-examination he clarified that the road served no purpose and parcel no. 614 and 616 were able to access the main road through a different access road. He also stated that the road had extended into parcel no. 1055 by 3metres.

#### **DEFENDANT'S CASE**

9. Three witnesses testified in support of the Defence case. The 1<sup>st</sup> Defendant testified as DW1. He stated that parcel no WEST MUGIRANGO/BOSAMARO EAST/614 was registered in the name of his late father who died in 2012. He told the court that there was a kay apple fence between parcel no. 614 and 1055 which had been in existence since 1985. He denied that he had encroached on parcel no. 1055.

10. Alfred Nyamwayo Matagaro, the 2<sup>nd</sup> Defendant testified as DW2. He stated that he was staying on his late father's land parcel no. WEST MUGIRANGO/BOSAMARO EAST/616. He stated that there was a footpath on the said parcel of land which had been created by his grandfather many years back. He stated that the said footpath passes along parcel no. 1055.

11. Upon cross-examination he stated he was present when the Land Registrar and County Surveyor visited the suit properties. He said that he had seen the report prepared by the Land Registrar and Surveyor which indicated that his houses have interfered with parcel no. 1055, particularly the access road. He denied that he has encroached on parcel no. 1055. He stated that he could access the Health Centre through an alternative road. He confirmed that there was footpath between parcels 616 and 1055 but he was not aware that it was illegal. He confirmed that the access road to the Plaintiff's land was very narrow and he could not access it using a motor vehicle.

12. The 3<sup>rd</sup> Defendant Peter Mose Matagaro testified as DW3. He stated that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were his brothers but he does not stay on land parcel no. 616 as he had moved to a different location in 1967. He denied that his brothers who live on parcel no. 616 had encroached on the Plaintiffs' land.

13. The 6<sup>th</sup> and 7<sup>th</sup> Defendants did not tender any evidence and therefore their case was marked as closed. Thereafter the parties were given time to file their written submission and the Plaintiffs, 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed their submissions.

## ISSUES FOR DETERMINATION

14. Having considered the pleadings, oral and documentary evidence and the rival submissions, the issues for determination are:

1. Whether the 1<sup>st</sup> to 5<sup>th</sup> Defendants have *locus standi* to be sued.
2. Whether the suit is wrongly before the court.
3. Whether the 1<sup>st</sup> to 5<sup>th</sup> Defendants have trespassed onto the Plaintiffs' land parcel no. WEST MUGIRANGO/BOSAMARO EAST/1055.
4. Whether the Plaintiffs are entitled to the reliefs sought.

## ANALYSIS AND DETERMINATION

15. It is not in dispute that land parcel number WEST MUGIRANGO/BOSAMARO EAST/614 is registered in the name of Stephen Nyakundi Nyamwaya - deceased who was the father of the 1<sup>st</sup> Defendant, while parcel number WEST MUGIRANGO/BOSAMARO EAST/616 is registered in the name of Matagaro Tiesoi - deceased who was the father of the 2<sup>nd</sup>-5<sup>th</sup> Defendants. It is also not in dispute that save for the 3<sup>rd</sup> Defendant who testified that he moved from the suit property in 1967, the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants are in occupation of the parcels number 614 and 616 respectively. The acts of trespass complained of by the Plaintiffs are being committed by the said Defendants in their individual capacity and not as administrators of their deceased fathers. It is therefore my finding that they have the *locus standi* to be sued.

16. The second issue for determination is whether the suit is wrongly before the court. Counsel for the 1-4<sup>th</sup> Defendants has submitted that the Plaintiffs have wrongly invoked the court's jurisdiction by filing this suit after they sought the Land Registrar's intervention. He has cited the provisions of section 86 of the Land Registration Act which provides that:

Section 86.

***"If any question arises with regard to the exercise of any power or performance of any duty conferred or imposed on the Registrar by this Act, the Registrar or any aggrieved person shall state a case for the opinion of the Court and thereupon the Court shall give its opinion, which shall be binding upon the parties"***

17. It is counsel's contention that the Plaintiffs filed a normal suit instead of stating a case for the court's opinion and therefore did not follow the right procedure. Whereas I agree with counsel's submission, am alive to the provisions of Article 159 2 (d) which enjoins the court to administer justice without undue regard to procedural technicalities. I am therefore disinclined to dismiss the Plaintiff's case on this ground.

18. On the question of trespass, it is clear from the report by the County Surveyor dated 15<sup>th</sup> May 2018 indicating that the disputed area marked B-C on the Sketch Map which is a 3 meter wide footpath on parcel 1055 adds up to about 0.05 Ha. He is of the opinion that this is within the acceptable margin of error because general boundaries are marked as approximate and not exact measurements. He recommended that the 3 metre encroachment be resolved amicably out of court.

19. Having considered the evidence on record, it is clear that the Plaintiffs are not ready to resolve this matter amicably. In his testimony DW2 admitted that their grandfather created a footpath on the Plaintiff's land which is still in use. He also conceded the road to the Plaintiff's land is now very narrow and the Plaintiffs are not able to access it using a motor vehicle. In the circumstances, I do find and hold that the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants have trespassed on the Plaintiff's land by using it as a footpath. The Plaintiffs as the registered owners of parcel no. WEST MUGIRANGO/BOSAMARO EAST/1055 is therefore entitled to protection of the law as provided in section and section 24 and 25 of the Land Registration Act No 3 of 2012 The said section provide as follows:

***Section 24 "The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto".***

Section 25 (1) of the said Act further provides that:

***“The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to any lawful encumbrances, set out in this section”.***

20. In view of the foregoing, the Plaintiff’s suit succeeds in part and I make the following final orders.

(i) The Land Registrar and County Surveyor Nyamira County are hereby ordered to visit land parcels No. WEST MUGIRANGO/BOSAMARO EAST/1055, 614 and 616 and open the road of access leading to WEST MUGIRANGO/BOSAMARO EAST/1055 which has since been restricted or encroached on by the Defendants.

(ii) The Defendants shall vacate and/or remove any structures on the said access road within 30 days failing which the Plaintiffs shall be at liberty to demolish the said structures in order to open up the road to the width of 6 metres.

(iii) An order of permanent injunction is hereby issued restraining the Defendants by themselves, agents, servants and/or anyone claiming under them from entering upon, re-entering, trespassing onto, building structures on, cultivating, interfering with or in any other manner dealing with the portion of parcel No. WEST MUGIRANGO/BOSAMARO EAST/1055 measuring 3 metres which forms part of the access road to the Plaintiff’s land.

(iv) The costs of the suit shall be borne by the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants jointly and severally.

**DATED, SIGNED AND DELIVERED AT KISII THIS 8TH DAY OF DECEMBER, 2021.**

**J.M ONYANGO**

**JUDGE**