

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

CIVIL SUIT NO. 697 OF 2016

NELSON ANYOKA NYAEMA.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF NYAMIRA.....DEFFENDANT

RULING

1. By an Amended Plaint dated 26th February 2014 the plaintiff instituted suit against the defendants claiming that the 1st defendant had unlawfully entered into the plaintiff's land parcel no. NORTH MUGIRANGO/BOKEIRA 11/432 and converted it into an open air market. The plaintiff seeks an order of eviction against the defendants, its servants and/or agents and a permanent injunction restraining the defendants from interfering with the plaintiff's parcel of land known as NORTH MUGIRANGO/BOKEIRA 11/432.

2. In its Amended Statement of Defence dated 20th December 2014 the 1st Defendant denies that it unlawfully entered into the plaintiff's land or converted the same into its own use as an open air market and denies that the plaintiff is entitled to an order of eviction. The 1st defendant further states that the livestock market at Nyamira market is situated within the 1st defendant's land parcel no. NORTH MUGIRANGO/BOKEIRA 11/405 and that the said market has been in existence since the 1970s serving a large community of livestock traders from Kisii and Luo land.

3. The 2nd defendant filed its statement of defence dated 21st April 2016, in which it denies that the suit property has ever been registered in the plaintiff's name and states that the suit property has at all material times been an open air market.

4. When the suit came up for hearing on 26th September 2016 the court issued an order directing the Land Registrar and County Surveyor Nyamira County to visit the land parcels no. NORTH MUGIRANGO/BOKEIRA 11/432 and NORTH MUGIRANGO/BOKEIRA 11/405 and establish the boundaries and dimensions of the two parcels of land. The Land Registrar was also directed to furnish the court with a certified copy of the Registry Index Map showing the position and delineation of the two parcels of land and file a report within 90 days.

5. The land Registrar and County Surveyor Nyamira visited the two parcels of land and on 22.3.2018 and filed their reports on 3.4.2018. The plaintiff disputed the contents of the report and filed an application dated 28th May 2018 seeking to set aside, vary or review the said reports. When the application came up for hearing on 23.9.2019, the plaintiff indicated that he wanted to cross-examine the County Surveyor on his report. The County Surveyor and Land Registrar were subsequently summoned to appear in court on the 12th November 2019 for purposes of being cross-examined on their reports.

6. Robert Atika Torori , a Surveyor in the Nyamira County offices stated that he had accompanied the Land Registrar on a site visit on land parcel no. NORTH MUGIRANGO/BOKEIRA 11/432 and 405 and filed a report dated 27.3.2018. Upon cross-examination by counsel for the plaintiff he stated that they had visited the two parcels of land pursuant to a court order dated 30.9.2018 which directed them to establish the dimensions and boundaries of the two parcels of land and furnish the court with a certified copy of the current Registry Index Map, showing the position and delineation of the 2 parcels of land. He stated that on the map there is a 10 metre road separating the two parcels of land but the said road does not exist on the ground as the owner of land parcel number NORTH MUGIRANGO/BOKEIRA 11/432 has encroached on it. He stated that there was nothing in the survey map to show that the plaintiff's land extends beyond the road. He stated that land parcel no. NORTH MUGIRANGO/BOKEIRA 11/ 405 was situated beyond the 10 meter road. He said that the plaintiff had put up mabati structures along the 10 metre road. He stated that the encroachment did not reach the County Government's land.

7. Charles Mutua, the Land Registrar Nyamira testified that he visited the two parcels of land on 22.3.2018 and prepared a report. He confirmed that the plaintiff was present during the site visit though he did not record his presence. He said he did not furnish the court with a copy of the Registry Index Map as it was not in his possession. He said that his report should be read together with the County Surveyor's report. He said that when they visited the site they summoned all the neighbours who showed them the original parcel of land known as NORTH MUGIRANGO/BOKEIRA 11/81. He also stated that there was a road separating the two parcels of land though the plaintiff had encroached on the road. He stated that the 2 parcels of land are in two distinct registration sections with distinct boundaries and there was no way the plaintiff's land could form part of the County Government's land.

8. After the County Surveyor and the Land Registrar testified, counsel of the plaintiff indicated that he wished to call the plaintiff's private surveyor to present his report and the court adjourned to allow the said surveyor to come and testify.

9. On 2nd December 2019 Solomon Njoga a Surveyor with Geoflex Consultants testified that he was engaged by the plaintiff to visit the site and establish the boundary between land parcel no. NORTH MUGIRANGO/BOKEIRA 11/405 and NORTH MUGIRANGO/BOKEIRA 11/432. He stated that when he visited the site he established that there was an old existing historical road bordering Bokeira location and Magwagwa location. He said that the plaintiff's land was in Bokeira location while the defendant's land was in Magwagwa location. He

stated that there was no encroachment by either party. He stated that the 10 metre road which separates the two parcels of land was intact. He stated that the only discrepancy he found was that land parcel no. NORTH MUGIRANGO/BOKEIRA 11/432 was slightly longer on the ground than on the map by about 4 meters.

10. Upon cross-examination by counsel for the 2nd defendant, he said he stated that at the time he visited the site he was aware that there was a court case. He said he did not inform the County Government about his visit.

11. From the evidence adduced by the County Surveyor, Land Registrar and the Private Surveyor it is clear the two parcels of land are separate and distinct. The Plaintiff's land is in Bokeira location while the County Government's land is in Magwawa location. The point of departure is whether or not the Plaintiff has encroached on the 10 meter road separating the two parcels of land. Whereas the County Surveyor and Land Registrar maintain that the plaintiff has encroached on the said road, the private surveyor states that the road is intact. The question of trespass by the defendants has also not been adequately addressed. That being the position, I am of the view that the court will need to visit the site to establish whether or not the plaintiff has encroached on the 10 metre road. Additionally the parties will have to adduce evidence on the history of the land in order for the court to resolve all the issues in contention. All the reports will form part of the court record and parties are at liberty to call witnesses and produce documents in support of their case.

Dated signed and delivered at Kisii this 21st day of February 2020.

J.M ONYANGO

JUDGE