



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 109 OF 2018

PAUL KIBET KIPLAGAT.....1ST PLAINTIFF

SUSAN KIMELI SUGUT.....2ND PLAINTIFF

VERSUS

DENNIS ASHTON NYANGIRI.....1ST DEFENDANT

BERNARD OTUPE.....2ND DEFENDANT

RULING

1. The plaintiffs filed the instant suit vide a plaint dated 8th March 2018 against defendants. The plaintiffs claimed that the 1st defendant had interfered with the boundaries of land parcel **Njoro/Ngata Block 2/3922** belonging to the 1st plaintiff and land parcel No. **Njoro/Ngata Block 2/3923** belonging to the 1st defendant with the result that the 1st defendant had encroached onto the 1st plaintiff's land parcel. The 2nd defendant was enjoined in the suit as the land surveyor who effected the subdivision of the 1st plaintiff's original land parcel **Njoro/Ngata block 2/3426** to create land parcels **Njoro/Ngata Block 2/3922-3924**.

The plaintiffs claim against the 1st and 2nd defendants jointly and severally is for:-

(a) Permanent injunction for trespass on parcel of land No. Njoro/Ngata block 2/3922.

(b) The resurvey, marking of new boundaries on plaintiffs' parcel of land No. 3922 done on 15th February is null and void.

(c) General damages

(d) Costs

2. The 1st defendant filed a statement of defence dated 20th June 2018 and denied any interference with the boundary between his parcel of land and the 1st plaintiff's parcel of land. The 1st defendant stated the anomaly between their respective boundaries was corrected by the 2nd defendant with the consent and approval of the 1st plaintiff.

3. The 2nd defendant filed a defence dated 13th April 2018 on 17th April 2018. The 2nd defendant averred that the 1st plaintiff was the cause of the problem in regard to the parcel boundaries as he sold land parcel 3924 stating it was 1 acre while in actual fact it was $\frac{3}{4}$ of an acre. In an effort to make it one (1) acre, the 1st plaintiff shifted the land parcel boundaries stating that there was to be a corresponding amendment of the survey map. The 2nd defendant stated he was requested by the 1st plaintiff to place beacons on the shifted boundaries on the understanding the survey map would be amended to reflect the changes.

4. On 27th June 2018 the Court directed that a surveyor do visit the site of the dispute parcel boundaries and to carry out any inspection and file a report. The extracted order was in the following terms:-

1. That parties herein do agree on land surveyor who will proceed to the disputed boundary and curve out one acre thereof.

2. That the parties do share surveyor's costs.

3. That the surveyor do prepare a report and the same be filed in Court in 30 days.

4. That mention be on third day of October 2018.

5. Mr. Charles Orema from the office of the District Surveyor, Nakuru visited the site, on 25th September 2018 and prepared and filed a report dated 27th September 2018 on 28th September 2018. The report by the surveyor affirmed that the boundary on parcel 3924 had been shifted into parcel 3923 by 6.2 M resulting in the boundary of land parcel 3923 being correspondingly shifted into land parcel 3922. The object of the shifting was so that land parcels 3924 and 3923 could each attain approximately 1 acre which the 1st plaintiff the owner of land parcel 3922 stated were the sizes at the time of sale. The report by the surveyor showed that land parcel 3924 as per dimensions in the mutation form was 0.3269 Ha (approximately) which is slightly less than 1 acre. However the area of land parcels 3923 as per the mutation was 0.4047 Ha (approximately 1 acre). The surveyor concluded that since land parcel 3924 was less than 1 acre, increasing the acreage to 1 acre would mean shifting the boundary between land parcels 3924 and 3923 which would give rise to a dispute as parcel 3923 would be diminished in size by 6.2 metres. It was therefore not possible for the land surveyor to curve out a portion of 1 acre for land parcel 3923 without interfering with the shifted boundary for land parcel 3924 and/or alternatively shifting the boundary of land parcel 3923 into 3922 to compensate for the loss of 6.2 metres.

6. The parties could not agree on how the surveyors report could be given effect and when the surveyor attended Court on 21st November 2019 upon being summoned, he explained the problem was because the owner of parcel 3924 was sold 1 acre and insisted on getting 1 acre on the ground which resulted in moving his boundary by 6.1 metres into parcel 3923.

7. The owner of land parcel 3924 was not made a party to these proceedings. If the Court was to make an order directing restoration of his boundary to the point it was before it was shifted, he would be affected. The Court cannot make an order adverse to the interests of a party who is not before it.

8. While it is evident and clear that this is a matter that involves the alignment of parcel boundaries and could easily be resolved by a surveyor provided the 1st plaintiff who sold the parcels to the 1st defendant and the owner of land parcel 3924 Co-operates. The issue as I discern is whether both parcels 3923 and 3924 ought to measure 1 acre or 0.4047 Ha as indicated in the mutation form and if so whether the appropriate subdivision was carried out. The surveyor's report indicates land parcel 3924 as per the calculations using the mutation dimensions measured 0.32679 Ha (approx.) and not 0.4047 Ha (approx.) as indicated in the mutation form. This is a significant variation and its impact is realized when it is implemented on the ground.

9. On the basis of the surveyor's report it is apparent the issues raised in the pleadings have not been resolved particularly because a party who is directly affected, the owner of land parcel Njoro/Ngata Block 2/3924 was not made a party to the proceedings. The Court in the premises directs that the report by the surveyor be admitted and to form part of the Court record and any party to be at liberty to place reliance on the same.

10. Under Order 1 Rule 10 (2) the Court can order the joinder of any party it considers necessary in order to enable the Court to effectually and completely adjudicate on a matter before it.

11. I have in the course of this ruling indicated that the owner of land parcel **Njoro/Ngata Block 2/3924** is necessary party as his actions could have led to the chain of events that led to the institution of this suit. There is a likelihood he could be affected by the outcome. I accordingly direct that he be enjoined as an interested party in these proceedings and he be served with the pleadings.

12. The plaintiffs to amend the plaint to enjoin the owner of land parcel **Njoro Ngata Block 2/3924** as an interested party within 30 days of this ruling and upon being served the interested party to have liberty, within 21 days of service to file their pleadings. Matter to be mentioned on 20th **April 2020** for pretrial directions. Costs in the cause.

Ruling dated signed and delivered at Nakuru this 13th day of February 2020.

J. M. MUTUNGI

JUDGE