



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 120 OF 2016

BEATRICE MGHAMBA ONYONKA..... PLAINTIFF

VERSUS

SAMWEL ONSARIGO OOGA DEFENDANT

AND

DAMARIS NYABOKE MANYANGE.....APPLICANT

RULING

1. The plaintiff brought the present suit vide a plaint dated 28th April 2016 filed in court on 29th April 2016. The plaintiff's claim was that she was the allottee of **Plot No. 37** Nyakoe Market while the defendant was the registered proprietor of land parcel **West Kitutu/Bogeka/3681**. The plaintiff contended that in mid 2015 the defendant unlawfully and illegally entered onto her said plot and wrongfully constructed illegal temporary structures thereon. The plaintiff averred that the defendant's land parcel **West Kitutu/Bogeka/3681** does not adjoin or share a boundary with **Plot No. 37** Nyakoe Market and thus the defendant's acts are an affront to the plaintiff's proprietary rights in regard to the suit property.

2. The plaintiff prays for orders that she is the rightful owner of Plot No. 37 Nyakoe Market, an order of injunction against the defendant and an order for the defendant to demolish the temporary structures he has erected on the suit property.

3. The defendant filed a statement of defence dated 14th July 2016 filed in court on 15th July 2016. The defendant stated that he purchased a portion of 100ft by 50ft from one, Rosalia Mongina Mwebi (deceased) which was excised from land parcel **West Kitutu/Bogeka/ 3681** and took possession of the same and constructed structures thereon which he has occupied since February 2009 when he purchased the property without any interference from anybody. The defendant averred that the suit land was a portion of land parcel **West Kitutu/Bogeka/3681** which following the subdivision became land parcel **West Kitutu/Bogeka/4137**.

4. The court while making a ruling on the plaintiff's application for injunction on 29th September 2017 observed that the issue that required determination was where **Plot No. 37** Nyakoe Market and land parcel **West Kitutu/Bogeka/3681** were physically located on the ground. On that account, the court proceeded to make an order of reference to the Land Registrar, Kisii, the County Surveyor and the physical planner Kisii County to visit and delineate the physical boundaries of **Plot No. 37** Nyakoe Market and land parcel **West Kitutu/Bogeka/3681** on the ground.

5. The land registrar and the County Surveyor filed a joint report dated 29th June 2018 on 12th July 2018 and the court on 19th July 2018 directed that the parties be furnished copies of the report and the matter to be mentioned on 4th October 2018 for the adoption of the report.

6. The applicant, Damaris Nyaboke Manyange, vide a Notice of Motion application dated 27th July 2018 filed in court on 3rd August 2018 applied to be enjoined to these proceedings as a co defendant and to be granted leave to file a defence to the claim by the plaintiff. Under prayer (3) of the Notice of Motion the applicant sought the following order:

3. The honourable court be pleased to grant leave to the applicant herein to be joined and/or enjoined in the instant matter as a co-defendant to enable same vindicate her rights and/or interests over and in respect of LR No. West Kitutu/Bogeka/3681.

7. The application is supported on the grounds set out on the face of the application and the affidavit sworn in support of the application. The defendant asserts that she purchased land parcel **West Kitutu/Bogeka/ 3681** from the defendant vide a sale agreement entered into in September 2013. The fulcrum of the applicant's application is that she claims land parcel **3681** is at the same position that the plaintiff claims her **Plot No. 37** Nyakoe Market is located. She claims unless she is enjoined in the suit she will be prejudiced by any decision that the court may make because she has an interest on the issue that is before court for determination.

8. In any application for joinder as a party an applicant has to demonstrate and show the interest he/she has in the subject matter of the suit which would entitle him or her to be enjoined in the suit in order to safeguard the interest they have in the subject matter of the suit. The court may also order a party to be enjoined if it deems the participation of such a party necessary in the proceedings so that all the matters in controversy between the parties can be fully adjudicated by the court. Order 1 Rule 10 (2) makes provision for joinder of parties at any stage of the proceedings and provides as follows:-

Order 1 Rule 10(2)

The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

9. In the present matter the plaintiff brought the suit claiming the defendant had encroached onto her **Plot No. 37** Nyakoe Market. The plaintiff has exhibited documents to support her ownership of **Plot No. 37** Nyakoe Market. The Kisii County Government vide letter dated 21st April 2016 annexed as “**BM0-05**” to the plaintiff’s application for injunction affirmed the plaintiff to be the owner of **Plot No. 37** Nyakoe Market. The plaintiff holds a plot card in respect of the Plot and the copy of the extract of Minute 14 of the Town Planning and Market Committee meeting of 10th June 2013 affirms that the transfer of **Plot No. 37** Nyakoe Market from one Richard Aminga Nyakundi to the plaintiff was approved. There can therefore be no dispute that the plaintiff owns **Plot No. 37** Nyakoe Market. The singular issue was where this plot is physically located on the ground.

10. The defendant’s assertion was that he purchased a portion of land measuring 50ft x 100ft from one Rosalia Mongina Mwebi out of land parcel **West Kitutu/Bogeka/3681** vide a sale agreement dated 16th February 2009. The defendant pleaded that land parcel 3681 ceased upon subdivision and that the portion he purchased was now comprised in the resultant subdivision LR No. **West Kitutu/Bogeka/ 4137**. A scrutiny of the copy of the agreement of sale dated 16th February 2009 shows that the land the subject of sale was **West Kitutu /Bogeka/3861** and not **3681**. A perusal of the abstracts of title in respect of **West Kitutu/Bogeka/4137** and **4138** show that they were subdivisions of land parcel **West Kitutu/Bogeka/3861** and were initially registered in the name of Rosalia Mongina Mwebi. The abstract of title in regard to land parcel **West Kitutu/Bogeka/3681** shows that it was a subdivision from land parcel **West Kitutu/Bogeka/3557** and was initially registered in the name of Rosalia Mongina Moebi before being transferred to the defendant and later to the applicant. Land parcel **3681** appears in the Registry Index Map (RIM) supplied by the applicant and annexed to the supplementary affidavit as “**DNM 4(a) and (b)**”. I have perused the RIM Sheet No. 15 where land parcel **3681** is highlighted and it is clear it shares boundaries with parcels **4137, 3507** and **3564** and abuts an access road. I have compared this with the sketch/abstract reproduced by the surveyor and I am satisfied the surveyor’s sketch conforms with the Registry Index Map as relates to the layout of the parcels of land that are adjacent to land parcel **3681**. Land parcel **3681** is registered under the Land Registration Act, 2012 and therefore its boundaries are delineated on the Registry Index Map (RIM) and consequently the land registrar would have the mandate under Sections 18 and 19 to have the boundaries of the same established and fixed.

11. The plaintiff’s **Plot No. 37** Nyakoe Market unlike land parcel 3681 is not registered and is not depicted on the RIM. However, the same would be shown on physical plan for Nyakoe Market maintained by the Physical Planning Department of Kisii County Government. **Plot No. 37** is within the Nyakoe Market area and the land registrar’s report has stated as much. It is not contiguous or adjacent to land parcel **3681** that the defendant and the applicant stake claim to. From the record (RIM) and the County Surveyor’s sketch, it is evident that **Plot No. 37** and land parcel **3681** are separate and distinct and do not share a common boundary. If the defendant occupied **Plot No. 37** Nyakoe Market assuming it was the location of land parcel **3681** or the portion he claimed to have purchased from Rosalia Mongina Mwebi he was misled and he is no doubt in unlawful possession and occupation of **Plot No. 37** Nyakoe Market belonging to the plaintiff. He should vacate and relocate to land parcel **3681**.

12. The applicant’s interest is in land parcel **West Kitutu/Bogeka/3681**. The plaintiff has no claim over land parcel **West Kitutu/Bogeka/3681**. The land registrar has determined the physical location of **Plot No. 37** Nyakoe Market and land parcel **West Kitutu/Bogeka/3681** is separate and distinct from Plot No. 37 Nyakoe Market. He has affirmed the portion in dispute between the parties is indeed the physical location of **Plot No. 37** Nyakoe Market owned by the plaintiff. No two parcels of land can occupy the same position on the ground. The court is satisfied the disputed site is the physical location of **Plot No. 37** Nyakoe Market and is of the view no purpose would be served by enjoining the applicant as a party to this proceedings. The applicant can apply to the land registrar to have the boundaries of land parcel **West Kitutu/Bogeka/3681** established and fixed now that the land registrar has established that the land parcel exists as a separate entity from **Plot No. 37** Nyakoe Market whose boundaries have been duly established and fixed.

13. The upshot is that I find no merit in the applicant’s application dated 27th July 2018. I order the same dismissed. I uphold and adopt the joint report of the land registrar and the County Surveyor dated 29th June 2018 as the judgment of the court. The net result is that the defendant is in unlawful occupation of the plaintiff’s **Plot No. 37** Nyakoe Market and is ordered to vacate and deliver vacant possession of the same within 30 days from the date of this ruling failing which an order of eviction will issue on application by the plaintiff. The costs of the suit will be borne by the defendant.

14. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KISII THIS 5TH DAY OF APRIL 2019.

J. M. MUTUNGI

JUDGE

In the Presence of:

N/A for the plaintiff

N/A for the defendant

Mr. Adawo for the applicant/interested party

Ruth Court Assistant

J. M. MUTUNGI

JUDGE