



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

E.L.C PETITION NO. 19 OF 2015

IN THE MATTER OF ARTICLE 40 AND 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND

FREEDOMS UNDER ARTICLES 40, 47 & 60 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF LAND REFERENCE NOS. WEST KITUTTU /BOGEKA/3194,3195,3195,3439 AND 3440

AND

IN THE MATTER OF THE REGISTRATION OF TITLES ACT CHAPTER 281 OF THE LAWS OF KENYA

BETWEEN

ANN NYABOKE ACHACHI.....1ST PETITIONER

VERONICA NYAMUSI MAISIBA.....2ND PETITIONER

LEONIDA KWAMBOKA.....3RD PETITIONER

VERSUS

ABEL MORANGA ONGWACHO.....1ST RESPONDENT

EDWARD OBAIGWA OMAYO.....2ND RESPONDENT

LAND REGISTRAR KISII CENTRAL.....3RD RESPONDENT

HON. ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

INTRODUCTION

1. The Petitioners commenced suit by way of Petition dated 13th May, 2015 claiming that the 1st and 2nd Respondents had connived with the 3rd Respondent and encumbered the Petitioners' right to quiet and peaceful enjoyment of their property rights by carrying out a survey and amending the boundaries to parcel number WEST KITUTU/BOGEKA/3193, without their consent thereby depriving the Petitioners of their right to protection of their land rights under Article 40 of the constitution. The Petitioners seek the following reliefs:

a) A declaration be and is hereby issued that the 1st and 2nd Respondents are trespassers on the Petitioners' respective parcels of land L.R No. WEST/KITUTU/BOGEKEA/3195, 3194 and 5249 which act of trespass is unlawful and unconstitutional and it violates the

Petitioner's right to property as protected by article 40 of the Constitution.

b) A declaration be and is hereby issued that the acts of commission and omission a 1st, 2nd and 3rd Respondents and the continuous trespass on the respective parcels of land L.R No. WEST/KITUTU/BOGEKEA/3195, 3194 and 5249 is an abdication of the statutory duty by the 3rd Respondent and it violates the Petitioners' rights under article 47 of the Constitution of Kenya.

c) An order of permanent injunction restraining the 1st and 2nd Respondents from trespassing onto and/or in any way interfering with the Petitioners' possession of their respective parcels of land.

d) An order do issue directing the 3rd Respondent to make necessary corrections thereof to reflect the correct boundaries of L.R No. WEST/KITUTU/BOGEKEA/3195, 3194 and 5249 per the original mutation of 17th January 2004.

e) The Respondent do pay the costs of this Petition.

2. The Petition is supported by the affidavit Veronica Nyamusi Maisiba, the 2nd Petitioner, herein sworn on her own behalf and on behalf of the other two Petitioners.

3. The Respondents opposed the Petition through the Replying affidavits of the 1st and 2nd Respondents sworn on the 9th July 2015. The 1st and 2nd Respondents depose that they purchased portions of land parcel No. 3139 which were subsequently registered in their name as L.R No WEST/KITUTU/BOGEKA/3439 and L.R No WEST/KITUTU/BOGEKA/3440 respectively. They depose that before they bought the said parcel of land, they visited the land and they were shown the boundaries which were clearly marked with a live fence made of a hedge and tall trees that had been in existence for some time. However, a dispute arose after they had obtained their title deeds and they wanted to erect a barbed wire fence in line with the existing hedge. The parties subsequently referred the matter to the Land Registrar and Land Surveyor who in turn visited the suit property and established the boundaries between the Petitioners' parcels of land and land parcel No. WEST/KITUTU/BOGEKEA/3439. They contend that since they are the registered owners of land parcel No. 3439 and 3440 any alterations made to the said titles are likely to interfere with the usage of their land.

4. They deny the allegations of fraud levelled against them and state that as a registered owners of L.R No. WEST/KITUTU/BOGEKEA/3439 and 3440 they are vested with exclusive rights thereon and cannot be restrained from using their land.

5. On 16.5.2016 the court observed that since there was indication that there may have been manipulation of the mutation forms resulting in annexation of the neighbouring portions of land it was necessary for the Land Registrar and the County Surveyor Kisii in conjunction with private Surveyors appointed by the 1st and 2nd Respondents to visit the suit properties and establish their boundaries and sizes and file a joint report. The court therefore issued orders to that effect.

6. The Land Registrar and County Surveyor visited the suit properties and filed a report dated 18.6.2018. Thereafter the court directed that the report forms part of the court record after which the Petition would be determined on the affidavit evidence and the documents filed. He further directed that the Petition be canvassed by way of written submissions and both parties filed their submissions which I have considered.

ISSUES FOR DETERMINATION

7. The singular issue for determination is whether based on the evidence on record the Petitioners are entitled to the reliefs sought.

ANALYSIS AND DETERMINATION

8. Learned counsel for the Petitioners referred to the report of the Land Registrar and District Surveyor dated 18.6.2018 which concluded as follows:

“The discrepancy in registered areas *vis a vis* the ground areas of parcel, 3194, 3195 and 5250 somehow corresponds with the excess on parcel 3439.”

9. He therefore submitted that it was clear from the said report that there is a discrepancy in registered areas of parcels WEST/KITUTU/BOGEKEA/3195, 3194 and 5250 and hence the Petitioners assertion that there was a deliberate distortion of the Survey Maps and mutations regarding the Petitioners' acreage and boundaries by the Respondents was not without merit. He submitted that report be adopted as a judgment of the court.

10. On the other hand, learned counsel for the Respondents submitted that the Petitioners had not provided any evidence of whatever nature when the 1st and 2nd Respondents encumbered the Petitioners' rights to quiet and peaceful enjoyment of their respective properties, by carrying out a survey and amending their respective parcels of land without their consent and/or authority thereby depriving the Petitioners of their rights to protection of their rights under the Constitution. He submitted that the Petitioners had not come out clearly to raise particular rights that the 1st and 2nd Respondents had interfered with as a result of purchasing their parcels of land. He cited **Kisii ELC Petition No. 18 of 2013 David Kenyana Magare & Another v Luthafal Jiwa Ranjwani & Others (2019)eKLR**, where the court dismissed the Petition on the ground that that the Petition did not satisfy the test of a constitutional petition as the petitioner had failed to specify how his rights had been violated.

11. He submitted that the Respondents parcels of land were surveyed and demarcated and they were issued with title deeds at different

times. The 1st Respondent got his title in 2014 while the 2nd Respondent got registered in 2007. He contended that the County Surveyor who demarcates, delineates and recommends the size of the land to the Land Registrar was not enjoined in the Petition. He alluded to a report dated 24th July 2014 prepared by the County Surveyor which indicated that the boundaries to the disputed parcels of land were intact and submitted that in the circumstances the issue of violation of the Petitioners rights did not arise. He argued that the Petitioners have not demonstrated how their rights under articles 40, 47 and 60 of the constitution have been violated. He submitted that the Respondents had neither committed acts of trespass nor interfered with the Petitioners' right to property.

12. It is common ground that the Respondents' titles L.R No. WEST/KITUTU/BOGEKA/3439 and L.R No WEST/KITUTU/BOGEKA/3440 were derived from L.R No. WEST/KITUTU/BOGEKA/3193. The mutation form dated 27.8.2007 which was used to create the Defendants' titles indicates that parcel No. 3439 measures 0.24 hectares while parcel No. 3440 measures 0.13 hectares. However, the title deed for title No. WEST/KITUTU/BOGEKA/3439 in the name of Abel Moranga Ongwacho (1st Respondent) dated 7th July 2014 indicates that the land measures 0.85 hectares while title No. WEST/KITUTU/BOGEKA/3440 issued to Edward Obagwa Omayo on 30.8.2007 measures 0.17 hectares. The measurements in the titles therefore do not tally with the measurements in the mutation forms and this is what gave rise to the complaints by the Petitioners whose land borders the Respondents' land.

13. In order to establish how the discrepancies in the acreage in the disputed parcels of land occurred, the court directed the Land Registrar and County Surveyor Kisii together with independent Surveyors appointed by the parties to visit land parcels No. West Kitutu/Bogeka/3439/, 5250, 3195, 3194 and 5249 and establish the size and delineation boundaries using the various documents held by the Lands office and such evidence as the parties would adduce or avail during the exercise. Pursuant to the directions of the court made on 27th May 2016, the Kisii County Land Registrar and County Surveyor visited the disputed parcels of land and prepared a report. The joint report of the County Surveyor and Land Registrar dated 18.6.2018 was filed in court on 3.7.2018. During the mention of the case 12.11.2018 the court ordered that the parties be supplied with copies of the said report so that they could file their comments on the same. However, by 25.4.2019 none of the parties had filed their comments. The court then ordered as follows:

“As the Land Registrar and the Surveyor have filed their report the same shall be taken as forming part of the court record. In the premises the court directs that the Petition be determined on the basis of the affidavit evidence and the documents filed and on record. Parties are directed to exchange their written submissions within 60 days from today”

14. It is therefore clear that the court adopted a practical approach to solving the dispute herein by relying on the affidavits and documents filed by the parties as well as the report of the Land Registrar and the surveyor. The said report states as follows:

“Observations:

i) All the suit parcels originated from parcel West Kitutu/Bogeka/1011 and their respective sizes as registered in both the Survey and Land Registry registers are as follows:

1. 3193- 0.39 Ha

2. 3194- 1.04 Ha

3. 3195- 0.97 Ha

4. 3196- 0.83 Ha

5. 3197- 0.05 Ha

6. 3198-0.09 Ha

7. 3199-0.03 Ha

ii) Parcel West Kitutu/Bogeka/3193 was further sub-divided into parcels 3439 and 3440 with their areas as 0.24 Ha and 0.13 Ha respectively as per the survey register. This is consistent with the prior survey (annexture 1) though the mutation is missing.

iii) Parcel 3439 as is on the ground is not in conformity with observations (i) and (ii) above. This is both in shape and size. The ground area was found to be 0.85 Ha contrary to 0.24 Ha which was captured during sub-division. These changes in shape and size have no known documentation.

iv) The office RIM conforms with the ground of parcel 3439 but it is not supported by the two prior sub-divisions as captured in observation (i) and (ii) and differs with an earlier print adduced by the three petitioners (see annexture 2 and 3 respectively)

v) Parcel 3194 was found to be 0.66 Ha against the registered area of 1.04 Ha. A discrepancy of 0.38 Ha.

vi) Parcel 3195 was found to be 0.70 Ha against the registered area of 0.28 Ha. A discrepancy of 0.10 Ha.

Conclusion

The discrepancy in registered areas vis a vis the ground areas or parcels 3194, 3195 and 5250 somehow corresponds with the

excess on parcel 3439.

Recommendations

i) The initial sub-division of 1011 should be the basis on which the boundary between the 1st Respondent's parcel and those of the three petitioners will be defined /fixed.

ii) The registry index map no.11 of Bogeka registration section should be re-amended to conform with the initial sub-division".

15. From the said report and the mutation form dated 30.8.2007 annexed as "VNM 4" to the supporting affidavit of Veronica Nyamusi Maisiba sworn on 5th May 2015, it is clear that land parcels No. 3439 and 3440 were created from land parcel No. WEST KITUTU/BOGEKA/3193. On the said mutation form land parcel No. 3439 measures **0.24 Ha** while land parcel No. 3440 measures **0.13 Ha**. However, the joint report of the Land Registrar and Surveyor shows that on the ground land parcel No. 3439 measures 0.85 Ha. Although the report does not mention the size of land parcel No. 3440, an extract of the register annexed to the 2nd Petitioner's affidavit as annexure VNM 5(c) shows that it measures **0.17 Ha**.

16. The joint report of the Land Registrar and the Surveyor attributes the excess land on parcel No. 3439 to the discrepancies in the Petitioners' parcels of land. In his Replying affidavit, the 1st Respondent has deponed that he conducted an official search before he purchased land parcel No. 3439. At paragraph 6 of his affidavit he has annexed a copy of certificate of official search dated 7th July 2014 in respect of WEST KITUTU/BOGEKA/3439 in the name of Dennis Omari Ogwora (annexture "AMO 1") which indicates the approximate area of the land parcel as **0.54 Ha**. At paragraph 14 of his affidavit he depones that following the registration and issuance of the title deed he carried out an official search over the same parcel No. 3439 and he has annexed the Certificate of Official search bearing his name dated 7th July 2014 which gives the acreage as **0.85 Ha**. Additionally, the application for consent of the Land Control Board Consent (annexture AMO 6) indicates that the acreage of land parcel No. 3439 is 0.54 Ha.

17. From the 1st Respondent's own documents it is clear that the acreage of the land parcel No. WEST KITUTU/BOGEKA/3439 was unlawfully increased from **0.54 Ha** to **0.85 Ha** on 7th July 2014. The 1st Respondent therefore cannot feign ignorance of these discrepancies. The alterations in the acreage of the land on the 1st Respondent's title could not have happened without the participation of the 3rd Respondent. This was acknowledged by the Land Registrar in his letter dated 1st August, 2014 which is annexed to the supporting affidavit of Veronica Nyamusi Maisiba as annexure "VNM 7". It is instructive to note that despite the acknowledgement that errors were detected in the acreage of the land parcel No.3439, no amendments were done with the result that the Respondents have continued to encroach on the Petitioners' land and Petitioners have been deprived of the use and enjoyment of portions of their land.

18. From the foregoing it is my finding that the Petitioners have proved that their rights under Articles 40 (1) and 47 of the Constitution have been infringed by the joint acts of the Respondents. Consequently, I enter judgment for the Petitioners and make the following final orders:

a) A declaration is hereby issued that the 1st and 2nd Respondents are trespassers on the Petitioners respective parcels of land No. WEST/KITUTU/BOGEKA/3195, 3194 and 5249 which act is unlawful and unconstitutional and it violates the Petitioners rights to property as protected by Article 40 of the Constitution.

b) A declaration is hereby issued that the acts of commission and omission a 1st 2nd and 3rd Respondents and the continuous trespass on the respective parcels of land L.R No. WEST/KITUTU/BOGEKEA/3195, 3194 and 5249 is an abdication of the statutory duty by the 3rd Respondent and it violates the Petitioner's rights under article 47 of the Constitution of Kenya

c) An order of permanent injunction is hereby issued restraining the 1st and 2nd Respondents from trespassing onto and/or in any way interfering with the Petitioners' possession of their respective parcels of land.

d) The 3rd Respondent is hereby directed to make necessary amendments to the register and Registry Index Map to reflect the correct boundaries of L.R No. WEST/KITUTU/BOGEKEA/3195, 3194 and 5249 per the original mutation of 17th January 2004 and in accordance with the joint report of the Land Registrar and Surveyor Kisii County dated 18.6.2018.

e) The costs of this Petition shall be borne by the Respondents.

Dated, signed and delivered via Zoom this 28th day of May, 2020.

J. M ONYANGO

JUDGE