



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELC CASE NO. 747 OF 2017

(FORMERLY KISII ELCC NUMBER 348 OF 2015)

RHOBYTY CHARLES LIMBIHAMU.....1ST PLAINTIFF/APPLICANT

LIMBHIHAMU TITIGONI NYABIGAINI.....2ND PLAINTIFF/APPLICANT

VERSUS

STEPHEN MWITA MOSOBA.....1ST DEFENDANT/RESPONDENT

SIMION MARANYA.....2ND DEFENDANT/RESPONDENT

SIMION TUBITI MWITA.....3RD DEFENDANT/RESPONDENT

JOICE NYANGIGE MWITA.....4TH DEFENDANT/RESPONDENT

JOHN CHACHA MWITA.....5TH DEFENDANT/RESPONDENT

RULING

1. The instant determination concerns a report dated 4th September 2018 and filed in this court on 5th September 2018 prepared by Mr. James Okoth Atata, sub County surveyor Kuria West/East Sub counties in Migori County. The report is with regard to the suit land, LR NO. Bukira/Bwisaboka/4919 pursuant to orders of this court made on 1st March 2018.

2. The said court orders read, inter alia;-

a) “The Land Registrar and Surveyor, Kuria East and West sub counties visit the suit land namely Bukira/Bwisaboka/4919 and establish and fix boundaries. The report to be filed in court within the next 60 days from the date hereof.”

3. The orders were initiated by learned counsel, Mr. Omotto holding brief for Mr. S.M. Sagwe for the plaintiffs during further mention of the suit for pre-trial directions on 1st March 2018. Counsel informed the court that the suit land was a sub division of the parent land, LR.NO. Bukira/Bwisaboka/975. That the present dispute is hinged on a boundary in respect of the suit land. Thus, he sought the orders which were granted accordingly.

4. The genesis of the instant dispute is that the plaintiffs then appearing in person, originated the instant suit by way of a plaint, dated 2nd July, 2015 and filed in court on 17th July, 2015. They are seeking reliefs which include a declaration that the 1st plaintiff is the lawful and registered proprietor of the suit land and that the 1st and 2nd defendants be evicted therefrom for being trespassers thereon.

5. In their separate statements of defence dated 9th September 2015 and filed in court on 10th September 2015, the 1st and 2nd defendants who are represented by the firm of Okongo, Wandago and company Advocates, denied the plaintiff’s claim and sought its dismissal with costs. They were very emphatic therein that present suit does not relate to land boundary dispute or at all.

6. The 3rd, 4th and 5th defendants who appear in person ,too, denied the plaintiffs claim in their statement of defence dated 4th September 2015 whereby they and dismissal of the same with costs. They stated, inter alia, that they were strangers to the claim.

7. The plaintiff’s’ agreed issues dated 24th November 2013 and filed in court on even date include whether;

- a. The suit land is registered in the name of the plaintiff.
- b. the 2nd defendant has trespassed to the suit land of the plaintiff
- c. the plaintiff is entitled for the orders he has sought in this suit.

8. The surveyor's report reveals that the suit land is measuring approximately zero point one (0.1) hectares in area as per copy of annexed scaled map. That the suit land is mapped on sheet number 12 Bukira/ Bwisaboka registration section. That LR numbers Bukira Bwisaboka/1920, 5069 and 3786 border the suit land which belong to the 1st plaintiff who has no physical possession of the same.

9. On 14th February 2019, this court directed and ordered the parties to this suit to file and serve submissions on the surveyor's report within 14 days from that date in the spirit of Articles **50 (1) and 25(c) of the Constitution of Kenya, 2010**. The orders were extended on 8th day of April, 2019. Subsequently, the plaintiffs and the 3rd to 5th defendants complied accordingly

10. In his submissions dated 4th March 2019 and filed in court on 7th November 2019, learned counsel for the plaintiffs outlined the orders sought in the plaint in this suit and urged that Judgment be entered in terms of the prayers in the plaint in view of the report (Exhibit 1) and its sketch plan (Exhibit 2). That the issues herein are of a technical nature which the Land Registrar and Surveyor determined hence no need for oral evidence in the present suit.

11. The 1st and 2nd defendants failed to file and serve submissions. Nonetheless, this court accorded them rights provided for under Article 48 and 50 of the Constitution of Kenya, 2010.

12. The 3rd, 4th and 5th defendants filed their submissions on 11th November 2019 whereby they contended that they are total strangers to the alleged trespass as affirmed in the surveyor's report. That there is no evidence established against them hence sought dismissal of this suit with costs.

13. I have duly examined the pleadings, the surveyor's report, the plaintiff's agreed issues and submissions as well as the 3rd to 5th defendants' submissions. I bear in mind the Court of Appeal decision in the case of **Great Lakes Company (U) Ltd v Kenya Revenue Authority (2009) KLR 720** in respect of the issues for determination in a suit. So, has the sub county surveyor's report (Exhibit 1) finally determined this suit in terms of the plaintiffs' agreed issues dated 24th November 2013 compressed into issues numbers 1, 5 and 6 thereof?

14. As regards the first issue, the plaintiffs stated that the first plaintiff obtained the suit land as a gift from the second plaintiff. That the land was transferred and title deed issued in favour of the first plaintiff accordingly. I note the second plaintiff's authority dated 2nd July 2015 herein.

15. As a result, the plaintiffs contended that the first plaintiff is the lawful and registered proprietor of the suit land. A declaration to that effect is sought in the instant suit.

16. It is further noted that by a copy of title deed dated 9th April 2015 and a certificate of official search dated 13th April 2015 marked as "RCL1" and "RCL2" respectively and attached to a notice of motion simultaneously filed with the plaint, the suit land is registered in the name of the first plaintiff with effect from 9th April 2015 under the Land Registration Act, 2016 (2012), (The LRA herein) The title deed thereto was issued pursuant to section 30 of the LRA.

17. This court is conscious of the term "**proprietor**" as defined under section 2 of the LRA. Admittedly, the right to property is protected under Article 40 (1) of the Constitution of Kenya, 2010 as reflected at sections 24, 25 and 26 of the LRA.=

18. The defendants in their respective statements of defence challenged the plaintiff's proprietorship of the suit land. A copy of the land register attached to the 3rd, 4th and 5th defendants' statement of defence relates to the parent land, LR No. Bukira/Bwisaboka/975 which is not in dispute.

19. Essentially, the first plaintiff's proprietorship of the suit land is reinforced by the surveyor's report which reveals in part;

"...that Parcel NO. 4919 belongs to RHOBYTY CHARLES LIMBHAMO..."

20. As regards the 2nd issue, the plaintiffs stated at paragraph 12 of their plaint that the defendants trespassed into the suit land and craved for their eviction therefrom. However, the defendants contented otherwise in their respective defence statements.

21. The surveyor's report is pretty clear on the findings concerning the area and boundaries of the suit land. On that score, the instant controversy relates to boundaries of the suit land.

22. According to the conclusion of the surveyor's report, the first plaintiff who is the rightful proprietor of the suit land has been dispossessed of the suit land. The report (EXh1) is fortified by EXh2 which discloses the location of the suit land.

23. On that score, has PExhibit 1 resolved the boundary dispute? Section 19(2) of LRA reads:

“The Registrar shall after giving all persons appearing in the register an opportunity of being heard cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcels.”
(Emphasis added)

24. It is my considered view that EXh1 and 2 are provided for under the foregone statutory provision. Quite clearly, by the said Exhibits 1 and 2, the court order of 1st March 2018 was duly implemented. As such, the boundary in question was determined thereby.

25. In the case of *Andrew Marigwa-vs- Josephat Ondieki Kebati (2017)eKLR* , John Mutungi J, observed that the Land Registrar and the surveyor duly implemented the order of the court and that their reports finally disposed of the matter. I find the said observation sound, relevant and endorse the same accordingly.

26. In respect of the third issue, it is notable that EXh1 is opinion evidence which generally does not bind this court as stipulated under sections 48 and 54 of the Evidence Act Chapter 80 Laws of Kenya; see also *Amosam Builders Developers -vs- Gachie and 2 others (2009) KLR 628*.

27. Based on the facts and circumstances of the instant case coupled with the cited authorities, I am of the considered view that EXh1 and 2 have determined the present dispute. Unassumingly, I proceed to endorse PExhibit 1 as the judgment of this court.

28. A fortiori, judgement be and is hereby entered for the plaintiffs against the defendants jointly and severally in terms of orders for a declaration, a permanent injunction, directions at Officer Commanding Station, Kehancha Police Station and costs of this suit as sought in the plaint dated 2nd July, 2015.

29. It is so ordered.

Delivered, Signed and Dated at Migori through email pursuant to,inter alia, Articles 7 (3) (b),159 (2) (b) and (d) of the Constitution of Kenya, 2010, Section 3A of Civil Procedure Act chapter 21 Laws of Kenya and Sections 3 and 19 of the Environment and Land Court Act, 2015 (2011) due to the prevailing Corona Virus pandemic, this 27th day of May, 2020.

G.M. A. ONGONDO

JUDGE

In presence of :-

1st plaintiff - Present

Court Assistant – Tom Maurice