



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELC CASE NO. 301 OF 2017

(FORMERLY KISII ELCC NO. 321 OF 2013)

NELSON OMOLO ACHOLA.....PLAINTIFF

VERSUS

GEORGE OMONDI AJWALA.....DEFENDANT

RULING

1. The present dispute concerns two (2) parcels of land as hereunder;

a) Title number Kanyamkago/Kawere II/3162 and its approximate area in one decimal two two (1.22) hectares (Hereinafter referred to as the suit land). The same is in Registry Map Sheet Number 9 and is situate within Migori County. The suit land is registered in the name of the plaintiff, Nelson Omolo Achola with effect from 31st July 2001 and title deed thereto was issued on 12th October 2001.

and

b) Title number Kanyamkago/Kawere II/4898 and its approximate area in zero decimal nine zero (0.90) hectares (Hereinafter referred to as the neighbouring land parcel). It is also in Registry Map Sheet Number 9 and situate within the same area. The defendant, George Omondi Ajwala claims that he owns the neighbouring land parcel.

2. The plaintiff is represented by M/S Oguttu Mboya and Company Advocates now M/S Oguttu, Ochwangi, Ochwal and Company Advocates The defendant is represented by M/S Omonde Kisera and Company Advocates.

3. Originally, this suit was lodged at Kisii Environment and Land Court. It is worthy to note that on 5th May 2016, the court (Mutungi J) directed and ordered that:

“By consent of the parties, the Land Registrar, Migori County and the County Surveyor, are directed to visit the disputed land parcels Kanyamkago/Kawere II/3162 and 4898 and establish their physical location on the ground as both the plaintiff and the defendant claim their parcels are on the same spot on the ground. The Land Registrar and the Surveyor to prepare a report respecting the side visit and their findings and to file the same in court within the next 90 days from today.....”

4. Pursuant to the said order, a surveyor’s report Ref No. TECH 14/MUG/SUR/VOL8/36 dated 5th December 2019 was filed in this court on 22nd January 2020. The report is authored by R.O.A for County Surveyor, Migori County. Annexed to the report are two copies of maps showing the suit land and the neighbouring land parcel.

5. During the mention of this suit on 27th January 2020, Mr. D. Adawo, learned counsel for the plaintiff urged the court to adopt the surveyor’s report. Thus, it generated the instant ruling.

6. The genesis of this suit is that by a plaint dated 22nd July 2013 and filed on even date, the plaintiff has sued the defendant for:

i. Declaration that the plaintiff is the registered and/or lawful owner of the suit land.

ii. An order of eviction directed against the defendant, his agents and/or servants, from the suit land.

iii. Permanent injunction restraining the defendant either by himself, agents, servants and/or anyone claiming under the

defendants from entering upon, re-entering, trespassing onto, making bricks, cultivating, building structures, interfering with and/or in any other manner dealing with the suit land and/or any portion thereof.

iv. General damages for trespass.

v. Interest on (iv) hereof at court rates.

vi. Costs of this suit be borne by the defendant.

vii. Such further and/or other relief as the Honourable Court may deem fit and expedient so to grant.

7. The plaintiff claims in or about the year 2000, he lawfully bought the suit land being a portion of LR No. Kanyamkago/Kawere II/2095 measuring approximately three (3) acres in area owned by Stephen Odongo Bongo (original owner). That he is the duly registered proprietor of the suit land following its lawful transfer from the original owner. That on or about May 2013, the defendant trespassed onto the suit land and commenced preparation of bricks, cultivation of a substantial portion of it, construction of a fish pond and temporary structures thereon hence precipitating the present suit.

8. In his statement of defence filed in court on 2nd September 2013, the defendant then acting in person, denied the plaintiff's suit, termed it an abuse of the court process and sought dismissal of the same with costs. He stated that he bought a portion of his land being part of the parent land, LR No. Kanyamkago/Kawere II/4277.

9. The defendant further stated that the original parcel of land was LR No. Kanyamkago/Kawere II/3396 and that the plaintiff has never staked a claim over the same. That the plaintiff has not advanced any reason that can defeat the defendant's superior rights over the land.

10. On 27th January 2020, this court directed and ordered the parties to exchange written comments in respect of the surveyor's report. Accordingly, the plaintiff's counsel filed submissions dated 24th April 2020 on even date. Counsel gave a brief background and introduction of the matter including the court order which propelled the surveyor's report. Counsel also framed and discussed in favour of the plaintiff, three (3) issues for determination inter alia, that the Land Registrar and County Surveyor are seized of the jurisdiction to determine and demarcate the boundary positions pertaining to registered land. That the surveyor's report has resolved the dispute between the parties herein.

11. To reinforce the submissions, counsel invoked Sections 18 and 19 of the Land Registration Act, 2016 (2012) and this court's decision in **Registered Trustees, Legio Maria Africa Church Mission v Simeon Nyamweya Obwocha (2018) eKLR**. That by dint of Article 159 (2) (c) of the Constitution of Kenya, 2010, this court is enjoined to encourage parties to resolve their disputes through Alternative Dispute Resolution (ADR) mechanisms including the reference that initiated the surveyor's report. Counsel termed the report apt and sufficient hence urged the court to adopt it as the judgement of this court.

12. Learned counsel for the defendant was given latitude to file and serve submissions regarding the report. The latitude was given on 2nd March 2020. So, the defendant was accorded his right **under Article 50 (1) of the Constitution (supra)**. Surprisingly, the defendant neglected to comment on the report.

13. I have duly considered the parties' respective pleadings, the plaintiff's submissions and the surveyor's report in the present suit. I further bear in mind the plaintiff's statement of issues dated 16th December 2015 and filed in court on 17th February 2015 under Order 15 Rule 1 & 2 Civil Procedure Rules, 2010. In that regard, I am of the considered opinion that the emerging issues for determination are as set out in the plaintiff's submissions and endorse them accordingly.

14. The plaintiff stated at paragraphs 3, 4, 5 and 6 of the plaint that he obtained title deed to the suit land on 12th October 2001. That, therefore, he is the lawful absolute proprietor of the suit land. Quite plainly, the title to the suit land was procured as envisaged under **Sections 27 and 28 of the Registered Land Act Chapter 300 Laws of Kenya (The Repealed Act)**.

15. The plaintiff alleged that the defendant has encroached into the suit land belonging to the plaintiff. At paragraph 17 of his plaint, he stated, inter alia that the defendant commenced to prepare bricks and cultivate a substantial portion thereof. On his part, the defendant merely denied the plaintiff's allegations but laid claim to the neighbouring land parcel.

16. Clerk and Lindsell on Torts 18th Edition at paragraph 18-01 defines the term "**Trespass**" thus:

"An unjustifiable entry by one person upon the land in possession of another. Removing any part of the soil of land also constitutes trespass."

17. It is well noted that in making the orders of 5th May 2016, the court was very conscious of Section 18 (2) of the Land Registration Act, 2016(2012) which states:

***"The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section."** (Emphasis laid)*

18. It is further noted that Section 19 (1), (2) and (3) (supra) provides that:

1) ***“If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.***

2) ***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 the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.***

3) ***Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section.*** (Emphasis added)

19. As directed and ordered by the court, the Land Registrar and Surveyor visited the site and prepared the surveyor’s report which read, inter alia;

“From the above findings, it follows that the creation of parcel number 4898 was as per the map as opposed to existing boundaries on the ground and thus the creators of this parcel of land took advantage of the ambiguity on the map to cause the confusion as to the positions of these two parcels of land on the ground. And from my analysis, interviews and observations, I am strongly convinced that the land in dispute is parcel number 3162 and not 4898.

I further recommend that there is need for map revision in this area so that the boundaries on the ground can match the same boundaries on the map (PID). (Emphasis supplied)

20. Clearly, the Land Registrar and Surveyor are technical officers mandated in matters of land boundary disputes under Sections 18 and 19 (supra); See also paragraphs 12, 13 and 14 in **Andrew Marigwa -vs- Joseph Ondieki Kebati (2017) eKLR** cited in **Registered Trustees, Legio Maria case (supra)**

21. The surveyor’s report is opinion evidence under sections 48 as read with **Section 54 of the Evidence Act Chapter 80 Laws of Kenya**. However, as a general rule, opinion evidence is not binding on the court which is at liberty to accept or reject it depending on the circumstances; see **CD Desai-vs-BR Sharma (1953) 26 KLR 41 at 42**.

22. It is pretty clear that the report is sound and did determine the dispute relating to the relevant boundaries in the instant suit under **Sections 18 and 19 (supra)**. In the case of **Registered Trustees; Legio Maria case (supra)**, this court held in part;

“.....this court is deprived of jurisdiction over a dispute as to boundaries of registered land unless the boundaries have been determined in accordance with Section 18 of the Land Registration, 2012.”

23. It is evident from the surveyor’s report that the defendant trespassed into the suit land of the plaintiff. As such, the latter is entitled to the reliefs sought in the plaint as per Section 13 (7)(a) of the Environment and Land Court Act, 2015 (2011), Section 152A of the Land Act, 2016 (2012) and the Court of Appeal decision in **Eric Edome and another - vs- Pauline Kasumba Osebe and another (2014)eKLR**.

24. Has the instant dispute has been resolved as envisaged under **Article 159 (2)(c) (supra)**? The answer is in the affirmative. This is clearly demonstrated by the surveyor’s report further to the court orders of 5th May 2016.

25. In my considered view, bearing in mind the nature of the suit as well as the obtaining circumstances, a sum of Kshs. 50,000/= would be appropriate as general damages for the plaintiff. So, I award the same.

26. In the premises, I endorse the surveyor’s report dated 5th December 2019 and filed in court on 22nd January 2020 as judgement of this court because the plaintiff has proved this case against the defendant on a balance of probabilities. I, therefore, direct and order that the report be implemented by the Land Registrar and Surveyor, Migori who shall proceed with the map revision in the area to ensure that the boundaries on the ground are in line with the boundaries of the Preliminary Index Diagram (PID).

27. Thus, judgement be and is hereby entered for the plaintiff against the defendant in terms of orders (i) to (v) sought in the plaint dated 2nd July 2013. General damages hereby assessed at **Ksh. 50,000/=** in favour of the plaintiff.

28. By dint of the proviso to Section 27 (1) of the Civil Procedure Act (Chapter 21 Laws of Kenya) and the decision in **Kamau-vs-Mungai and another (2006) 1 KLR 150**, each party to bear his own costs. Moreover, costs to be shared on equal proportions between the parties as ordered on 16th September 2019 shall be paid accordingly.

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 Corona Virus pandemic challenge this 10th day of JUNE , 2020.

G.M.A. ONGONDO

JUDGE

In presence of :-

Mr. D. Adawo learned counsel for the plaintiff

Mr. Singei holding brief for Kisera learned counsel for the defendant.

Court Assistant – Tom Maurice