



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC CASE NO. 401 OF 2013

BENARD NYAMANYA MOGAKA.....1ST PLAINTIFF

ALLOYS TUMBO MOGAKA.....2ND PLAINTIFF

DAVID ONSONGO MOGAKA.....3RD PLAINTIFF

VERSUS

PETER MOMANYI KEBATI.....1ST DEFENDANT

LAND REGISTRAR, KISII CENTRAL DISTRICT.....2ND DEFENDANT

RULING

INTRODUCTION

1. The Plaintiffs are beneficial owners of land parcel No. CENTRAL KITUTU/MWABUNDUSI/833 which is a sub-division of land parcel No. CENTRAL KITUTU/MWABUNDUSI/506. Land parcel No. 506 was originally registered in the name of their late father Mogaka Nyabaro.

2. The Plaintiffs' claim is that the 2nd Defendant illegally caused the 1st Defendant's land parcel No. CENTRAL KITUTU/MWABUNDUSI/347 to be mounted or superimposed on land parcel No. CENTRAL KITUTU/MWABUNDUSI/833 as the two parcels appear to be in the same location on the ground. The Plaintiffs allege that by virtue of the foregoing, the 1st Defendant encroached and trespassed on their land thus interfering with the Plaintiffs' possession thereof. The Plaintiff therefore seeks the following reliefs:

- a) A declaration that the original land parcel No. CENTRAL KITUTU/MWABUNDUSI/506 existed in a separate and distinct location and map sheet from land parcel No. CENTRAL KITUTU/MWABUNDUSI/347.
- b) A declaration that Land parcel No. CENTRAL KITUTU/MWABUNDUSI/347 was illegally created and/or carved from a portion of Land Parcel No. CENTRAL KITUTU/MWABUNDUSI/506 which now affects land parcel No. CENTRAL KITUTU/MWABUNDUSI/833.
- c) An order for rectification of the maps to have land parcel No. CENTRAL KITUTU/MWABANDUSI/347 identified and relocated to its original location, position and sheet.
- d) An order of permanent injunction to restrain the Defendants by themselves, agents and servants from selling or dealing howsoever or otherwise interfering with land parcel No. CENTRAL KITUTU/MWABUNDUSI/833 in any manner adverse (sic) likely to affect the Plaintiffs.
- e) An order to have the illegal relocation of land parcel No. CENTRAL KITUTU/MWABUNDUSI/347 investigated.
- f) Costs of this suit
- g) Such further or other relief (s) as the Honourable Court may deem fit to grant.

3. In his defence dated 25th November 2013, the 1st Defendant denies that he has trespassed onto the Plaintiffs' land and states that he has no

interest therein. He denies that he mounted land parcel No. CENTRAL KITUTU/MWABUNDUSI/347 on land parcel No. 833 as land parcel No. 347 was creature of a first registration and was not acquired by way of fraud. He therefore avers that there is no reason for the court to order rectification of the map or issue an order of injunction. He further states that there have been various suits touching on land parcel number CENTRAL KITUTU/MWABUNDUSI/347 all of which have been determined and the instant suit is therefore *res judicata*.

4. The suit was set down for hearing before Justice Okong'o on 9.7.2014 and 4.5.2015 when the Plaintiff testified and called two witnesses. When the matter came up for further hearing before Justice Mutungi on 18.1.2018, the court observed that the main bone of contention was the ground location of parcels no. 506 and 347 which both resulted from the adjudication process in the 1960s. He therefore directed that the Land Registrar and County Surveyor, Kisii County visit the two parcels of land and use the original adjudication records to establish and fix the boundaries of the two parcels of land and file their report in court within 120 days.

5. The report indicates that the Land Registrar and County Surveyor visited the suit property on 16th October in the presence of both parties and filed their report dated 22nd November 2019. Their findings were that land parcel No. 347 measures 0.38 hectares. It was adjudicated on 28.8.1966 and registered in the name of Moywaywa Nyabaro on 22nd April 1966. According to the aerial photographs, the said parcel of land is in map sheet No. 6 of Mwabandusi registration section.

6. The adjudication register indicates that land parcel No. 506 was adjudicated on 10th September 1966 and was registered in the name of Mogaka Nyabaro on 22nd April 1966. The parcel measures 1.7 hectares and is also found in map sheet No. 6. In 1990 land parcel No. 506 was sub-divided into 5 portions, namely land parcels no. 831,832,833,834 and 835. The report indicates that the sub-division of land parcel No. 506 did not in any way interfere with the existence of parcel No. 347. The report concludes that the two parcels of land do exist on the ground, they neighbour each other and their boundaries are clear on the ground. The parties were then directed to file their comments on the said report. Counsel for the 2nd Defendant indicated that he was in agreement with the report.

7. The 1st Plaintiff filed an affidavit sworn on 2nd January 2020 in which he depones that he opposes the report, as he contends that it was signed by one David Lemaiyan who is a junior officer and not an Adjudication Officer as envisaged by the court order. He further contends that the report is not in conformity with the court order which directed that the Adjudication officer should furnish all the original adjudication documents relating to land parcels number KISII/MWABUNDUSI/347 and 506. He depones that the Land Registrar and County Surveyor filed their report without visiting the suit properties. He depones that the report contradicts an earlier report prepared by one Mr. Kamau, the Surveyor in charge at Kisii to the DCIO who is investigating the matter. He avers that the acreage of land parcel number 347 is not supported by the adjudication records. He states that the 1st Defendant has not furnished any documents to show how he obtained land parcel No. 347 from Moywaywa Nyabaro and he is of the view that the issues in dispute cannot be determined on the basis of a report. He therefore urges the court to disregard the said report.

8. On the other hand, the 1st Defendant filed a Replying affidavit sworn on 10th March, 2020 in which he refutes the contention that one David Lemaiyan is a junior officer in the Survey office at Kisii. He states that the court order did not require the Adjudication Officer to file his own report as the Land Registrar was directed to use the adjudication records to prepare his report. He depones that the Land Registrar and Surveyor visited the suit properties on 31.5.2018 in the presence of the parties and took the evidence of witnesses on the ground. He depones that the report dated 22.11.2019 is comprehensive as it touches on all the aspects mentioned in the court order and mentions the documents relied on, including the scanned aerial photos for the two parcels of land, adjudication data, the adjudication register and certified copies of the green card.

9. He states that the report is conclusive and if the Plaintiffs are not satisfied with it they are at liberty to cross-examine the Land Registrar on the same. He depones that the report is not contradictory as it states that the two parcels of land exist as shown on map sheet No. 6. It is his contention that the report makes reference to the adjudication register which shows that parcel No. CENTRAL KITUTU/MWABUNDUSI/347 was first adjudicated to Moywaywa Nyabaro on 28.8.1966 while parcel No. CENTRAL KITUTU/MWABUNDUSI/506 was adjudicated to Mogaka Nyabaro on 10.9.1966. It therefore follows that land parcel No. 347 was adjudicated earlier than land parcel No. 506 and the owner of land parcel No. 506 could have raised an objection at that time if there was any discrepancy and the Plaintiffs cannot purport to object now. He states that the plaintiffs' opposition to the report is intended to delay the finalization of this case.

10. I have considered the County Surveyor's report dated 22.11.2019 and on the face of it, it is not a joint report of the Land Registrar and County Surveyor as envisaged by the court order issued on 18.2018. Furthermore, it is not clear whether there were two site visits or only one as the County Surveyor's letter dated 6.9.2019 indicates that a site visit was made on 31.5.2018 by the Land Registrar and County Surveyor in the presence of both parties while the report indicates that the site visit was made on 16.10.2019 by two Surveyors in the presence of the Plaintiffs only. The report makes reference to various documents including adjudication records, aerial photos and green cards and map sheets, all of which were used to arrive at the findings and conclusions made in the report.

11. Having considered the pleadings, the Kisii County Surveyor's report and the rival affidavits on the report, I am of the view that the dispute is not solely one concerning boundaries as it is necessary to understand the history of the suit property and how the Defendant acquired his title in addition to the issue of trespass. That being the position, I find and hold that the report does not resolve all the issues in controversy and therefore it is necessary for the case to proceed for hearing from where it had reached so that all the evidence is placed on record. In the premises, the County Surveyor's report will form part of the court record and either party may call the maker of the said report as a witness so that he can shed more light on his findings.

Dated, signed and delivered at Kisii via video link this 28th day of July 2020.

J.M ONYANGO

JUDGE