



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**ELC CASE NO. 498 OF 2014**

**CYPRIAN ONDIEKI NYAMBEKI.....PLAINTIFF**

**VERSUS**

**NYANGWONO MOTONU.....1<sup>ST</sup> DEFENDANT**

**CHARLES ONYAMBU BIRUNDU.....2<sup>ND</sup> DEFENDANT**

**THE COUNTY LAND REGISTRAR KISII COUNTY.....3<sup>RD</sup> DEFENDANT**

**THE COUNTY SURVEYOR KISII COUNTY.....4<sup>TH</sup> DEFENDANT**

**THE ATTORNEY GENERAL.....5<sup>TH</sup> DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Plaintiff is the registered owner of land parcel number WANJARE/BOGITAA/810 measuring 1.4 hectares while the 1<sup>st</sup> Defendant was the registered owner of land parcel number KISII WANJARE/BOGITAA/1320 measuring 5.2 hectares which was subsequently sub-divided to give rise to parcels No. KISII WANJARE/BOGITAA/1553 and 15554. The two parcels of land border each other. The 1<sup>st</sup> Defendant later sold land parcel number WANJARE/BOGITAA/1554 measuring 1.55 Ha to the 2<sup>nd</sup> Defendant and retained parcel No. WANJARE/BOGITAA/1553 in his name.

2. The Plaintiff's claim is that during the sub-division of land parcel No. WANJARE/BOGITAA/1320, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants wrongfully excised a portion of the Plaintiff's land parcel No. 810 on the upper side of the road measuring approximately 1.06 Ha and amalgamated the same into land parcel No. KISII WANJARE/BOGITAA/1554. The 2<sup>nd</sup> Defendant then wrongfully and unlawfully caused the Registry Index Map Sheet No. 5 to be amended to reflect that land parcel No. WANJARE/BOGITAA/810 does not exist on the upper side of the access road and instead that the said portion forms part of land parcel No. WANJARE/BOGITAA/1554. The Plaintiff claims that this is not the position on the ground as he has been in occupation and use of his land parcel No. 810 since 1998.

3. Sometime in 1996 the 1<sup>st</sup> Defendant filed suit against the Plaintiff herein vide Kisii HCCC No. 163 of 1996 claiming that he had acquired a title to land parcel No. WANJARE/BOGITAA/810 by way of adverse possession but the said suit was dismissed on 18<sup>th</sup> November 2009. During the hearing of the said case the Plaintiff discovered that there were two different Registry Index Maps showing different locations of land parcel No. WANJARE/BOGITAA/810.

4. The Plaintiff alleges that as a result of the unlawful amendment of the map, he has been deprived of a portion of his land measuring approximately 1.06 Ha. The Plaintiff states that he has requested the Land Registrar to visit the suit property and fix the boundaries but the Land Registrar has declined to do so. The Plaintiff therefore seeks the following reliefs:

a) A declaration that the Plaintiff is the sole registered owner of all that land known as WANJARE/BOGITAA/810 and is entitled to exclusive unimpeded right of possession and user thereof.

b) A declaration that the 1<sup>st</sup> to 4<sup>th</sup> Defendants whether by themselves or their agents or servants, assignees or howsoever wrongfully and unlawfully curved out part of L.R No. WANJARE/BOGITAA/810 measuring approximately 1.06 Ha and included the same in L.R No. WANJARE/BOGITAA/1554.

c) A declaration that the 1<sup>st</sup> to 4<sup>th</sup> Defendants whether by themselves or their agents or servants, assignees or howsoever wrongfully

and unlawfully created a Mutation Form which shows that L.R No. WANJARE/BOGITAA/810 does not overlap the road of access and thus L.R No. WANJARE/BOGITAA/ 1320 covered the whole (sic) and thus created a Registry Index Map Sheet no. 5 which is contrary to what is shown on the original photograph.

d) An order directing the 3<sup>rd</sup> Defendant to rectify the register of L.R No. WANJARE/BOGITAA/1554 to read 0.49 Ha instead of 1.55Ha.

e) An order directing the 4<sup>th</sup> Defendant to rectify the Registry Index Map Sheet No. 5, to reflect the correct position contained in the aerial photograph and/ or restore the Registry Index Map No. 5 of 1.7.2013.

f) Any other relief that this honourable court will deem fit to grant in the circumstances of this suit.

g) Costs and interest.

5. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed a defence dated 13<sup>th</sup> May 2015 denying the Plaintiff's claim. The 1<sup>st</sup> Defendant states that the suit is res judicata in view of Kisii HCCC No. 163 of 1996. They deny that land parcel No. WANJARE/BOGITAA/810 overlaps the road of access and state that the said road of access is the boundary. They deny that land parcels No. WANJARE/BOGITAA/ 1554 has encroached on parcel no. 81

6. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants filed their defence on 30<sup>th</sup> April 2015. They state that if there are two different Registry Index Maps of the suit land then the same were done legally. They further deny that they received any requests to rectify the Registry Index Map and state that if there is a genuine reason to rectify the map they are ready to do so even without the court's directions.

7. When the matter came up for hearing on 24.10.208, Counsel for the Plaintiff informed the court that he needed the Land Registrar to visit the suit property and prepare a report regarding the status on the ground. The court therefore directed that the Land Registrar and Surveyor visit land parcel No. WANJARE/BOGITAA/ 810, 1553 and 1554 to inspect the land parcels, and delineate the boundaries using the Registry Index Map that provided for land parcels No. 810 and 1320 for purposes of establishing and fixing the boundaries of parcel 810, 1553 and 1554 and in particular to delineate the boundary between parcel 810 and 1554 and file their report in court.

8. The Land Registrar and County Surveyor visited the suit property in the presence of the parties and filed their report dated 16.7.2019. In the said report, they indicated that the boundary of land parcel 810 and 1554 is the road.

9. The parties were then directed to file their comments on the report but only the Plaintiff's counsel filed his comments. In his comments, counsel took issue with the fact that the Land Registrar did not personally visit the suit property and instead sent an undesignated officer to represent him. He also faulted the surveyor for using a corrupted Index Diagram and mutation form as opposed to the Registry Index Map that created parcels 810 and 1320. He further complained that the Surveyor refused to look at the aerial photograph provided by the Plaintiff and that the Surveyor did not take the ground measurements to confirm if they tallied with the measurements on the register. He noted that there was a discrepancy between the acreage of land parcel No. 1320 in the register and the mutation form used to create land parcels No. 1553 and 1554. He therefore urged the court to disregard the said report as it was not conclusive.

10. In the absence of the unexplained discrepancies with regard to the measurements of land parcels No. WANJARE/BOGITAA/ 1553, 1554 in relation to land parcel No. WANJARE/BOGITAA/1320 from which they were derived and the failure of the Surveyor to use the RIM that created land parcel No. 1320 and 810 as a basis for the boundaries. I am inclined to agree with counsel for the Plaintiff that the report does not assist the court in resolving the issues in dispute. In the premises, I direct that the case be fixed for hearing. The report shall form part of the court record and any of the parties may call the maker of the report for cross-examination on the same.

**Dated, signed and delivered via video link this 28<sup>th</sup> day of July 2020.**

**J.M ONYANGO**

**JUDGE**