



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 164 OF 2015**

**IN THE MATTER OF LAND RIGHTS UNDER ARTICLE 64 (1) OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**ONDIEKI NYATWANG'A ..... 1<sup>ST</sup> PETITIONER**

**ALFRED NYABERI NYATWANG'A ..... 2<sup>ND</sup> PETITIONER**

**VERSUS**

**THE COUNTY GOVERNMENT OF NYAMIRA ..... 1<sup>ST</sup> RESPONDENT**

**THE COUNTY EXECUTIVE COMMITTEE NYAMIRA COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The petitioners are the registered proprietors of land parcels **Central Kitutu/Mwogeto/779** and **780** measuring 0.7 Hectares and 1.5 Hectares respectively. The petitioners through their petition claimed that the County Government of Nyamira who are the proprietors of **Central Kitutu/ Mwogeto/1419** had invaded portions of their respective parcels of land with the object of constructing a public stadium and in so doing had destroyed and damaged the petitioners' crops and buildings. The petitioners sought declaration that their property rights guaranteed under the constitution had been violated and further sought an order for compensation for damage occasioned. Pending the hearing of the petition the petitioners sought an order of temporary injunction to restrain the respondents from interfering in any manner with their suit properties. The court granted a temporary order of injunction ex parte on 8<sup>th</sup> May 2015 after the respondents failed to attend court for the interpartes hearing of the Notice of Motion application.

2. The respondents by a Notice of Motion application dated 15<sup>th</sup> May 2015 sought to have the temporary injunction issued by the court on 8<sup>th</sup> May 2015 discharged and/or set aside and the petitioners Notice of Motion dated 5<sup>th</sup> May 2015 heard interpartes. The respondents averred that the order of temporary injunction was granted on the basis of material non disclosure on the part of petitioners. The respondents stated that it was the petitioners who had in fact encroached onto the Government land and effected developments on the land and averred that if the true position had been established the court would not have granted the temporary injunction as it did.

3. The matter was listed before me for hearing of the respondents' application dated 15<sup>th</sup> May 2015 and after hearing the parties counsel I was persuaded that indeed this was a case of a boundary dispute which

could only be determined by the District Land Registrar and the County Surveyor and on that account I made an order *suo moto* for the Land Registrar Nyamira and the County Surveyor to identify and point out the beacons for the respective parcels of land. The extracted order of reference was in the following terms:-

**1. That the Land Registrar Nyamira and the County Surveyor do visit the petitioners' parcels of land and delineate and identify and point out the respective beacons for Plot Nos. Central Kitutu/Mwogeto/779 and Central Kitutu/Mwogeto/780 and to also confirm the dimensions of Plot No. Central Kitutu/Mwogeto/1419 (before subdivision) said to be owned by the government.**

**2. That the Land Registrar and Surveyor to inform whether there is any encroachment onto the petitioners' lands by the respondents.**

**3. That the Land Registrar/Surveyor shall notify the petitioners of the date appointed for the site visit and the petitioners will be at liberty to be represented by their own surveyor during the exercise.**

**4. That the land registrar/surveyor to file their report in court within the next sixty (60) days from today and thereafter parties to take a mention date for directions.**

4. The Land Registrar executed the order of the court and prepared the report dated 16<sup>th</sup> February 2016 which was filed in court on 16<sup>th</sup> March 2016. As per the Land Registrar's report both petitioners and their private surveyor were present during the site inspection. The report notes land parcel **Central Kitutu/Mwogeto/1419** was registered under the County Government of Nyamira and that the same had been grossly encroached upon by individual parcel holders adjacent to the parcel. The report states that initially **land parcel 780** had encroached onto the respondents land by approximately 0.89 acres while **land parcel 779** had encroached by approximately 0.63 acres as per diagram "A" attached to the report. The County Government apparently forcibly removed the encroachers and demolished the temporary structures erected on their land and thereafter constructed a stadium which extended to the encroached portion.

5. The report further indicated that after the dimensions of parcels 779 and 780 were taken it was evident that the County Government following the removal of the encroachers inadvertently slightly encroached into parcel 780 by an area of 0.012Ha approximately (8feet by 100 feet) and into parcel 779 by 0.01Ha approximately (7feet by 100feet) as per diagram "B" attached to the report. The land registrar opines that the encroachment is insignificant and can be dispensed with but otherwise leaves it upon the court to advise as appropriate.

6. Having reviewed and considered the matter it is my view that since the Land registrar confirmed and identified the encroachment by the County Government onto the petitioners parcels of land, the County government should yield the portions that they were shown to have encroached on forming part of the petitioners land back to the petitioners. A portion of land extending 8 feet by 100feet is sizeable land that can be put to some use by the owner. My determination therefore is that the petitioners should have the boundaries of their parcels of land fixed as shown in diagram "A" prepared by the surveyor/land registrar and that will of course discount the portions that the petitioners were initially shown to have encroached on the respondents' land.

7. This determination of necessity disposes of the main petition which I accordingly proceed to mark as finally settled. Each party will bear their own costs of the application and petition.

**Ruling dated, signed and delivered at Kisii this 7<sup>th</sup> day of October, 2016.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

..... for the petitioners  
..... for the respondents  
..... Court Assistant

**J. M. MUTUNGI**

**JUDGE**