



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 83 OF 2016

MARY WANGECHI ALI PLAINTIFF

-VERSUS-

MARY NJERI KIBIRU 1ST DEFENDANT

DAMARIS WANGECHI WESA.....2ND DEFENDANT

DAVID MURIITHI GICHEHA3RD DEFENDANT

PETER KIBUI NYAGUANJI..... 4TH DEFENDANT

JASAN KANJA NYAGUANJI 6TH DEFENDANT

THE LAND REGISTRAR, NYERI.....7TH DEFENDANT

JUDGMENT

1. The plaintiff herein instituted this suit seeking judgment against the defendants jointly and severally for a declaration that the acts of the Land Registrar, Nyeri, changing the layout of his parcel of land to wit **LR No. Gatarakwa/ Gatarakwa Block 3/1972** (the suit property) and reducing its registered area is illegal, null and void. The plaintiff also seeks a perpetual injunction to restrain the 1st to 7th defendants by themselves, their agents and/or servants from interfering with the suit property, general damages for trespass to his property, costs of the suit and interest.

2. It is the plaintiff's case that at all times material to this suit, all the suit properties which are the subject matter of this suit, with an exception of the one for the 1st defendant were clearly delineated with no boundary dispute.

3. Explaining that on or about 10th March, 2016 the 1st defendant lodged a complaint to the 7th defendant to the effect that her parcel of land was none existent on the ground, he points out that the 7th defendant embarked on a boundary fixing exercise which culminated in creating a parcel of land for the 1st defendant from five neighboring parcels of land.

4. Lamenting that the exercise led to reduction of his parcel of land by $\frac{3}{4}$ of an acre, the plaintiff contends that the exercise was illegal in that:-

- (i) It was a reparation exercise disguised as a boundary fixing exercise;
- (ii) It led to creation of boundaries that are incompatible with his documents of title contrary to the provisions of **Section 15(2)** of the Land registration Act, 2012;
- (iii) That it led to changing of the layout of the suit properties;
- (iv) It would result to preparation of a new cadastral map and cancellation of the respective registers required under the law hence affecting the ownership of the affected properties;
- (v) It led to vesting part of his land to the 2nd to 6th defendants;

(vi) That the exercise was done without his consent.

5. The plaintiff further laments that owing to the impugned exercise he suffered loss; his trees and fence were destroyed; trespass to part of his land and violation of his rights as the absolute proprietor of the suit property.

6. Parties on 6th November, 2017 agreed that the surveyor's report dated 14th June, 2016 filed by the 1st to 6th defendants on 13th February, 2017 be treated as the facts of the case. The parties also agreed that the District Surveyor be summoned to produce the report and thereafter parties would file submissions.

7. In accordance with the agreement referred to herein above, Nelson Ngare Mureithi, the County Surveyor, Nyeri County, attended court and produced the report. The contents of the report are as follows:-

“RE: SURVEYOR’S REPORT ON BOUNDARY DISPUTE BETWEEN PARCEL NUMBERS 1972, 1973, 524, 523 AND 522.

A site visit of the dispute parcels was made on 25th February, 2016. While at the site existing boundaries of parcels Gat/Gat Blk3/522, 524 (resultant of 1823, 1824, 1825, 1826, 1827, 1828 and 1929), 1972 and 1973 were picked since parcel 523 was not existing on the ground.

The length of the parcels picked was 386.2 metres against 290 metres provided by RIM on the upper side next to the road of access inclusive of 523.

The length of the parcels picked on the lower side was 390m against 400m provided by RIM inclusive of parcel 523.

The measurement indeed confirmed that parcel No. 523 that never existed on the ground had been encroached upon.

A reparation was done and the boundaries of the various parcels planted on 30th March 2016. While fixing the boundaries, the deficiency of the ground measurements was distributed on a prorata basis among all the parcels against scaled distances on the RIM thereby fixing the parcels as follows:

Parcel No.1973 at 60.0 against 61.0 m on the map;

Parcel No. 1972 at 55.4m against 56.0m on the map;

Parcel No.524 at 53.0m against 54.0m on the map;

Parcel No.523 at 68.1m against 69.0 on the map;

Parcel No.522 at 110.0m against 111.5m on the map.

Similarly on the lower side the same distribution was done fixing the parcels as follows:

Parcel No.1973 at 58.8 against 58.0 m on the map;

Parcel No.1972 at 70.5m against 72.0m on the map;

Parcel No.524 at 123.4m against 126.0m on the map;

Parcel No.523 at 50.9m against 52.0 on the map;

Parcel No.522 at 88.1m against 90.0m on the map.

Attached herewith is a plan showing the parcels of interest as they were fixed on the ground.”

8. On cross examination by counsel for the plaintiff, the County Surveyor explained that before visiting the site, the applicant, owner of parcel number 523, had applied to the office of the Land Registrar for him to visit the disputed parcel to determine the boundaries. He further explained that the Land Registrar summoned the owners of land parcels numbers 522, 523, 1828, 1829, 1827, 1825, 1823, 1972 on 10th March, 2016 to the site on 30th March, 2016.

9. The court heard that parties had earlier been summoned on 14th January 2016, to appear before the Registrar on 25th February, 2016.

10. The court further heard that all the parties were present at the time the impugned exercise was carried out.

11. They visited the site to establish the correct measurements of the disputed parcels. After measurements, they corrected the boundaries.

12. He denied the contention that they shifted the boundaries in favour of the 1st defendant.
13. He contended that the parties had erroneously erected fences outside the boundaries.
14. He denied the plaintiff's contention that they felled down his trees and destroyed the fence.
15. According to the County Surveyor, the boundaries existing at the time of demarcation were tampered with when the parties were settling in their respective parcels of land.
16. They re-fixed the boundaries as per the map.
17. The court further heard that there was no trespass by other respective parties onto the plaintiff's parcel of land.
18. At close of hearing, parties filed submissions which I have read and considered.

The Plaintiff's submissions

19. On behalf of the plaintiff reference is made to the report of the County Surveyor and submitted that the report confirms that the 7th defendant embarked in a reparation exercise which resulted in reduction of the size of her land.
20. Terming the exercise illegal and contra-statute, based on the provisions of **Section 23** of the Land Registration Act, 2012 which according to her ought to have guided the exercise, the plaintiff submits that the impugned exercise did not conform to those legal edits as:-
 - (i) It produced results which are incompatible with her title document;
 - (ii) The process was not on application of the parties;
 - (iii) The affected parcels are not contiguous; and
 - (iv) There was no written consent of parties.
21. Reliance was made on the cases of **David A. Langat & Another v. Arap Sigilai & Another (2016) eKLR** where it was *inter alia* held that the Land Registrar's power to reparcel land is subject to consent being given by the land owners; and the case of **Macfoy vs. United Africa Co. Ltd (1961) 3 ALL E.R 1169** where it was stated that if an act is illegal thus void, it is automatically null and void without more ado, though it is sometimes convenient to have the court to declare it to be so.

The 2nd to 6th defendants' submissions

22. On behalf of the 2nd to 6th defendants, it is submitted that the plaintiff has neither made up a case for being granted the orders sought nor demonstrated the prejudice she has suffered owing to the impugned boundary fixing exercise. The prayer for trespass to property is said to be lacking substratum as there was no physical trespass to the plaintiff's land by the defendants. In particular it is contended that:-
 - (i) The plaintiff has not established that the 7th defendant changed the layout of the her property or that the exercise resulted in reduction in the size of her parcel of land;
 - (ii) The plaintiff has not demonstrated the illegality in the exercise conducted by the 7th defendant;
 - (iii) That the report by the County Surveyor shows that the 1st defendant's parcel of land was irregularly encroached upon by LR Nos. 522, 524, 1972 and 1973. The plaintiff is said to have failed to controvert that evidence.
 - (iv) That the plaintiff was notified about the impugned exercise.
 - (v) All parties were present or sufficiently represented during the exercise.
 - (vi) That it appears the plaintiff does not want the dispute hereto solved as she is the beneficiary of the excess land occasioned by the deliberate encroachment into the adjacent parcels of land.
 - (vii) That the plaintiff has not come to court with clean hands.

Analysis and determination

23. From the pleadings and the submissions filed, this court finds the issues for determination to be as follows:-
 - (i) Whether the exercise carried out by the 7th defendant amounted to reparation. If yes, whether the applicable law and procedure was complied with in carrying out the exercise?

(ii) Whether the plaintiff has made up a case for being granted the orders sought or any of them?

(iii) What orders should the court make?

24. As to whether the exercise carried by the 7th defendant amounted to reparation as opposed to merely fixing the boundary dispute by the parties, I begin by pointing out that it is admitted in the surveyors report that the Land Registrar did not merely fix the boundaries between the parcels of land hereto but ended up creating parcel number 523 from the other parcels. Parcel number 523 was allegedly missing on the ground before the exercise was conducted.

25. As to whether the Land Registrar complied with the applicable law and procedures, firstly, it is important to consider what the law says about reparation. In that regard see **Section 23** of the Land Registration Act which provides as follows:-

“subject to Section 15 and authentication of the cadastral map, on the application of proprietors of contiguous parcels who are desirous of changing the layout of their parcels, and with the consent in writing of all other persons whose names any right or interest in the parcels is registered and of any cautioner, the Registrar may-

(a) Cancel the registers relating to those parcels and prepare new registers in accordance with the new edition of the cadastral map; or

(b) Refuse to effect the reparation if the Registrar considers that the proposed re- parcellation involves substantial changes of ownership, which should be effected by transfer without invoking this section, in which case the Registrar shall direct the proprietors accordingly.

26. The above quoted section of law was espoused by **Munyao J.**, in the case of **David A. Langat & another v. Arap Sigirai & another** supra thus:-

“it will be observed that a Land Registrar has power to reparcel. However, this is subject to consent being given by the land owners. I think it is the same principle that the court ought to apply. Where one party insists on its rights and no interest in reparceling, the court ought to be slow to order a reparation....”

27. It is clear from the above cited provision of the law and case law, that the Land Registrar has power to reparcel land. However, that power can only be exercised where the conditions set in that part of the law are met. That is to say, all the affected land owners must have given their consent to the reparation.

28. Whereas in the circumstances of this case there is evidence or it is not controverted that the land owners participated in the impugned exercise, there is no evidence that they gave consent to reparation of their land. Given that the exercise the Land Registrar was asked to undertake was going to result in substantial changes in ownership of the affected parcels of land (the parcels would be reduced in size and layout, the Land Registrar should have, in accordance with the provisions of **Section 23(b)** of the Land Registration Act, 2012 refused to conduct the exercise.

29. In view of the foregoing, I find that the plaintiff has made up a case for being granted the orders sought which I hereby grant her as prayed.

Dated, Signed and Delivered in open court at Nyeri this 26th day of February, 2019.

L N WAITHAKA

JUDGE

Coram:

Mary Wangechi Ali – plaintiff

Damaris Wangechi – 2nd defendant

Peter Kibui Nyaguanji – 4th defendant

Jason Kanja – 6th defendant

1st, 3rd and 7th defendants