



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYERI

ELC NO. 121 OF 2014

JOSHUA KINYUA KIARIE.....1ST PLAINTIFF

SUSAN MUTHONI (*Suing for and on behalf of the*

estate of JOYCE WAMAITHA - DECEASED).....2ND PLAINTIFF

-VERSUS-

MUIRURI WAINAINA.....1ST DEFENDANT

AGATHA WAMBUI WAINAINA.....2ND DEFENDANT

JUDGMENT

1. The plaintiffs herein instituted this suit seeking judgment against the defendants jointly and severally for an order that L.R Nos. Nyeri/Uaso Nyiro/205, 206 and 207 (formerly Uaso Nyiro 127) be resurveyed and the boundaries on the ground be fixed by the District Land Registrar, Nyeri giving the plaintiff's parcel of land L.R No. Nyeri/Uaso Nyeri/207 the actual and physical acreage of 42.827 acres on the ground and not less, cost of the suit and interest at court rates, any other or better relief that this Honourable court may deem mete and just to grant.

2. The plaintiffs' case is that the defendants' parcels of land namely L.R No. Nyeri/Uaso Nyiro/202 and L.R No. Nyeri/Uaso Nyiro/206 measuring 2.02 (4.991 acres) respectively which are as a result of subdivision of the original parcel of land namely L.R No. Nyeri/Uaso Nyiro/127 measuring 21.5 ha (53.126 acres) are much bigger on the ground than they ought to be while the plaintiffs' parcel on the ground is smaller than it ought to be.

3. It is deponed that the subject matter of this dispute was reported to the District Land Registrar, Nyeri who decided that the matter be referred to court.

4. The defendants through their statement of defence dated **3rd July, 2014** denied the allegations leveled against them and contended that the existing boundary was fixed and marked by a Government Surveyor with the concurrence of all parties; that the plaintiffs' claim is statute barred and that this court has no jurisdiction to hear and determine the suit.

5. When the suit came up for hearing, parties to the dispute through their advocates recorded a consent in the following terms: -

“By consent

1. L.R Nos. Nyeri/Uaso-Nyiro/205, 206 and 207 (formerly Nyeri/Uaso-Nyiro 127 be resurveyed and the boundaries on the ground be fixed by the District Land Registrar Nyeri and the District Land Surveyor Nyeri in accordance with the records held by the land registry, Nyeri.

2. The date and time for the site visit to be agreed between the parties and the District Land Registrar and Surveyor but the said exercise to take place and a report be filed in court not later than 90 days from the issuance of the order.

3. The parties in this matter to share the costs of the District Land Registrar and the District Land Surveyor;

4. Mention of 11th February, 2015”.

6. Pursuant to the order issued in respect of the above consent, the District Land Registrar and Surveyor filed the following report: -

Report on implementation of Court Order ELC No. 121 of 2014

Josua Kinyua Kiarie

Susan Muthoni Kiarie

Suing for and on behalf of

The estate of Joyce Wamaitha

Deceased.....Plaintiffs

Versus

Muiruri Wainaina

Agatha Wambui Wainaina.....Defendants

Introduction

Implementation of the above mentioned court order was carried out in two days, 17th October, 2017 and on 14th December, 2017

The following persons were present;

- 1. Joshua Kinyua Kiarie**
- 2. Susan Muthoni Kiarie.....Plaintiffs Parcel No. Nyeri/Uaso Nyiro 207**
- 3. Muiruri Wainaina.....Defendant Parcel No. Nyeri/Uaso/ Nyiro 207**
- 4. Agatha Wambui Wainaina..Defendant parcel No. Nyeri/Uaso Nyiro 206**
- 5. Jonah Mwambia.....Land Registrar**
- 6. Nelson Muriithi.....Land Surveyor**
- 7. John Nderitu.....Land Surveyor**
- 8. Lydia Wachira.....Area Chief**
- 9. Duncan Kahama.....Area Assistant Chief**
- 10. Stanley Wachira.....Police Officer**
- 11. Charles Kanyoro.....Elder**
- 12. Others**

The court order directed the Land Registrar and the Land Surveyor to resurvey land parcel numbers. Nyeri/Uaso Nyiro/205, 206 and 207 (formerly Nyeri/Uaso Nyiro/127) and the boundaries on the ground be fixed in accordance with the records held by the land registry, Nyeri.

Observations/findings

Land parcel numbers Nyeri/Uaso Nyiro 205, 206 and 207 are resultant numbers of Nyeri/Uaso Nyiro/127 which was subdivided on 20.11.1984 and measured 21.5 ha. Land parcel numbers Nyeri/Uaso Nyiro/205, 206 and 207 have registered areas 2.02 ha, 2.02 ha and 17.332 ha respectively.

Land parcel number Nyeri/Uaso Nyiro/205 is registered under Muiruri Wainaina, number 206 is registered under Agatha Wambui Wainaina while number 207 is in the name of Wamaitha Kiarie as the administrator.

On the ground, upon resurvey it was found that land parcel number Nyeri/Uaso Nyiro/205 measures 2.88 ha meaning it has an excess of 0.86 ha above what is registered (2.02 ha).

Land parcel number Nyeri/Uaso Nyiro/206 measures 2.59 ha on the ground meaning it has an excess of 0.57 ha above registered area of 2.02 ha.

Lastly, land parcel number Nyeri/Uaso Nyiro/207 with a registered area of 17.332 ha measures 16.30 ha on the ground meaning it lacks or is in deficit of 1.032 ha from what is registered.

Conclusion

The boundaries for the respective parcels were fixed in accordance with the land registers (green cards) and the registry index map, being records held by the land registry.

Consequently, the portions that were in excess on parcel numbers 205 and 206 fell on parcel number 207 upon the resurvey as ordered.

Report prepared by

Jonah Mwambia (Land Registrar)

John Nderitu (Land Surveyor)

Nelson Muriithi (Land Surveyor).”

7. Counsel for the plaintiff informed the court that the report of the Land Registrar would be sufficient for the court to render judgment. He urged the court to adopt the report as the judgment of the court. Counsel for the defendant left the issue to court to determine.

Analysis and determination

8. As pointed out herein above, the plaintiff instituted the suit herein seeking the reliefs listed above on the aforementioned reasons.

9. Being a case for fixing of boundaries, this court did not have jurisdiction to entertain the dispute at the time the suit was filed. In that regard, see **Section 18(2)** of the Land Registration Act, 2012 which provides as follows:-

“18. (2) 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.”

10. Be that as it may, perhaps in recognition of the above legal huddle, the parties through their advocates, entered into the consent referred to above. The effect of the consent was to cure the defect in the proceedings in that the mischief meant to be cured by denying the court jurisdiction to entertain any action or proceedings relating to a dispute as to boundaries of registered land was cured by the report filed by land registrar.

11. The report filed by the Land Registrar being unchallenged and there being no basis for not believing it, I adopt it as the judgment of the court.

12. As none of the parties to this suit was shown to have caused the situation that led to the filing of this suit, I order that parties bear their own costs of the suit.

13. Orders accordingly.

Dated, signed and delivered in Nyeri this 20th day of February, 2019.

L N WAITHAKA

JUDGE

Coram:

Mr. Mshila for Muchiri wa Gathoni for the plaintiff

N/A for the defendants

Court assistant - Esther