



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**ENVIRONMENT AND LAND CASE NO. 235 OF 2016**

**ELIAS NYASIMI NYAONI alias TUTI ..... PLAINTIFF**

**VERSUS**

**JANE MECHA ..... DEFENDANT**

**R U L I N G**

1. The plaintiff initiated the instant suit by way of plaint dated 5<sup>th</sup> August 2016. The plaintiff's claim was that he was the registered owner of LR No. **North Mugirango/Bokeira I/2966** which shares a common boundary with land parcel LR No. **North Mugirango/Bokeira/2408** registered in the name of Robinson Mecha Mabuka (deceased) represented in the instant suit by the defendant as the legal and personal representative. The plaintiff's land parcel LR No. **North Mugirango/Bokeira/2966** was a subdivision from land parcel LR No. **North Mugirango/Bokeira I/32** while the defendant's land parcel LR No. **North Mugirango/Bokeira I/2408** was a subdivision from land parcel LR No. **North Mugirango/Bokeira I/31**.

2. The plaintiff stated that the defendant's late husband filed Kisii CMCC No. 408 of 2008 seeking the eviction of the plaintiff from land parcel LR No. **North Mugirango/Bokeira I/2408** but the plaintiff claims he was never at any time in occupation of land parcel **North Mugirango/ Bokeira I/2408** and was always in occupation of land parcel **Bokeira I/2966** which belonged to him. The plaintiff claims he was unlawfully and wrongfully evicted from his land parcel **Bokeira I/2966** and in the process his properties were damaged.

3. The plaintiff sought judgment against the defendant for:-

**(a) A declaration that the plaintiff is the owner and proprietor of land parcel No. North Mugirango/Bokeira I/2966.**

**(b) A declaration that the actions of the defendant involving eviction and destroying the plaintiff's properties involving a permanent house and other structures from land parcel No. North Mugirango/ Bokeira I/2966 was wrongful and illegal since the eviction order was specifically for land parcel No. North Mugirango/Bokeira I/2408.**

**(c) The plaintiff having suffered loss, he be paid damages and costs of the suit.**

**(d) Any further relief as the honourable court may deem fit to grant.**

4. The plaintiff simultaneously with the plaint filed a Notice of Motion application dated 5<sup>th</sup> August 2016 expressed to be brought under Section 1A, 1B, 3 and 3A of the Civil Procedure Act and Order 40 Rules 1(a), 2, 3, 4 and 5 and Rule 11 and Order 51 of the Civil Procedure Rules seeking inter alia the following orders:-

**1. That pending the hearing and determination of the suit herein, the Honourable court do issue a temporary order of injunction restraining the defendant/respondent whether by herself, her employee, servant, agent or anyone claiming through her from interfering, selling or howsoever dealing with the land parcel No. North Mugirango/Bokeira I/2966.**

**2. That in the alternative the Honourable Court be pleased to issue an order of status quo to be maintained pending the hearing and determination of the application and the suit.**

**3. That the costs be provided for.**

5. The plaintiff's said application was founded on the grounds set out on the face of the application and on the supporting affidavit sworn by the plaintiff. The plaintiff inter alia set out the following grounds in support of the application:-

**1. That the plaintiff/applicant was wrongfully and illegally evicted from, his land parcel No. North Mugirango/Bokeira I/2966 which was not subjected of the eviction order as issued.**

**2. That as a result the plaintiff/applicant has suffered since the defendant has fenced off the land parcel No. North Mugirango/ Bokeira I/2966 which belongs to the plaintiff/applicant.**

**3. That the eviction order was for the land parcel No. North Mugirango/Bokeira I/2408 belonging to the defendant's/respondent's late husband and not the land parcel No. North Mugirango/Bokeira I/2966.**

6. The defendant swore a replying affidavit dated 19<sup>th</sup> August 2016 in opposition to the application by the plaintiff. The defendant's position as can be deduced from her affidavit was that a lawful eviction order was executed against the plaintiff and there was no basis for the plaintiff's application and the suit.

7. The plaintiff's application was listed for interpartes hearing on 26<sup>th</sup> September 2016 and the court upon reviewing the same was of the opinion that the issue in dispute related to the delineation of the parties parcels of land physically on the ground and *suo moto* decided to refer the matter to the land registrar and the surveyor for determination/adjudication. The court's order of reference to the registrar/surveyor was in the following terms:

**“The parties herein are claiming ownership of 2 different parcels of land. The plaintiff claims land parcel North Mugirango/ Bokeira I/2966 while the defendant states her parcel is North Mugirango/ Bokeira I/2408. The two parcels cannot sit on the same spot on the ground. The court directs the land registrar Nyamira and the County Surveyor to visit the two parcels of land and to delineate their respective boundaries within the next 90 days from today and to file a report in court together with a sketch plan showing the layout of the two parcels. Mention date to be taken at the registry after the expiry of the period.”**

8. The land registrar and the surveyor filed their respective reports on 12<sup>th</sup> September 2017. The surveyor's report dated 30<sup>th</sup> March 2017 identified three (3) plots namely Plot Nos. **North Mugirango/Bokeira I/2966, 2408 and 2965** on the ground and indicated that upon measurement all the 3 plots were of equal size 7.5m x 30m equaling an area of 0.0225Ha. He furnished a sketch plan showing the layout of the plots. The plaintiff's land parcel **2966** is separated from the defendant's parcel **2408** by land parcel **2965**.

9. The land registrar's report dated 31<sup>st</sup> August 2017 agreed with the surveyor's report. The land registrar affirmed that land parcel **2965** was in between the plaintiff's and the defendant's parcels of land. The defendant's plot was developed with a shop (kiosk) and residential houses and was being utilized by the defendant. Land parcels **2966** and **2965** the land registrar observed were under cultivation (bananas and other crops) by the owners and had natural fence all around. The land registrar's conclusion was that the three parcels were of equal size and were physically there and well marked on the ground and hence did not require any boundary delineation as they were all well marked on the ground.

10. After the reports were filed, the plaintiff indicated he was happy with the reports but the defendant opted to challenge the reports and in that regard filed a replying affidavit sworn on 7<sup>th</sup> October 2016. In the replying affidavit the defendant raises issues regarding some of the observations made by the land registrar. For instance, she deposes that there are no bananas and other plants grown on land parcels **North Mugirango/Bokeira I/2965 and 2966** and asserts that bananas are only growing on her land parcel 2408. The defendant further takes issues with the varying sizes of the parcels of land. The report by the land registrar and the surveyor indicates all the three parcels of land are equal in size (0.0225Ha). The defendant annexed copies of titles in regard to the three parcels of land which indicate land parcel **2408** is 0.051Ha; land parcel **2965** is 0.037Ha; and land parcel **2966** is 0.037Ha. These variations in sizes were not explained by the land registrar and the surveyor in their reports.

11. The court had the land registrar and the surveyor summoned to court to present and explain their reports. The land registrar and the surveyor explained that their report conformed with the Registry Index Map (RIM) which the surveyor duly produced and tendered to the court. The land registrar and the surveyor indicated that they carried out actual physical inspection at the site and took measurements which informed their reports.

12. While the matter was pending direction on the reports filed by the land registrar and the surveyor, the defendant through the law firm of Elijah K. Ogoti & Co. Advocates gave a notice of preliminary objection dated 16<sup>th</sup> November 2018 filed in court on 19<sup>th</sup> November 2018. The preliminary objection was founded on the following grounds:-

**1. The subject matter herein has already been adjudicated upon by the Honourable Court vide Kisii CMCC No. 408 of 2008 - Robinson Mecha Mabuka –vs- Alfred Momanyi Rosasi & 2 Others hence the same issues cannot be placed before this Honourable Court for determination.**

**2. That due to the above facts clearly depict res judicata contrary to Section 7 of the Civil Procedure Act Cap 21 of the Laws of Kenya since the defendant herein Jane Mecha is a legal representative of the estate of Robinson Mecha Mabuka, the decree holder in Kisii CMCC No. 408 of 2008.**

13. Although no directions were given regarding the disposal of the preliminary objection by the defendant, the court is duty bound to consider the efficacy of the same as it is on record. The basis of the preliminary objection as I understand it, is that since there had been an earlier suit namely Kisii CMCC No. 408 of 2008 where similar issues were raised and determined, the present suit is *res judicata*.

14. The plaintiff in his pleadings has disclosed there was an earlier suit namely Kisii CMCC No. 408 of 2008 in which the defendant's husband who was the plaintiff was decreed to be the owner of the land parcel No. **North Mugirango/Bokeira I/2408** and was granted an order to evict the defendant therein from the said land parcel. The plaintiff's instant suit is that he is the owner of land parcel No. **North Mugirango/Bokeira I/2966** which was separate and distinct from land parcel 2408. The plaintiff's position is that the defendant's husband in executing the decree in Kisii CMCC No. 408 of 2008 unlawfully and illegally destroyed the plaintiff's properties in land parcel **2966**. I

have considered the issues that arise in the present suit and my view is that the issues are not the same and similar to the issues in the earlier suit. The issue in the present suit is where land parcels **2408** and **2966** are physically positioned on the ground. The parties have not availed the pleadings and/or the proceedings in the previous suit and it is not possible to determine whether the physical ground location of the two parcels of land was in issue in the previous suit and if so, if any determination had been made. Trespass can only arise if it is proved and shown that a party has unlawfully encroached onto another's parcel of land. Where the parcel boundaries are not delineated trespass cannot be established until the boundaries are fixed.

15. In the present matter although both land parcels are shown to exist in the Registry Index Map (RIM) and the reports by the land registrar and the surveyor indicate the plots exist on the ground, the various documents such as the copies of the search certificates and the copies of the title deed show sizes that are at variance with the areas reported by the surveyor as indicated earlier in this ruling. These variances have not been explained and in the premises I cannot admit and accept the land registrar's reports as disposing of the issues in this matter. It is noteworthy that the plaintiff claims his semi permanent house valued at kshs. 1Million was destroyed by the defendant. The reports by the land registrar and the surveyor make no mention of this yet they observe the parcels of land have established boundaries and are occupied by the respective owners.

16. It is my finding therefore that the reports filed by the land registrar and the surveyor have not fully resolved the issues in dispute and I accordingly direct that the parties proceed to prepare the suit for full trial. As the defendant does not appear to have filed a defence to the suit, the court directs that the defendant files her defence and ensures compliance with Order 11 within the next 30 days of this ruling.

17. Costs of the application to abide the outcome of the suit.

**RULING DATED, SIGNED AND DELIVERED AT KISII THIS 20<sup>TH</sup> DAY OF MARCH 2019.**

**J. M. MUTUNGI**

**JUDGE**

**In the Presence of:**

N/A for the plaintiff

N/A for the defendant

Ruth Court Assistant

**J. M. MUTUNGI**

**JUDGE**