



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 553 OF 2015

JAMES CHARAHA OTOREPLAINTIFF

VERSUS

JEREMIAH MASESEDEFENDANT

R U L I N G

1. The plaintiff filed the instant suit vide a plaint dated 16th December 2015 claiming the defendant had encroached and trespassed onto his land (plaintiff's) parcel number **Nyansiongo Settlement Scheme/149** and had unlawfully appropriated and occupied a portion of approximately 1½ acres. The defendant for his part vide a defence dated 25th January 2016 denied being in trespass in the plaintiff's land and asserted he was in occupation and possession of land parcel **Nyansiongo Settlement Scheme/527** which was his property in respect of which he was the registered owner.

2. Arising from the nature of pleadings, the court was of the view that the matter raised issue of a boundary dispute and/or delineation of the respective parcel boundaries. Accordingly, the court on 6th June 2016 made an order of reference to the land registrar Nyamira to establish and fix the boundary between the two parcels of land owned by the parties.

3. In compliance with the order of reference the land registrar and the county surveyor filed their reports dated 21st March 2017 and 30th March 2017 respectively. The court vide a ruling delivered on 29th September 2017 approved and adopted the report by the land registrar and the surveyor as judgment of the court. In view of the fact that the land registrar and the surveyor had established and fixed the boundaries and fixed the boundaries of land parcels **Nyansiongo/Settlement Scheme/149** and **527** the court ordered that in case the defendant was in occupation/possession of the plaintiff's land parcel **149** he should vacate therefrom within a period of 30 days from the date of the ruling failing which an eviction order would issue on application by the plaintiff.

4. The plaintiff vide a Notice of Motion application dated 8th February 2018 expressed to be brought under Sections 1A, 1B and 3A of the Civil Procedure Act and Order 22 Rule 82 of the Civil Procedure Rules seeks the following orders:-

1. That this honourable court be pleased to grant an order of eviction against the defendant/respondent from the portion of land measuring approximately 0.58Ha forming part of LR No. Nyansiongo Settlement Scheme/149.

2. That the court be pleased to order the defendant/respondent to pay the costs of the application.

5. The application is premised on the grounds set out on the body of the application and the affidavit sworn in support thereof by James Charana Otores the plaintiff/applicant. The applicant depones that the defendant/respondent has failed to comply with the court order requiring him to vacate from the portion of approximately 0.58Ha that he occupies on the plaintiff's land parcel **Nyansiongo Settlement Scheme/149** within the period of 30 days as ordered. The plaintiff states that the defendant instead of vacating has intensified his unlawful activities on portion including destroying the plaintiff's trees and even creating an access road thereon.

6. The defendant filed a replying affidavit dated 23rd March 2018 in opposition to the plaintiff's application. The defendant averred that he had not trespassed onto the plaintiff's land parcel No. **149**. He maintained that the land registrar's and the surveyor's reports did not state he was in occupation of any portion of land parcel **149** observing that the reports had indicated that it was the proprietor of land parcel **Nyansiongo Settlement Scheme/527** who had encroached onto land parcel No. **149**.

7. The parties canvassed the application by way of written submissions. I have duly reviewed and considered the parties written submissions. The issue for determination was whether the defendant was indeed shown to be in possession of the portion of land parcel **149** marked in the surveyor's sketch 0.58Ha. so that an eviction order can issue against the defendant. In the reports filed by the land registrar and the surveyor, the officers were clear that they had established and fixed the boundaries of parcel numbers **159** and **527**. From the surveyors sketch, the boundary of land parcel **527** and **149** was represented by the marked "YWZ". The land registrar report did not indicate that the owner of parcel **527** had encroached and/or occupied any portion of land parcel of the plaintiff but was clear that there was encroachment on land

parcel 149 by the owner of land parcel II. The land registrar in his report stated that they were able to successfully measure and fix boundary marks on the side touching land parcels 527 and 149 and observed as follows:-

“That the boundary between parcel number 527 and number 149 does not have much issue as portrayed by the complainant, nevertheless the complainants land on the ground is seriously interfered with from the left side by parcel number II whose owners have encroached on the said parcel by almost half and fenced off.”

8. The reports by the land registrar and the surveyor were indeed silent on whether the defendant was in possession and occupation of the portion of parcel 149 marked “XYWZ” in the surveyor’s report. The defendant denies he is and it was incumbent on the plaintiff to demonstrate that the defendant in fact was in occupation. The court cannot in the absence of tangible evidence hold that the defendant is in possession particularly in the face of the reports by the officers who were on site and have not highlighted that fact. In adopting the reports as judgment, the court took a cautious approach and stated thus:-

“In case the defendant is in occupation of the portion of land parcel Nyansiongo/Settlement Scheme/149 marked “ZYWZ” on the attached plan by the surveyor measuring 0.58Ha or 1.42acres approximately the defendant is ordered to vacate...”.

9. The defendant avers he is not in occupation of the portion and there is no evidence to show that he in fact is in occupation of the portion. The plaintiff’s position is made more precarious by the affirmative observation in the reports that it is the owner of land parcel No. 11 who has encroached onto land parcel 149 which raises questions as to why the plaintiff has chosen to ignore this aspect. The defendant has maintained it is the owner of land parcel II who has encroached into the plaintiff’s land and that cannot be wished away in the face of the land registrar’s reports herein.

10. Having reviewed the plaintiff’s application and the reports adopted as judgment through my ruling of 27th September 2017, I am not persuaded an order for the eviction of the defendant is merited as there is no proof he is in occupation or possession of the portion of land in land parcel Nyansiongo Settlement Scheme/149 he is sought to be evicted from.

11. I accordingly order the plaintiff’s Notice of Motion dated 8th February 2018 dismissed with costs to the defendant.

RULING DATED, SIGNED AND DELIVERED AT KISII THIS 20TH DAY OF MARCH 2019.

J. M. MUTUNGI

JUDGE

In the Presence of:

Mr. Momanyi for the plaintiff

Mr. Obure for the 1st to 8th defendants

Ruth Court Assistant

J. M. MUTUNGI

JUDGE