



**REPUBLIC OF KENYA**  
**ENVIRONMENT AND LAND COURT**

**AT KISII**

**CASE NO. 45 OF 2014**

**YUSUF MONG'ARE MATARA.....PLAINTIFF**

**VERSUS**

**ALLOYS ONGOTO NYAGOTO.....1<sup>ST</sup> DEFENDANT**

**JOSEPH OKEMWA MAIRURA.....2<sup>ND</sup> DEFENDANT**

**AND**

**ELMELDA MONYANGI OSUMO.....INTERESTED PARTY**

**R U L I N G**

1. The plaintiff by a plaint dated 11<sup>th</sup> February 2014 averred that he was the registered owner of land parcel **West Kitutu / Bogeka /2476** since 16<sup>th</sup> June 1997. He claimed that on 8<sup>th</sup> February 2013, the 1<sup>st</sup> Defendant hired goons who violently entered his land and pulled down a fence he had erected and started preparing the land for cultivation. The plaintiff stated that he ran an establishment christened “**Greater Grace Academic Centre**” which catered for orphaned children and the parcel of land had been dedicated for the use and occupation of the centre. The plaintiff stated that the illegal activities of the 1<sup>st</sup> defendant had denied the children a playing ground in violation of their statutory rights. The plaintiff sought leave to enjoin the 2<sup>nd</sup> defendant whom he claimed had forcefully fenced the parcel of land and planted maize thereon. In the amended plaint, the plaintiff averred that the 2<sup>nd</sup> defendant was the owner of land parcel **West Kitutu/Bogeka/4902** whereas the 1<sup>st</sup> defendant was the registered owner of land parcel **West Kitutu/Bogeka/2511**.
2. Simultaneously with the plaint, the plaintiff filed an application seeking interim orders to restrain the defendant from interfering with his peaceful enjoyment of the land pending the final determination of the suit. The 1<sup>st</sup> defendant filed grounds of opposition to that application. He stated that the disputed portion of land formed part of his land parcel No. **West Kitutu/Bogeka/2511**. The 1<sup>st</sup> defendant argued that the dispute relates to the location of boundaries and therefore the court lacked jurisdiction to hear the matter. He also argued that the entire suit was *res judicata* as the plaintiff had filed Kisii Civil Suit No. 593 of 2003 which had been dismissed for want of prosecution.
3. Further, in his statement of defence dated 25<sup>th</sup> March 2014 and replying affidavit sworn on the same day, the 1<sup>st</sup> defendant stated that he had been in possession of land parcel **West Kitutu/Bogeka/2511** since 1<sup>st</sup> May, 1997. He stated that his parcel of land is bordered by the plaintiffs' land parcels **West Kitutu/Bogeka/2476** to the south and land parcel **West Kitutu/Bogeka/2265** to the west. According to him, Greater Grace Academic Centre was built on **West Kitutu/Bogeka/ 2265**. He averred that the plaintiff encroached on his parcel of land and attempted to convert a part thereof into a play ground after demolishing his hut and crops which prompted him to report the matter to the police.
4. The 2<sup>nd</sup> defendant, who is the Catholic Bishop of the Diocese of Kisii, opposed the claim vide his defence dated 4<sup>th</sup> November 2014. In his statement, the 2<sup>nd</sup> defendant averred that he had been informed by one James Machoka Mosigisi that he had acquired land parcel **West Kitutu/Bogeka/4902** from Annastancia Kerebi Achoma and that he intended to sell it. The 2<sup>nd</sup> defendant purchased the land and was issued with a title deed on 10<sup>th</sup> February 2014. He stated that he had never gone physically to the land and denied the allegations that he had trespassed on the plaintiff's land or instructed anyone to do so.
5. The interested party filed an application to be enjoined in the suit, which was allowed by consent. In her supporting affidavit, she deponed that she is the daughter of Annastancia Kerebi Achoma the registered proprietor of land parcel **West Kitutu/Bogeka/576** which was the original title to the suit properties. She stated that her mother had sold land to the plaintiff and subsequently sold the land to other parties to

the suit. She alleged that the plaintiff and the 1<sup>st</sup> defendant had colluded to increase their portions of land depriving them of their ancestral land and attached copies of mutation forms in support of her claim that the transactions had been fraudulent.

6. The parties having agreed that the dispute related to the portions of land occupied by the respective parties on the ground and having also agreed that the surveyor and the land registrar could delineate the boundaries in dispute, the court on 6<sup>th</sup> December 2016 directed the Land Registrar, Kisii and the County Surveyor to visit the land parcels **West Kitutu/Bogeka/2476, 2511 and 4902** to establish and delineate the boundaries of the parcels of land in accordance with section 18 and 19 of the Land registration Act 2012 and file their report in court. The parties were entitled to be represented by their own independent surveyors during the exercise.

7. The land registrar and the surveyor consequently filed a joint report dated 19<sup>th</sup> September 2017 on 9<sup>th</sup> October 2017. The parties did not agree with the contents/findings of the report prompting the court to summon both the surveyor and the land registrar to explain the report. The land registrar and the surveyor attended court on 17<sup>th</sup> October 2018 and defended the report asserting that the same represented the correct status of the properties as per their records.

8. The report by the land registrar/surveyor dated 19<sup>th</sup> September 2017 and filed in court on 9<sup>th</sup> October 2017 made the following observations/findings:

**a. The original parcel pertaining to the case in question was parcel No. West Kitutu/Bogeka/576 registered under Annastancia Kerebi Achoma;**

**b. It was subdivided and new number 2264 & 2265 registered on the 31<sup>st</sup> of August 1995. See mutation labelled as No. 1.**

**c. Parcel 2264 was further subdivided in 3<sup>rd</sup> June, 1997 and gave rise to plot 2474, 2475, 2476, and 2477. See mutation labelled as No. 2.**

**d. Plot 2474 was further subdivided on 29<sup>th</sup> of August 1997 to give rise to No. 2510 & 2511 see mutation labelled as No. 3.**

**e. Plot 2510 was further subdivided creating new numbers 3248 and 3249. However in this subdivision, No. 3249 was drawn up to including inside of plot 2475 as when you refer from the previous subdivisions, as plot 2510 was not going all through to the upper road. see mutation labelled as No. 4.**

**f. Plot 3248 was subdivided to create plot No.s 4901 and 4902 as per mutation registered on 10<sup>th</sup> February 2014. However also in this subdivision the subdivision was done encompassing part of plot West Kitutu /Bogeka/2476, see mutation labelled as No. 5.**

**g. Going by chronology of our office records subdivision of plot 2510 which created plot 3248 & 3249 was wrongly done. Also subdivision of plot 3248 to create 4901 & 4902 followed the same predicament.**

9. The report further made the following recommendations:

**a. The claims by 1<sup>st</sup> defendant cannot hold since at the time this number was created is very well indicated by its measurements as shown in mutation labelled as 3 attached;**

**b. The claims of plaintiff hold true as per our records; and**

**c. The claims by the 2<sup>nd</sup> defendant are a bit ambiguous as this no was purely overlapped on an already existing No. i.e. plot 4902 was overlapped completely on part of plot 2476.**

10. In determining the implications of that report in this case, the court notes that the plaintiff's claim to land parcel **West Kitutu/Bogeka/2476** is undisputed. His ownership of that parcel of land is affirmed by the copy of the title deed and official search in his bundle of documents. The plaintiff's ownership of land parcel **West Kitutu/Bogeka/2476** is also supported by a copy of title. The 2<sup>nd</sup> defendant has not supplied a copy of his title to land parcel **West Kitutu/Bogeka/4902** but has annexed a mutation form which shows parcel 4902 was derived from the subdivision of land parcel **West Kitutu/Bogeka/3248**.

11. The mutation form annexed to the report and labelled "1" shows that parcel **West Kitutu /Bogeka/576**, which was the original parcel, was subdivided into land parcels **2264** and **2265**. The mutation form labelled "2" shows that land parcel 2264 was subdivided into parcels **2474, 2475, 2477** and the plaintiff's land parcel **2476**. The report states that the 1<sup>st</sup> defendant's parcel **2511** was created upon subdivision of parcel **2474** into parcel **2510** and parcel **2511**. Parcel **2510** was subsequently subdivided into parcel **3248** and **3249**. Thereafter, Parcel **3248** was further subdivided into parcel **4901** and the 2<sup>nd</sup> defendant's parcel **4902**. The report concluded that the subdivision of parcel **2510** had been conducted improperly thus the 2<sup>nd</sup> defendant's parcel **4902** was nonexistent on the ground as it completely overlaps the plaintiff's parcel **2476**. That much is clear from the report. It is however impossible to tell from this report where the boundary between the plaintiff's parcel **2476** and the 1<sup>st</sup> defendant's parcel of land **2511**.

12. The report dated 11<sup>th</sup> February 2015 and filed on 22<sup>nd</sup> May 2015 which was adopted as part of the court's record was much clearer on this point. In that report the Land Registrar and County Surveyor found that the 1<sup>st</sup> defendant had encroached into the plaintiff's parcel of land. The surveyor identified the disputed boundary and the same was marked and planted on the ground. The Land Registration Act 2012 Sections 18 and 19 places the duty of defining the precise position of disputed boundaries on the Land Registrar. I am satisfied that the report dated 11<sup>th</sup> February 2015 and filed in court on 22<sup>nd</sup> May 2015 and the report dated 19<sup>th</sup> September 2017 and filed in court on 9<sup>th</sup> October 2017 support the plaintiff's claim that there was encroachment by the defendants on his land parcel **West Kitutu/ Bogeka/2476**. The

land registrar and survey department are the custodians of land records and are mandated by the law to exercise that function. Whenever there is a dispute relating to the location, positioning and size of land the courts have no option but to look upon them to offer solutions as the technical experts.

13. In the present matter, it is evident that two site inspections carried out by different land registrars and surveyors produced the same result to the effect that the 1<sup>st</sup> defendant had encroached onto the plaintiff's land parcel **West Kitutu/Bogeka/2476**. Parties somehow have to learn to accept that the position of the land on the ground cannot change and neither can the size of the land increase. Whenever there is necessity to verify the position and/or the size of any land, that mandate belongs to the land registrar and the surveyor and not the court. The land registrar and the surveyor have exercised their mandate in the present matter and I accordingly enter partial judgment in favour of the plaintiff on the basis of the land registrar's report in of prayers (a) and (b) of the plaint dated 11<sup>th</sup> February 2014. The plaintiff's claim for special and general damages shall proceed to trial and the parties will fix the matter for hearing at the court registry.

14. The costs of the suit will await the final determination 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:**

Mr. Otara for the plaintiff

N/A for the 1<sup>st</sup> defendant

Mr. Bunde for the 2<sup>nd</sup> defendant

Ruth Court Assistant

**J. M. MUTUNGI**  
**JUDGE**