



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT KISII**

**CASE NO. 1172 OF 2016**

**(FORMERLY HCC NO. 297 OF 2011)**

**STELLA RATEMO.....PLAINTIFF**

**VERSUS**

**STEPHEN NYANGAU OMANGA.....DEFENDANT**

**R U L I N G**

1. The plaintiff commenced the instant suit by way of plaint dated 9<sup>th</sup> December 2011 filed in court on the same date. The plaintiff's claim was that he was the registered owner and proprietor of land parcel **Nyaribari Chache/B/B/Boburia/5598**. He claimed that the defendant who was the owner of land parcel **Nyaribari Chache/B/B/Boburia/ 9401** had commenced construction thereon and had caused the building he was constructing to extend and encroach onto a portion of his (plaintiff's) land parcel **5598** and had therefore deprived the plaintiff the use of his entire parcel of land.

2. Inter alia the plaintiff sought a declaratory order that she is the lawful owner of land parcel **Nyaribari Chache/B/B/Boburia/5598** and an order of eviction against the defendant his agents and/or servants from the portion of LR No. **Nyaribari Chache/B/B/Boburia/5598** trespassed upon by the defendant.

3. The defendant in a statement of defence dated 26<sup>th</sup> April 2012 filed in court on 3<sup>rd</sup> May 2012 admitted being the registered proprietor of land parcel **Nyaribari Chache/B/B/Boburia/9401** but denied that his said parcel of land adjoins and/or shares a common boundary with the plaintiff's land parcel **Nyaribari Chache/B/B/Boburia/5598**. The defendant denied he had trespassed onto the plaintiff's said parcel of land and averred that he was undertaking his construction on his land parcel **Nyaribari Chache/B/B/Boburia/9401**.

4. On 19<sup>th</sup> February 2013, the parties entered a consent which inter alia was in the following terms:

**1. The dispute herein be and is hereby referred to the District Land Registrar and District Surveyor Kisii County to:-**

**(i) Determine if common boundary exist between land parcel numbers Nyaribari Chache/B/B/Boburia/5598 and 9401.**

**(ii) if it exists to proceed and fix it according to their records.**

**(iii) If it exist to determine whose parcel of land as fenced on the ground has encroached on the other.**

**2. The said officers to file in court a report of their finding within 30 days from the date of service upon them of the order hereof.**

5. The land registrar and the surveyor filed their reports dated 19<sup>th</sup> July 2013 and 22<sup>nd</sup> July 2013 respectively. As per the reports the plaintiff is the registered owner of land parcel **Nyaribari Chache/B/B/Boburia/ 5598** in respect of which she obtained title on 30<sup>th</sup> April 1998 while the defendant is the registered owner of land parcel **Nyaribari Chache/ B/B/Boburia/9401**. The parcels of land do not share a common boundary but are separated by a road of access. The parties however claimed their parcels of land were on the same position on the ground. The land registrar and surveyor affirmed that the position on the ground pointed out by the parties as per their records corresponded with land parcel **Nyaribari Chache/B/B/Boburia/5598**. The defendant has effected his development on land parcel **5598** belonging to the plaintiff and not on his parcel **9401**.

6. No specific directions were given by the court respecting the reports filed by the land registrar and the surveyor. The suit was fixed for

hearing on 25<sup>th</sup> April 2016 when the plaintiff's counsel drew the court's attention to the fact that the dispute had been determined by the land registrar. The defendant's counsel admitted the land registrar had indeed filed a report. The court upon review of the report by the land registrar made an order adopting the report in the following terms:-

**“As both the plaintiff and the defendant each own distinct parcels of land and the land registrar has through his report dated 19<sup>th</sup> July 2013 confirmed as much the court hereby adopts the report by the land registrar dated 19<sup>th</sup> July 2013. The court however directs the land registrar to visit the land parcels 9401 and 5598 Nyaribari Chache/B/B/Boburia and thereat to fix the boundaries of the 2 parcels as per his report in terms of Section 18 of the Land Registration Act 2012. Any party who is in occupation of another's plot after the boundaries are established to relocate to their respective plots. The land registrar to carry out the exercise within the next 60 days from today. Mention on 27<sup>th</sup> July 2016”.**

7. The county surveyor filed a report dated 3<sup>rd</sup> February 2017 which was endorsed by the land registrar. The report was clear that parcels 5598 and 9401 are separate and distinct and are represented in the Registry Index Map (RIM). The report concluded that the disputed portion of land was indeed part of land parcel **Nyaribari Chache/B/B/Boburia/ 5598** and the same belongs to the plaintiff.

8. The court on 22<sup>nd</sup> November 2017 adopted the report by the County surveyor dated 3<sup>rd</sup> February 2017 as judgment of the court and directed the defendant to vacate from the plaintiff's land within 90 days from the date of the judgment failing which the plaintiff was to be at liberty to seek the forcible eviction of the defendant. The costs of the suit were awarded to the plaintiff. On 2<sup>nd</sup> July 2018 on the application by the plaintiff, the court granted an order of eviction against the defendant.

9. On 9<sup>th</sup> October 2018 the defendant filed the Notice of Motion dated on the same date which is the subject of this ruling. The application is expressed to be brought under Order 10 Rule 11 of the Civil Procedure rules and Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act and inter alia seeks the following orders:

**1. That the honourable court be pleased to grant an order of stay of execution of the judgment and eviction orders issued on 2<sup>nd</sup> July 2018 against the defendant/applicant together with any consequential orders pending the hearing and determination of the instant application.**

**2. That the honourable court be pleased to set aside, vary and or rescind the judgment and eviction orders issued on 2<sup>nd</sup> July 2018, and any other consequential orders against the applicant/defendant herein, pending the hearing and determination of the substantive suit by way of oral evidence.**

**3. That consequent to prayer 2 above being granted the suit herein be set down for hearing.**

10. The application is supported on grounds set out on the face of the application and the affidavit sworn by Henry Maraga Nyaberi by virtue of a Power of Attorney donated to him by the defendant. The defendant/applicant avers that he does not agree with the reports made by the County Surveyor and the land registrar stating that he has constructed his building on land parcel **Nyaribari Chache/B/B/Boburia/ 6066** and not on the plaintiff's plot and therefore should the eviction order be executed he will suffer irreparable injury and damages. He further avers that the report by the Land Registrar was arrived at without the parties calling witnesses to testify as to the circumstances on the ground.

11. The plaintiff filed a statement of grounds of opposition to the defendant's application dated 16<sup>th</sup> October 2018 filed in court on 24<sup>th</sup> October 2018. Inter alia the plaintiff avers that the judgment entered on 22<sup>nd</sup> November 2017 was by consent and no proper grounds have been adduced to warrant its being set aside. Further the plaintiff avers that the judgment entered was pursuant to the land registrar's and surveyor's reports dated 19<sup>th</sup> July 2013 and 3<sup>rd</sup> February 2017 which had not been challenged and/or opposed. The plaintiff further contends that the firm of **M/s Okemwa Elijah & Company Advocates** who have filed the application are not properly on record and there was no compliance with the provisions of Order 9 Rule 9 for them to come on record for the defendant after judgment had been entered. Consequently, the plaintiff contends that the defendant's application is incompetent and an abuse of the court process.

12. The defendant filed submissions in support of the application and in response to the plaintiff's grounds of opposition on 10<sup>th</sup> December 2018 though no directions were given by the court in regard to filing of submissions.

13. I have reviewed the pleadings, the court record and the defendant/applicant's application and I have considered the rival contentions of the parties in regard to the defendant's application. The issue for the court to resolve is whether the defendant has laid any appropriate basis to warrant the court to exercise its discretion to set aside the judgment entered in favour of the plaintiff in this matter. The issue whether or not the firm of **M/s Okemwa Elijah & Co. Advocates** is properly on record for the defendant is indeed a non issue since a perusal of the record shows that the advocate who previously acted for the defendant signed a consent dated 9<sup>th</sup> August 2018 affirming he had no objection to the firm of **Okemwa Elijah & Co. Advocates** coming on record for the defendant. This consent was filed in court on 15<sup>th</sup> August 2018 and was duly minuted on 16<sup>th</sup> August 2018 and signed by the Deputy Registrar. There was therefore compliance with Order 9 Rule 9(b) which provides as follows:

**9. When there is a change of advocate or when a party decides to act in person having previously engaged an advocate, after judgment has been passed such change or intention to act in person shall not be effected without an order of the court:-**

**(a) upon an application with notice to all the parties; or**

**(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in**

**person as the case may be.**

The Deputy Registrar by minuting and signing the terms of the consent made the order envisaged under Order 9 Rule 9 and thus the change of advocate was properly effected.

14. There is no dispute that the order to refer the dispute for resolution/determination of the dispute by the land registrar and the surveyor was made by consent of the parties. Indeed having regard to the pleadings the nature of the dispute is one that related to the delineation and determination of the physical ground locations of the parcels of land owned by the plaintiff and the defendant respectively. It is admitted that the plaintiff was the registered owner of land parcel **Nyaribari Chache/B/B/Boburia/5598** while the defendant was the registered owner of land parcel **Nyaribari Chache/B/B/Boburia/9401**. The contest was where these parcels of land were located on the ground. It is the responsibility and mandate of the land registrar acting with the assistance of the surveyor to establish and fix boundaries of land registered under the previous Registered Land Act Cap 300 Laws of Kenya (now repealed) and replaced by the Land Registration Act, 2012. The court is infact divested of jurisdiction to entertain suits relating to boundary disputes under the provisions of Section 18(2) of the Land Registration Act, 2012. Section 19 of the Land Registration Act, 2012 gives the land registrar the mandate and power to establish and define the boundaries of any registered land.

15. The dispute in the present matter was that both the plaintiff and the defendant were each claiming their respective parcels were on the same position on the ground. In my view this was an appropriate matter to be referred to the Land Registrar and the Surveyor as they were best suited to delineate and point out to the parties their respective plots using the records they hold in their respective offices.

16. The officers are the custodians of all the records respecting registered land including all the appropriate survey maps and mutation records in regard to all subdivisions. The reports by the land registrar and the surveyor of July 2013 were consistent that the land parcels **5598** and **9401** were separate and distinct and the Registry Index Map (RIM) supplied by the surveyor show the two parcels are separated by an access road though the access road is not physically there on the ground. The land registrar and the surveyor were both satisfied it was the defendant who had encroached onto the plaintiff's parcel of land. The surveyor's report dated 3<sup>rd</sup> February 2017 made after a revisit of the site re-affirmed the earlier report that it was the defendant who had entered into and commenced development on the plaintiff's land parcel **5598**.

17. The reports by the land registrar and the surveyor were prepared in conformity with the order of reference. Once the reports were filed none of the parties challenged them and same remain on record. As I explained on 22<sup>nd</sup> November 2017 when adopting the surveyor's report of 3<sup>rd</sup> February 2017, the report like the earlier report of July 2013 was clear that the defendant had encroached onto the plaintiff's plot and I saw no reason why the report could not be adopted as judgment and I proceeded to do so. The defendant has not placed any material before me to persuade me to set the judgment aside. The defendant did not challenge the reports made by the land registrar and the surveyor and I did not find any basis to fault the reports.

18. The defendant has contended that the reports were made without any oral evidence as to the circumstances respecting the existing ground positions. The reports show that all the parties were both present when the officers visited the site and each was given the opportunity to show where their parcels were. The officers had the survey records including the mutation records and that enabled them to place the particular locations of the parcels of land on the ground. To the extent that each of the parties held title to a specific parcel of land the identification of any such land on the ground and the delineation of the boundaries of such land lay within the province of the land registrar and the surveyor, I am satisfied they duly exercised their mandate as envisaged under the provisions of Section 18 and 19 of the Land Registration Act, 2012 and that the report filed conformed to the order of reference.

19. There is no basis to set aside the judgment I entered on 22<sup>nd</sup> November 2017. The defendant's application dated 9<sup>th</sup> October 2018 is devoid of merit and I order the same dismissed with costs to the plaintiff.

20. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT KISII THIS 5<sup>TH</sup> DAY OF APRIL 2019.**

**J. M. MUTUNGI**

**JUDGE**

**In the Presence of:**

Mr. Adawo for the plaintiff

Mr. Okemwa for the defendant

Ruth Court Assistant

**J. M. MUTUNGI**

**JUDGE**