



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT KISII

CASE NO. 135 OF 2014

DISMAS NYANTIKA MIRORO.....1ST PLAINTIFF

JOHANA OMONDE NYABOGA..... 2ND PLAINTIFF

JAMES H. OBAGA.....3RD PLAINTIFF

VERSUS

JOYCE MOKEIRA.....1ST DEFENDANT

KENNEDY OMBESE.....2ND DEFENDANT

R U L I N G

1. The Plaintiffs' instituted the present suit vide a plaint dated 5th April 2014 which was subsequently amended on 7th July 2014. The Plaintiffs' claim was that they were the lawful proprietors of Plot Number 9 Menyinkwa Market. They alleged the Defendant had unlawfully encroached into and were in trespass in their said plot. The Plaintiffs' prayed for judgment against the Defendants jointly and severally for:-

- i. Declaration that the Plaintiffs are the lawful, bonafide and registered proprietors of Plot Number 9, Menyinkwa Market.**
- ii. An order of Eviction against the Defendants, their agents and/or servants from Plot Number 9, Menyinkwa Market.**
- iii. Permanent injunction restraining the Defendants by either by themselves, agents, servants and/or anyone claiming under the Defendants from entering into, re-entering, trespassing onto, building structures on, depositing building materials, converting the suit plot, abusing the Plaintiffs' rights, interfering with and/or in any other manner dealing with the suit plot, that is, Plot Number 9, Menyinkwa Market.**
- iv. General damages for trespass and/or conversion.**
- v. Interest on (iv) above at court rates.**
- vi. Costs of the suit be borne by the Defendants.**
- vii. Such further and/or other relief as the honourable court may deem fit and expedient so to grant.**

2. The Defendants filed a joint defence on 20th August 2014. The Defendants denied being in trespass onto the Plaintiffs Plot No. 9 Menyinkwa Market. The 2nd defendant stated he sold to the 1st Defendant a portion of land from his land parcel Nyaribari Chache/B/B/Boburia/9170. The portion sold to the 1st Defendant was registered in her name as Nyaribari Chache/B/B/Boburia/9207 and the Defendants asserted that the same was distinct and separate from Plot No. 9 Menyinkwa Market. The 1st Defendant claimed she had possessed and occupied her parcel of land since 2010 when she purchased the same.

3. On 12th October 2015 when the suit was listed for hearing the parties were in agreement that the issue of contention in the matter related to delineation of the physical boundaries of the parcels of land on the ground. The parties agreed that an order of reference could be made to the Land Registrar and the Surveyor who had mandate under the Land Registration Act, 2012 to establish and fix boundaries in respect of any registered land. The Court in making the order of reference stated as follows:-

“...The Court thus is of the view that a technical experts report would be necessary to determine the issue. The Court is of the view the matter falls within the mandate of the Land Registrar/Surveyor under the provisions of the Land Registration Act No. 3 of 2012.”

The order of reference was in the following terms:-

“The Court in the premises orders and directs that the Land Registrar, Kisii and the County Surveyor do in terms of Sections 16-19 of the Land Registration Act, 2012 visit land title no. Nyaribari Chache/B/B/ Boburia/9207 and to delineate and fix the boundaries of the same. The Land Registrar/Surveyor to confirm whether the Defendant has encroached onto the Plaintiffs’ Plot No. 9 Menyinkwa Market and/or the Plaintiff has encroached onto the Defendants said Plot.”

4. The Land Registrar and the Surveyor were required to file their reports within 90 days. The order was duly extracted and served on the officers who prepared separate reports dated 22nd March 2016 annexed to the Plaintiffs’ further supplementary bundle of documents dated 26th May 2017 as documents 2 and 3.

5. On 19th December 2018 when the suit was listed for mention for purposes of considering whether the Land Registrar’s and the Surveyor’s report could be adopted the Defendant’s counsel, Mr. Ombachi expressed reservations observing that the reports were inconclusive. Mr. Oguttu Advocate for the Plaintiff indicated the Plaintiffs had no problem with the reports and sought adoption. Given the divergent views on the report the Court invited written comments/observations on the filed reports for consideration before making a ruling and/or issuing further directions.

6. The Defendants filed their comments/observations on 13th February 2019 while the Plaintiffs filed theirs on 20th March 2019.

7. The reports made by the officers are basically similar in content. Both the Plaintiffs’ and the Defendants were present at the time the officers visited the site. The report is clear there is no marked boundary between land parcel **Nyaribari Chache/B/B/Boburia/9207** and Plot No. 9 of Menyinkwa Market. From a reading of the report, it is not clear whether infact the Land Registrar and the Surveyor executed/implemented the terms of order of reference which inter alia required that they delineate and fix the boundaries of land parcel **Nyaribari Chache/B/B/Boburia/9207**. The officers observed that the ground measurements was smaller than the map measurement by about 20metres explaining that this could be as a result of encroachment from the neighbouring parcel. Was this confirmed or clarified? It is not clear. In making finding (iii) in the report it is not clear whether this was after clarifying finding (ii) in the report where they state the shrinkage of ground size by 20metres could have been as a result of encroachment from the neighbouring parcel. The last paragraph of the report where the report states:- **“We are therefore passing to you (the court) this report for your perusal and necessary action while seeking further direction with regard to fixing the boundaries of the two parcels of land”** suggests the boundaries of the two parcels of land were not fixed. The order required that the same be fixed.

8. This being a dispute that clearly relates to boundary dispute the jurisdiction of the court to entertain the dispute is ousted by reason of Section 18(2) of the Land Registration Act, 2012. The Court however rather than strike out suits which are instituted in contravention of the said provision, has taken the position that the roles of the Court and the Land Registrar in the resolution of disputes are complementary and in that regard the Land Registrar has to take the mandate vested on his office under the law seriously otherwise the administration of justice could end up being compromised. It is hoped the Land Registrar realizes how critical a role his office plays particularly in a County such as Kisii where there are numerous disputes involving boundaries at times involving very small parcels of land.

9. So that this matter is finally resolved, I direct that the Land Registrar and the Surveyor do revisit the parcels of land the subject of the dispute and to in particular delineate and fix the boundaries of land parcel **Nyaribari Chache/B/B/Boburia/9207**. I am emphasizing the boundaries of parcel **9207** since this is a parcel that is registered and must have mutation forms that resulted in its subdivision. The Registry Index Map (RIM) should also assist in having the boundaries fixed. I am also mindful that if the boundaries of parcel **9207** are fixed the boundaries of Plot No. 9 invariably will fall in place. In case there are other neighbours who may be affected when the exercise is being undertaken, the Land Registrar can properly invoke the provisions of Section 19(1) of the Land Registration Act, 2012 and give them notice to attend during the exercise.

10. The Land Registrar and the Surveyor should file their report within the next 90 days from the date of this ruling. Mention on 23rd September 2019 to confirm compliance and for further orders and/or directions.

RULING DATED, SIGNED AND DELIVERED AT KISII THIS 31ST DAY OF MAY 2019.

J. M. MUTUNGI

JUDGE