



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 1208 OF 2016

(FORMERLY HCC NO. 5'B' OF 2008)

PAUL ORANGA MUMA.....PLAINTIFF

VERSUS

DOMINIC MUMA KWORO.....DEFENDANT

RULING

1. The Plaintiff filed the present suit vide a plaint dated 25th February 2008. The Plaintiff's complaint against the Defendant was that the Defendant unlawfully interfered with an access road between land parcels **West Kitutu/Bomatara/1219** and **3113**. The Plaintiff sought an order for the District Surveyor to restore the road of access between the two parcels of land, an order of injunction restraining further encroachment and damages for trespass.

2. As early as 9th July 2008 the court formed the view that the issue in the suit involved the delineation of the boundaries of land parcels **West Kitutu/Bomatara/1219** and **West Kitutu/Bomatara/3111, 3112** and **3113**. Hon. Justice Musinga (as he then was) made an order for the District Land Surveyor to undertake a survey with the consent of the parties. The surveyor filed a report dated 16th October 2008 but the report was not in conformity with the order of reference. A subsequent survey report by the same surveyor dated 7th September 2011 was equally not adopted by the Court as it did not conform to the order of reference.

3. The parties to the suit appeared before me on 2nd October 2017 and both agreed the matter concerned the positioning of the road of access on the ground. The Court being satisfied that indeed the dispute related to delineation of parcel boundaries made an order of reference to the land registrar and county Surveyor in the following terms:-

“The Court notes that the pleadings herein relate to a dispute respecting the positioning of the roads of access between land parcels West Kitutu/Bomatara/1219 and 3113. Although a previous surveyor's report was not adopted by the Court, it is clear that this is a matter that falls squarely within the mandate of the Land Registrar and County Surveyor to resolve under Sections 18 and 19 of the Land Registration Act, 2012. Accordingly, the Land Registrar, Kisii and the County Surveyor are ordered to visit the two parcels of land and to delineate and establish the road of access serving the two parcels of land. The Land Registrar and Surveyor to file their report within the next 90 days from today. Mention on 21st February 2018 for further directions.”

4. The Land Registrar and the Surveyor filed a joint report dated 1st August 2018. The report was clear that the land parcels involved in the present suit were all depicted on survey map sheet number 15 Bomatara Registration Section. The report noted that some of the access roads were closed on the ground while others were diverted through people's parcels of land. The report further observed that the suit parcels of land were separated by an access road on the ground which was not there but which they marked. The report further indicated that although on the map the Defendant's plot is shown to touch the main tarmac road, on delineation on the ground the land parcel cannot touch this road. The report stated that for the Defendant's plot to reach the road, it encroaches on the Plaintiff's land by a stretch of approximately 50metres long and 20metres wide.

5. Upon the filing of the report the parties elected to make written comments and/or observations respecting the report. The Plaintiff was generally happy with the findings/observations in the report and requested that judgment be entered in terms thereof with a direction that the County Land Registrar and the County Surveyor do fix the boundaries of the parties respective plots.

6. The Defendant in his filed written comments stated he did not agree with the Land Registrar's and the Surveyor's findings. The Defendant averred that he was not accorded a chance to present his case. He stated there were discrepancies in the report and pointed to the two earlier reports stating that although the report of 7th September 2011 was materially similar to the current report dated 1st August 2018, the two were significantly different from the earlier report dated 16th October 2008. He argued an oral hearing could assist to clarify the discrepancies in the reports.

7. I have considered the pleadings, the record of proceedings and the joint report filed by the Land Registrar and the Surveyor. I have no doubt that the present suit related to the physical location of the suit properties on the ground and the delineation of the road of access. The suit in real sense related to a dispute touching on boundaries of registered land. Section 18(2) of the Land Registration Act No. 3 of 2012 divests the Courts of jurisdiction to entertain such suits. However, the reality is that parties file suits in court where the issue eventually turns out to relate to a dispute relating to boundary. The Court rather than strike out and/or dismiss such suits makes an order of reference to the Land Registrar and the Surveyor being the officers mandated under Sections 18 and 19 of the Land Registration Act, 2012 to establish and fix boundaries of registered land.

8. Section 18 (2) and Section 19 of the Act provides as follows:

18. Boundaries

(2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.

19. Fixed boundaries

(1) If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.

(2) The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.

(3) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section.

9. These provisions of the Act clearly show it is the Land Registrar and the Surveyor who have the mandate to determine the position of boundaries in regard to registered land. It is not difficult to understand why jurisdiction for the court to deal with boundary disputes is ousted. The Court lacks the capacity to determine the positioning of boundaries as that requires technical people and equipment to do that which the Court does not possess. The Land Registrar would normally have custody of the records and the surveyor would possess the technical knowhow and the equipment to interpret the survey records.

10. In the present matter, I am satisfied that the Land Registrar and the Surveyor properly executed their mandate in terms of the order of reference. The Plaintiff and the Defendant were present together with their witnesses during the exercise. Whatever measurements that required to be taken by the officers were taken in the presence of the parties. The one constant factor in land matters is that the position of the land on the ground does not change and the size of the land cannot increase and/or decrease. The Land Registrar and the Surveyor did not have any reason to favour either of the parties. There is no affidavit filed to the effect any of them committed any misconduct. I have to accept and find that they conducted the exercise in accordance with the mandate given to them under the Act. They have in the report affirmed that they executed the exercise with due diligence and that they paid due regard to the actual sizes of the parcels of land the subject of the suit.

11. There is no basis upon which I can fault the report by the Land Registrar and the Surveyor. They are the custodians of all the records and instruments relating to the registration, subdivision and survey of the land. The Defendant's submission that he was not given a hearing can only be deemed as clutching on straws as the record shows he was present and the exercise was carried out in his presence. If the officers were doing anything that was objectionable, no doubt he would not have kept quiet. It is my view that an oral hearing in Court would serve no purpose as the court would of necessity result to the same officers who have filed their report on the question of ascertaining the boundaries of the suit lands and the delineation of the road of access.

12. The upshot is that I find no basis to interfere with the report by the Land Registrar and the Surveyor. I adopt the same as judgment of the Court and direct that the report be implemented such that the parcel boundaries identified on the ground by the Land Registrar and the Surveyor should be honoured. The road of access identified by the officers on the ground should equally be opened. In case there is variance between the map and the ground position, the Land Registrar and the surveyor ought to make the necessary amendments to their records in conformity with the law. I am conscious that unless the report is timeously implemented the dispute that has been alive since 2008 when the present suit was filed will continue and only by implementing the report will the dispute be finally put to rest.

13. The net effect is that the Plaintiff has been successful but as the report by the Land Registrar and the Surveyor attests there has been a measure of confusion on the ground as some roads of access are said to be nonexistent on the ground and others have been diverted through peoples parcels of land. The Defendant may not have been entirely to blame and on that account even though encroachment onto the Plaintiff's land has been proved, I do not find any basis to award general damages for trespass as sought by the Plaintiff. The parties including any neighbours who may be affected would in fact benefit from the implementation of the report as their boundaries and roads of access would be officially re-established. I just hope the parties would see the wisdom in co-operating in having the boundaries of their land parcels aligned and the roads of access marked and opened.

14. Considering the observations I have made, it is my view that this would be fitting case where each party should bear their own costs of the suit.

15. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KISHI THIS 14TH DAY OF JUNE 2019.

J. M. MUTUNGI

JUDGE