



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT KISII

CASE NO. 148 OF 2015

BENJAMIN BOSIRE OGERO.....PLAINTIFF

VERSUS

ALLOYS MATAYA MOSETI 1ST DEFENDANT

PRISCA KERUBO MAUTI.....2ND DEFENDANT

SAMWEL ISABOKE MWAMBI3RD DEFENDANT

THE COUNTY LAND REGISTRAR.....4TH DEFENDANT

RULING

1. The Plaintiff commenced the present case by way of a plaint dated 13th April 2015 which was subsequently amended with the leave of the court on 12th October 2015 against the Defendants and sought the following orders:-

i. Declaration that the Plaintiff is the registered and/or lawful owners of LR No. Kisii Municipality/Block I/847.

ii. An order directing the 4th Defendant to expunge the fake register created in respect of the fictitious parcel number LR No. Kisii Municipality/Block I/828, at Kisii Land Registry and nullify and/or revoke and/or delete any entries relating to the same to the extent that the same affects parcel number LR No. Kisii Municipality/Block I/847, belonging to the Plaintiff.

iii. Permanent injunction restraining the Defendants either by agents, servants and/or anyone claiming under the said Defendants from entering upon, re-entering, trespassing onto, laying a claim to, building on, interfering with and/or in any other manner dealing with the suit property, that is, LR No. Kisii Municipality/Block I/847 and/or any portion thereof, in any manner whatsoever and/or howsoever.

iv. General damages for trespass.

v. Interest on (IV) hereof at court rates.

vi. Costs of this suit be borne by the defendant.

vii. Such further and/or other relief as the honourable court may deem fit and expedient so to grant.

2. The Plaintiff by the plaint averred that he was the duly registered owner of **LR No. Kisii Municipality/Block I/847** measuring 0.0465Ha. situate within Nyanchwa/Nubian Area Kisii Municipality which he stated was allocated to him by the Commissioner of Lands and that he held a certificate of lease over the property issued in his name on 2nd July 2003. The Plaintiff further averred that he had peacefully been in occupation and possession of the suit property until on or about 26th February 2015 when he discovered some persons unknown to him had trespassed on his plot and constructed a temporary structure thereon. The Plaintiff averred that he later came to learn that it was the 1st Defendant acting by himself and/or through his agents who had trespassed on the suit property and was staking a claim of ownership over the suit property which prompted the institution of the instant suit.

3. The 1st Defendant filed a defence and counterclaim dated 2nd June 2015 which he subsequently amended on 1st December 2015 following amendment of the plaint by the Plaintiff. The 1st and 2nd defendants in response to the Plaintiffs claim denied that they had encroached onto

the Plaintiff's land parcel **Kisii Municipality/Block I/847**. The 1st and 2nd Defendants averred that the 2nd defendant, Priscah Kerubo Mogute, was the registered proprietor of **LR No. Kisii Municipality/Block I/828** and that the actions complained of by the Plaintiff against the Defendants were carried on **LR No. Kisii Municipality/Block I/828** and not on parcel **LR No. Kisii Municipality/Block I/847**. The Defendants averred that land parcels **847** and **828** were separate and distinct and contended that it was the Plaintiff who had encroached onto land parcel **828**. The 1st and 2nd Defendants in the Counterclaim sought the following orders:-

a. Declaration that the ground location on which the actions by and/or at the instance of the 1st and 2nd defendants and in particular, the Counterclaimers are being carried out and/or undertaken fall within and comprises of LR No. Kisii Municipality/Block I/828.

aa. An order of eviction against the Plaintiff/Defendant to the Counterclaimers, his agents and servants from LR No. Kisii Municipality/Block I/828.

b. Permanent injunction restraining the Plaintiff/Defendant to the counterclaim either by themselves, agents, servants and/or anyone claiming under the Plaintiff/Defendant to the counterclaim, from entering upon, trespassing onto, re-entering, building on, alienating, selling, transferring and/or otherwise interfering with LR No. Kisii Municipality/Block I/828, whatsoever and/or howsoever.

c. General damages for trespass, together with interests thereon at court rates (14%) from the date of judgment.

d. Costs of the cross suit be borne by the plaintiff and the 2nd Defendant to the counterclaim.

e. Such further and/or other relief as the honourable court may deem fit and expedient.

4. The 3rd Defendant did not enter appearance or file any defence. The 4th Defendant appeared and filed a statement of defence dated 8th December 2015. The 4th Defendant in his defence denied any wrong doing and in particular denied being complicit in any fraudulent and/or irregular actions as alleged by the Plaintiff.

5. The suit was fixed for hearing on 10th July 2018 and on the day the matter was allocated hearing time at 11.00am. When the matter was called out at 11.45am on the day there was no representation for the 1st and 2nd Defendants although Ms. Kebungo Advocate had earlier on held a brief for Mr. Kimanga Advocate who was on record for the 1st and 2nd Defendants. As there was no reason proffered for the absence of the 1st and 2nd Defendants and/or their advocate, and the Plaintiff was present in court and ready to proceed with the hearing, the court allowed the hearing to proceed the absence of the 1st and 2nd Defendants and their counsel notwithstanding.

6. PW1 Ruth Kanini Bosire testified in chief and explained how her late husband acquired land parcel **Kisii Municipality/Block I/847** and produced documentation "**PEX.1-22**" contained in the Plaintiff's bundle of documents which illustrated how the property was acquired. She stated the 1st and 2nd Defendants have laid claim of ownership to what on the ground is the Plaintiff's Plot No. **847** claiming that the plot was land parcel **828** in respect of which they held title documents. The Plaintiff testified that land parcel **847** was regularly allocated to her late husband in 1986 and that as per the records the land in dispute belonged to the Plaintiff and not the 1st and 2nd Defendants.

7. At the close of the Plaintiff's evidence in chief at 12.30pm, Mr. Ochwangi Advocate appeared and stated he held brief for Mr. Kimanga Advocate and made a two faceted application. Firstly, he sought to be allowed to cross examine the Plaintiff and in that regard, he sought for an adjournment so as to prepare for the cross examination. Secondly, he drew the court's attention to the fact that the 1st and 2nd Defendants claim was to parcel **828** which they claimed the Plaintiff had encroached into while the Plaintiff claimed she was on land parcel **847**. He suggested the Land Registrar may be required to prepare a report respecting the two parcels of land as the issue was where the two parcels of land were located physically on the ground.

8. Mr. O. M. Otieno Advocate for the Plaintiff had no objection to the Land Registrar and the Surveyor being requested to prepare a report. Equally, Ms. Opiyo, State Counsel who appeared for the Land Registrar, the 4th Defendant had no objection to the Land Registrar and the Surveyor visiting the disputed land and preparing a report.

9. As it was clear the issue in the suit was the physical location on the ground of the two disputed properties, and the parties were in agreement, the court made a comprehensive order of reference of the matter to the Land Registrar and the Surveyor in the following terms:-

"This is a case where the Plaintiff claims ownership of land parcel Kisii Municipality/Block I/847 and the 1st Defendant claims ownership of land parcel Kisii Municipality/Block I/828. The contest appears to be where each of these plots are located on the ground if indeed both of them exist. In the circumstances and with the agreement of the parties, the court orders and directs that the Land Registrar, Kisii and the County Surveyor Kisii do visit land parcel Kisii Municipality/Block I/847 and 828 and to identify and delineate the physical location on the ground and to establish their respective boundaries using the appropriate Registry Index Map (RIM). The Land Registrar to file a report within the next 90 days from today. Each party to be at liberty to be represented during the exercise by a private surveyor of their choice. Mention on 17/10/2018. The witness (PW1) stood down pending the filing of the Land Registrar's report. Parties to share the costs for the exercise."

10. The Land Registrar and the County Surveyor filed their joint report dated 5th November 2018. The report highlighted the following observations and made a conclusion as hereunder:

Observations:

1. Parcel Kisii Municipality/Block I/847 is registered in the name of Benjamin Bosire Ogero measuring 0.0465Ha.
2. Parcel Kisii Municipality/Block I/828 is registered in the name of Priscah Kerubo Mogute with an acreage of 0.0465Ha.
3. Parcel Kisii Municipality/Block I/847 is in the RIM sheet 130/2/16/6 of Kisii Municipality on the North West it borders parcel 827, on the South East it borders parcel 829 on South West it borders 638 and to the borders 8M access road.
4. Parcel Kisii Municipality/Block I/847 on the ground is well defined with a fence around it. Also on the said ground there are two semi permanent structures done on the upper side of the plot while on the lower side some plants are planted.
5. Parcel Kisii Municipality/Block I/828 does not appear in our Registry Index Maps (RIM). As per the survey plans F/R271/39 and F/R360/168. The two parcels i.e 828 and 847 overlap on each other. Actually they occupy the same position and equal in size (0.0465Ha) approx.

Conclusion:

1. Kisii Municipality/Block I/828 appears to have been irregularly allocated to the one Priscah Kerubo Mogute.
2. Survey records for Kisii Municipality/Block I/828 were expunged and replaced with ones for parcel Kisii Municipality/Block I/847; see a copy of letter to Director of Surveys dated 29th June 2015.

11. On 11th March 2019 when the matter came up for mention for directions, the Plaintiff sought the adoption of the Land Registrar's/Surveyors report as judgment of the court as it had disposed of all the issues. Mr. Ochwangi Advocate representing Mr. Kimanga Advocate for 1st and 2nd Defendants indicated he had not seen the report and sought time to peruse the report and take instructions from the clients.

12. The court directed the parties to file written comments/observations which they had on the report. The Plaintiff filed her comments dated 29th March 2019 on 2nd April 2019. None of the Defendants filed any comments.

13. The Plaintiff's comments were to the effect that the report by the Land Registrar and the Surveyor had fully resolved the issues in contention and that the court should proceed to enter judgment in favour of the Plaintiff and award costs of the suit to the Plaintiff. The issues in the suit were whether the Plaintiff was validly allocated and documented as the owner of land parcel **Kisii Municipality/Block I/847** and the physical location of the parcel of land. The evidence adduced by the Plaintiff and the documentary evidence availed establishes that the Plaintiff was regularly allocated land parcel **847** and title to the land processed regularly in his favour. The other issue was the actual physical location of parcel 847 on the ground. The evidence of the Land Registrar and the Surveyor was crucial in establishing that fact. Observations 3 and 4 in the report filed by the Land Registrar and the Surveyor is clear on the physical location of land parcel **Kisii Municipality/Block I/847** as per the Registry Index Map (RIM). The Land Registrar and the Surveyor were able to identify the same on the ground on the basis of the records they hold. The report observation No. 5 is clear that land parcel **Kisii Municipality/Block I/828** does not appear in the RIM as it was super imposed on land parcel **Kisii Municipality/Block I/847** as per conclusion No. 2 in the report, survey records relating to **Kisii Municipality/Block I/828** were expunged from the record meaning the records for land parcel **Kisii Municipality/Block I/847** are the only ones that remained on record.

14. Having carefully reviewed the pleadings, the documentary evidence and the joint report by the Land Registrar and the Surveyor, I am satisfied that the report has finally disposed all the issues in this suit. The report has unequivocally stated that the disputed property belongs to the Plaintiff and it is land parcel **Kisii Municipality/Block I/847** and not **828**. The report has stated that there are no records for land parcel **828** as the records that had been used to process title documents in respect of the same were expunged. The Land Registrar and the Surveyor are the legal custodians of documents relating to all registered land. The order of reference required them to locate and identify land parcels **Kisii Municipality/Block I/847** and **Kisii Municipality/Block I/828** on the ground and confirm their existence on the ground. The report has affirmed that land parcel **Kisii Municipality/Block I/828** does not exist on the ground and that documents for the parcel of land that had been prepared were super imposed and overlapped land parcel **Kisii Municipality/Block I/847**. These documents were expunged and the lawful owner of the disputed site is the Plaintiff and the ground location is for land parcel **Kisii Municipality/Block I/847**.

15. In the premises, I accept and adopt the joint report by the Land Registrar, Kisii and the Surveyor dated 5th November 2018 as judgment of the court on the basis that it has fully resolved the issues in the suit. In the final result, the Plaintiff is successful in the suit while the 2nd defendant is unsuccessful in her counterclaim. I enter judgment in favour of the Plaintiff in the suit and dismiss the 2nd Defendant's counterclaim. I make the following final orders:-

1. The Plaintiff is hereby declared to be the lawful registered proprietor of land parcel Kisii Municipality/Block I/847.
2. The 1st and 2nd Defendants are ordered to vacate from land parcel Kisii Municipality/Block I/847 forthwith failing which the Plaintiff shall be entitled to an order of eviction against the 1st and 2nd defendants on application.
3. A permanent injunction is hereby issued against the Defendant restraining them either by themselves, agents and/or servants from trespassing into or in any other manner, interfering with the Plaintiff's land parcel Kisii Municipality/Block I/847 whatsoever and/or howsoever.

4. The costs of the suit and the counterclaim are awarded to the Plaintiff as against the 1st and 2nd defendants jointly and severally.

RULING DATED, SIGNED AND DELIVERED AT KISHI THIS 19TH DAY OF JULY 2019.

J. M. MUTUNGI

JUDGE