



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT KISII**

**CASE NO. 491 OF 2013**

**GILBERT AGATA NYAMWAYA .....1<sup>ST</sup> PLAINTIFF**

**CHRISPIN NYAMWAYA AGATA.....2<sup>ND</sup> PLAINTIFF**

**GAUDENTIA ALARO NYAMWAYA .....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**CLIFF NYABUTI NYAKUNDI.....1<sup>ST</sup> DEFENDANT**

**ALFRED NYAMWAYA MATAGARO..... 2<sup>ND</sup> DEFENDANT**

**PETER MOSE MATAGARO.....3<sup>RD</sup> DEFENDANT**

**JOEL B. MATAGARO.....4<sup>TH</sup> DEFENDANT**

**WILLIAM NYAMWAYA MATAGARO ..... 5<sup>TH</sup> DEFENDANT**

**THE DISTRICT LAND REGISTRAR, NYAMIRA..... 6<sup>TH</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL.....7<sup>TH</sup> DEFENDANT**

**RULING**

1. The Plaintiffs filed the instant suit vide a plaint dated 16<sup>th</sup> December 2013. They alleged the 1<sup>st</sup> - 5<sup>th</sup> Defendants had trespassed onto their land parcel **West Mugirango/Bosamaro East/1055**. The 1<sup>st</sup> - 5<sup>th</sup> Defendants were entitled to occupy land parcels **West Mugirango/Bosamaro East 614 and 616** which shared a common boundary with the Plaintiffs land parcel. The Plaintiffs contended that the 6<sup>th</sup> Defendant, the land registrar visited the land parcels on 24<sup>th</sup> October 2012 with a view of demarcating the disputed boundary but the Plaintiffs averred that the report prepared by the Land Registrar on 15<sup>th</sup> November 2012 apparently reduced the Plaintiffs land parcel from 0.46Ha as appeared on the title register (green card) to 0.38Ha thereby sanitizing the trespass by the Defendants.

2. Inter alia the Plaintiffs sought orders that:

**i. Their parcel of land West Mugirango/Bosamaro East/1055 measured 0.46Ha as per the green card and not 0.38Ha. as per the Land Registrar's dated 15<sup>th</sup> November 2012.**

**ii. A declaration that the Land Registrar's report dated 15<sup>th</sup> November 2012 was unlawful and null and void.**

**iii. An order compelling the 6<sup>th</sup> defendant (Land Registrar to revisit the land parcels West Mugirango/Bosamaro East/614, 616 and 1055 and to demarcate the boundaries thereof in accordance with the records held and/or kept at the District Land Registry, Nyamira County and also to reopen the road of access leading to the suit land which the 2<sup>nd</sup> – 5<sup>th</sup> Defendants had encroached upon.**

3. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Defendants filed a joint statement of defence dated 21<sup>st</sup> February 2014. The defendants denied ever interfering

with the common boundary between land parcels **West Mugirango/ Bosamano East/614, 616 and 1055** and further denied being in trespass onto the Plaintiffs land parcel **1055**. The Defendants denied the Plaintiffs had any basis to challenge the report by the Land Registrar.

4. On 16<sup>th</sup> February 2017 the parties agreed to the dispute relating to the land parcel boundaries being referred to the Land Registrar and the Surveyor for determination. The parties were given liberty to be represented by independent surveyors of their choice during the site inspection.

5. The Land Registrar and the Surveyor filed their reports dated 23<sup>rd</sup> May 2018 and 15<sup>th</sup> May 2018 respectively. The report by the Land Registrar acknowledged the dispute was basically a family dispute resulting from the sale by one of the brothers of a parcel of land to the Plaintiff. The dispute centers on a pathway that the parties have used over a long time which runs along the land parcels 615, 616 and 1055. The Land Registrar and the Surveyor are agreed that the registry Index Map (RIM) does not show any access road exists on the position the footpath passes. The Land Registrar and the Surveyor appear to agree that the footpath has existed where it is for a long time and recommended the continued existence of the same.

6. The court notes that no party has claimed an easement over the others land and further the process through which an access road may be created or established under the Land Act 2012 has not been invoked by any of the parties. The suit before the court merely raises the issue whether or not the Defendants have trespassed onto the Plaintiffs land parcel **1055**. On the basis of the reports filed, I am not able to make a finding that the same have resolved the issues in the suit to justify their adoption as judgment of the court.

7. The reports by the Land Registrar, the Surveyor and private Surveyor engaged by the Plaintiff may nonetheless have served to highlight the obtaining status on the ground. What comes out is that it was not purely a case of a boundary dispute but rather whether there is an access where the footpath is said to be, and if not, the issue would arise as to whether some of the land parcels notably land parcel 615 are landlocked. From the reports the footpath was used to access Nyangweta Health Centre. Was there an intention to create an access road where the footpath exists? On the material contained in the reports, I do not consider it would be prudent to rely on the reports to finally make a determination when it is clear the issue was really not one of fixing parcel boundaries.

8. I direct that the reports be admitted as part of the court record and the parties to take the necessary steps to prepare the suit for formal hearing. Any party who may wish to call either the Land Registrar or the Surveyor as a witness to explain the reports will be at liberty to do so at the hearing.

**RULING DATED, SIGNED AND DELIVERED AT KISII THIS 19<sup>TH</sup> DAY OF JULY 2019.**

**J. M. MUTUNGI**

**JUDGE**