



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 559 OF 2015

JOSEPH N. ANGWENYI.....1ST PLAINTIFF

DR. PETER KENNETH NDEGE.....2ND PLAINTIFF

VERSUS

ALICE KEMUMA MICHIEKA.....1ST DEFENDANT

FRANCIS KINGI MICHIEKA.....2ND DEFENDANT

OMWENGA MICHIEKA3RD DEFENDANT

RULING

1. The Plaintiffs commenced the instant suit by way of a plaint dated 22nd December 2015 seeking a declaration that they were the registered absolute owners of land parcels **Central Kitutu/ Mwamosioma/3164** and **3163** respectively and were as such entitled to absolute and exclusive possession thereof. They further sought an order of permanent injunction against the Defendants who they alleged had repeatedly been encroaching on their said parcels of land.

2. The Defendants filed a joint defence and counterclaim dated 25th January 2016 whereof they denied the Plaintiffs alleged acts of trespass/encroachment. The Defendants stated that their family owns land parcel **Central Kitutu/Mwamosioma/1775** which shared a common boundary with the Plaintiffs parcels of land. The Defendant averred it was the Plaintiffs who had moved the boundaries of their parcels of land with the objective of annexing part of land parcel 1775. The Defendants by the counterclaim sought an injunctive order to restrain the Plaintiffs from interfering with land parcel **Central Kitutu/Mwamosioma/1775** or the boundary separating the respective properties.

3. On 21st April 2016 when the matter came up for hearing of the Plaintiffs application for injunction the Court upon review of the pleadings and the application determined that the dispute related to the determination of the boundaries and the physical location of the suit parcels of land. The court made an order of reference to the Land Registrar and the County Surveyor inter alia on the following terms:-

1. The Land Registrar Kisii visits land parcels Central Kitutu/ Mwamosioma/1775, 3163 and 3164 in the company of the County Surveyor and thereat to establish and fix the boundaries of the parcels of land, under the provisions of Section 18 of the Land Registration Act No. 3 of 2012 and to file a report respecting the exercise complete with any annexures within the next 90 days from today.

2. The affected parties to be notified and to be at liberty to be represented during the exercise by their surveyors.

3. In the meantime parties were to observe the status quo.

4. The surveyor following a visit to the site filed a preliminary report dated 9th February 2018 where he indicated thus:-

“During the execution of the order, it was discovered that the case is a land claim, therefore, we have requested Nairobi office for the initial data used for mapping and the subsequent mutation forms used to generate Central Kitutu/Mwamosioma/ 1775, 3163 and 3164.”

5. The Land Registrar subsequently summoned the parties to attend at the site on 12th September 2018 for purposes of hearing the boundary dispute. On the date the Plaintiffs did not attend. The Land Registrar and the Surveyor on inspection of the site prepared a joint report dated 15th November 2018 which was filed in Court on the same date. The observations, findings and conclusions made on the report are

reproduced hereunder:-

Observation:

1. Sections of the disputed parcel of land has a fence around it, this fence encompasses also Plot No. 3163 and 3164 making it appear as one parcel of land on the ground.
2. There are old eucalyptus trees in the suit lands and a permanent house.

Findings:

1. Parcels No. Kisii Central/Kitutu Mwamosioma/1775 is registered under Omwenga Musa Michieka measuring 0.15ha. approx.
2. Parcels No. Kisii Central/Kitutu Mwamosioma/325 has been subdivided to 3164 and 3163.
3. Parcels No. 326 was subdivided to 1047 and 1048 measuring 2.65Ha. and 0.09ha. approx.
4. The disputed section of land is Plot No. 1775 which was as a result of a subdivision of parcel No. 1288 and measured 0.15ha.
5. Plot No. 1288 alignment was corrected vide the Land Registrars report dated 9th April 1999 which subsequently the anomaly along the common boundary between Plot 1288 and Plot No. 326 and a road of access was marked out which still exist on the ground.

Conclusion:

In view of the above findings and the measurements taken on the ground and upon comparing them with the relevant documents taken on the disputed parcels of land, the disputed section is in Plot No. 1775. We therefore submit this report to court for perusal and for further directions.

6. The Plaintiffs opposed the adoption of the report as judgment of the Court. The Defendants were happy with the report and sought its adoption as judgment of the Court. Having regard to the conflicting positions respecting the report the Court directed the parties to make written comments/observations in regard to the report whereupon the court would make a ruling.

7. The Defendants filed their comments on 10th June 2019 and the Plaintiffs filed theirs on 27th June 2019. The Defendants in support of the adoption of the report submitted that the report had addressed all the issues raised in the pleadings. It was the Defendants' contention that what was in issue was a boundary dispute and therefore it was the Land Registrar and the Surveyor who had the mandate to determine the issue in accordance with Section 18 of the Land Registration Act No. 3 of 2012. The defendants submitted that the Land Registrar's report affirmed that the Defendants did not encroach onto the Plaintiffs land and sought dismissal of the Plaintiffs suit and prayed that the Defendants counterclaim be allowed.

8. The Plaintiffs submitted that the Land Registrar's visit to the site on 12th September 2018 was not sanctioned as the Land Registrar and the Surveyor had earlier on 6th February 2018 visited the site and made a report. The Plaintiffs contended that the issue was ultimately not one relating to boundary but rather whether the Defendants title over **Central Kitutu/Mwamosioma/1775** was a fake title created and superimposed on the Plaintiffs land.

9. It is not denied that the Land Registrar and the Surveyor had visited the disputed parcels of land on 6th February 2018 and the Surveyor prepared a report (earlier referred to) where he intimated that what was in issue was indeed a land claim and not a boundary dispute. The Surveyor in the report indicated they had sought data from Nairobi to be able to ascertain how the mapping for the parcels of land was done. It is not clear whether the Surveyor obtained the further information that he was seeking. The Plaintiffs further submitted that it was unclear where land parcel **Central Kitutu/Mwamosioma/1775** originated from unlike land parcels **3163** and **3164** which the report affirms were subdivisions from land parcel **Central Kitutu/ Mwamosioma/325**.

10. I have considered the pleadings, the report filed by the Land Registrar and the observations/comments made by the parties respecting the report and I am satisfied that matters in dispute go beyond a boundary dispute between the parties. The creation and origin of the 3rd Defendant's land parcel **Central Kitutu/Mwamosioma/1775** is in issue. The Plaintiffs assert the parcel of land was fictitious and fake and was created by superimposing the same on the Plaintiffs land parcels. I have looked at the annexures to the report and my view is that without some explanation those annexures are not explicit. For instance the copy of the mutation form annexed is unclear as to what land it relates to and the same is not shown to have been registered. No current Registry Index Map (RIM) was annexed showing the current land parcels and how they were positioned on the ground. No mutation of land parcel **1288** from which it is stated land parcel **1775** was hived was annexed and it is therefore not possible to see the layout of the Plot vis-à-vis land parcel **325**.

11. In the premises, I am not in a position to hold and find that the Land Registrar's report has fully disposed the issues in dispute so as to adopt the report as a judgment of the court. I find and hold that there are grey areas that the report cannot explain and for that reason I decline to adopt the report as a judgment of the Court. I however direct that the report be admitted as part of the record of the court and that any party who may wish to place reliance on any aspect of the report will be at liberty to call either the Land Registrar or the Surveyor or both as witnesses at the trial to make a presentation of the report and to be cross-examined.

12. In the premises, the suit shall proceed to trial and the parties are at liberty to take a hearing date at the court registry and/or move the court appropriately. The costs occasioned by the reference of the matter to the Land Registrar/Surveyor will be in the cause.

RULING DATED, SIGNED AND DELIVERED AT KISII THIS 29TH DAY OF AUGUST 2019.

J. M. MUTUNGI

JUDGE