



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KISII

ELC NO. 1210 OF 2016

ABEL KURURA TINEGA (Suing as the personal representative of

NASHON TINEGA KURURA, DECEASED).....**PLAINTIFF**

VERSUS

SHADRACK ORINA MOGENI.....**1ST DEFENDANT**

HEZRON NYANGAU MOGENI.....**2ND DEFENDANT**

EVANS GESORA MOGENI.....**3RD DEFENDANT**

R U L I N G

1. On 28th June 2018 when this matter was scheduled for hearing the court found it necessary to have the Land Registrar and the surveyor visit the disputed land parcels Ekerubo Settlement Scheme/25 and 26 and to establish the parcels boundaries on the ground and to file a status report in court. Inter alia the extracted order as varied on 22nd October 2018 was in the following terms:-

- 1. The Land Registrar, Nyamira County other than Mr. K.E M. Bosire and the County Surveyor, Nyamira to visit Land Parcel LR No. Ekerubo Settlement Scheme/25 and 26 and establish the physical boundaries on the ground.**
- 2. The report by the Land Registrar to incorporate findings as to who is in occupation of what parcel and in case there is any encroachment by the plaintiff and/or the defendants onto the others portion to indicate and show the encroachment by way of a sketch plan.**
- 3. Parties to be at liberty to be represented by their own independent surveyors during the inspection.**

2. Mr. Charles M. Mutua, Senior Land Registrar, Nyamira and Robert Torori of the County Surveyor's Office Nyamira implemented the Court order and made their respective reports dated 28th and 29th January 2019 which were both filed in court on 14th March 2019. The parties were furnished with copies of the report and invited to make their comments/observations to facilitate the court to render a ruling respecting the filed reports.

3. The plaintiffs filed their submissions observations on 24th May 2019 while the defendants filed their observations on 21st June 2019. The plaintiff's submissions are to the effect that the report by the Land Registrar and the surveyor have vindicated the plaintiff that indeed the defendants have trespassed and encroached onto the plaintiffs land parcel Ekerubo Settlement Scheme/26. The plaintiff prayed for the adoption of the report as judgment of the court and for orders to be issued against the defendants as sought in the plaint. The plaintiff contended that the Land Registrar and the surveyor were the persons mandated under the Law to establish and fix land parcel boundaries and that they had appropriately identified and delineated the boundaries of land parcels 25 and 26 Ekerubo Settlement Scheme.

4. The defendants in their written observations contended that the defendants family were allocated the land on which they had established their homes in 1968 and that they have since that time been in occupation and possession of a portion of 10 acres in what is now described as land parcel 26. The defendants observation set out evidence that can only be interrogated in a formal hearing. The report by the Land Registrar did not record the evidence availed and or given by the parties during the exercise at the site inspection. Indeed the defendants have annexed documentary evidence to their observations and it is not possible to tell if the Land Registrar and the surveyor took this evidence into account before they prepared their respective reports.

5. The report by the Land Registrar affirmed that both the plaintiff and the defendants occupy, reside and utilize parts of land parcel 26 and

both have homes on this land. Land parcel 25 is largely unoccupied although there are trees growing thereon. The report indicates the defendants further utilize parts of Land parcels 24 and 27. The owners of land parcels 24 and 27 are not parties to the instant suit.

6. In the defence filed by the defendants, the defendants claim is that they were allocated 10 acres by the Society in what is now land parcel 26 and that was how they came to establish their homes on the portion of land parcel 26 that was allocated to them way back in 1983. The defendants therefore are making a land claim to part of land parcel 26 and their contention is that they are in lawful occupation of the portion of land parcel 26 that they were legally allocated by the society .

7. That although land parcels 25 and 26 Ekerubo Settlement Scheme are separate and distinct the issues raised in the suit cannot be distilled to a boundary dispute that could be resolved by the Land Registrar and the surveyor visiting the land parcels and establishing the boundaries of the parcels of land. The issues raised in the suit go beyond determination of parcel boundaries. The defendants essentially are making a land claim in regard to a portion of land parcel 26 and in that respect the court will need to take evidence at the trial to determine the issues.

8. In that premises it is my view that the reports filed by the Land Registrar and the Surveyor herein have not resolved all the issues raised in the pleadings and cannot thereof be a basis to pronounce a judgment on the issues . The reports however serve to affirm the status as relates to the occupancies and utilization of the disputed parcels of land. The reports will be admitted as part of the court record and either of the parties will be at liberty to call either or both of the officers as witnesses at the trial to adduce evidence and to produce the said reports if necessary.

9. Costs occasioned shall be in the cause.

Ruling dated, and signed at Nakuru this 9th day of October 2019.

J M MUTUNGI

JUDGE

Ruling delivered at Kisii this 23rd day of October 2019

J ONYANGO

JUDGE