



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 638 OF 2016

NYAKUNDI ONCHIRI PLAINTIFF

VERSUS

NYAMWANGE NYANG'AU1ST DEFENDANT

OBIERO NYANG'AU.....2ND DEFENDANT

OSEKO NYANG'AU3RD DEFENDANT

R U L I N G

1. The plaintiff vide a plaint dated 1st December 2016 filed the instant suit claiming that the defendants had encroached onto his land parcel Central Kitutu/Mwogeto/1230. The defendants occupied and were utilizing the adjacent land parcel Central Kitutu/Mwogeto/1239. The plaintiff sought an order of eviction and permanent injunction against the defendants restraining them from interfering with the plaintiff's quiet possession of his land and the costs of the suit.

2. The record as per the affidavit of service sworn by Isaiah Miruka process server on 3rd February 2017 shows that the defendants were served with summons to enter appearance together with the plaint on 19th December, 2016 after having been pointed out to the process server by one John Oguye Keura, a clan elder. The defendants did not file a defence and/or any response to the interlocutory application which had been scheduled for inter partes hearing on 6th February 2017. On the date following presentations by the plaintiff in the absence of the defendants, the court was satisfied that the issue involved was one of a boundary dispute and the court proceeded to make an order of reference to the Land Registrar and the County Surveyor to establish and fix the parcel boundaries. The court's order of reference was in the following terms:-

1. The Land Registrar Kisii County and the County Surveyor visits land parcels Central Kitutu/ Mwogeto/1240 and 1239 and to establish and fix the boundaries in accordance with Section 18 of the Land Registration Act 2012.

2. The Land Registrar to file a report within the next 90 days from today.

3. Mention on 8th May 2017 for further directions.

4. The parties to share the costs of the exercise.

3. As the land was situate within Nyamira County and not Kisii County, the order of reference was subsequently varied and directed to the land registrar Kisii County. The period within which to file the report was extended severally but ultimately the land registrar and the County Surveyor Nyamira filed their reports on 5th June 2018.

4. The report by the land registrar and the surveyor affirmed the defendants/owners of land parcel central Kitutu/ Mwogeto/1239 had encroached onto the plaintiff's land parcel Central Kitutu/Mwogeto/1230 to the extent of approximately 12 metres by 65 metres (0.1Ha). The court on 9th October 2018 adopted the report by the land registrar and surveyor as judgment of the court and ordered the defendants to vacate from the portion of land parcel Central Kitutu/Mwogeto/1230 they had encroached upon within 30 days of being served with the decree.

5. The firm of Maosa & Company Advocates on 25th February 2019 file a Notice of Motion application of even date inter alia seeking the setting aside of the decree and a stay thereof and liberty to file a defence on behalf of the defendants. On 7th March 2019 the firm of Gitonga, Kinyanjui & Company Advocates filed a notice of change of advocates for the defendants and on 8th April 2019 filed a Notice of Motion dated 5th April 2019 seeking virtually the same orders sought in the earlier application dated 25th February 2019.

6. The Notice of Motion dated 5th April 2019 inter alia sought orders that:-

(i) The firm of M/s Gitonga Kinyanjui & Co. Advocates be granted leave to come on record on behalf of the defendants in place of Maosa & Co. Advocates who had come on record after judgment was delivered.

(ii) The judgment entered against the defendants on 9th October 2018 together with all the consequential orders be set aside and the defendants be allowed to file their defence out of time.

(iii) That the application be heard together with the notice of motion dated 25th February 2019.

7. The application was grounded on the supporting affidavit sworn by Wilfred Obiero Nyangau. The applicants in support of the applications aver that they were never served with summons to enter appearance and further raise issues respecting the integrity of the land registrar's and the surveyor's reports on what the judgment was based.

8. The plaintiff swore two replying affidavits in response to the two applications by the defendants. The 1st replying affidavit was sworn on 12th March 2019 and the second affidavit on 14th May 2019. The Plaintiff maintained the defendants were duly served with summons to enter appearance and that they were present when the land registrar and the surveyor visited the site. The plaintiff contended that the defendants application lacked any merit and was merely intended to delay the adjudication of the matter.

9. On 20th May 2019 the court directed the parties to canvass the application by way of written submissions. The parties have filed their respective submissions which I have duly perused and considered. The fulcrum of the defendants/ applicants submissions was that the defendants were not served with summons and therefore had no opportunity to file a defence to the suit. The defendants implore the court to exercise its discretion in their favour and set aside the judgment and the other consequential orders so that the defendants could be afforded the opportunity to be heard on merits. The defendants have referred the court to various authorities on the exercise of judicial discretion and on the need for a party to be afforded an opportunity to be heard having regard to the principles of natural justice which I have considered.

10. The plaintiff for his part insisted that the defendants were served summons on 19th December 2016 as the affidavit of service attests. Besides the plaintiff contended the 1st defendant was present when the land registrar visited the land on 23rd May 2018 and that the defendants were all along aware of the suit.

11. Earlier in this ruling the court stated that it had been satisfied that this was a matter that concerned boundary dispute between two land parcels Central Kitutu/ Mwogeto/1230 and 1239 occupied by the plaintiff and the defendants respectively. It was on that basis that the court gave direction for the dispute to be determined by the land registrar under the provisions of Section 18 of the Land Registration Act 2012. The import of that is that once the court determined the matter only raised the issue of a boundary dispute, then it followed the court lacked the mandate and/or jurisdiction to entertain the matter. Section 18(2) of the Act provides:-

(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.

12. The court was cognizant of this provision and rather than dismiss or strike out the suit, the court opted to make a reference to the land registrar for the boundaries to be ascertained. It was evident that the plaintiffs land parcel 1230 was adjacent to land parcel 1239 occupied by the defendants and the two parcels were therefore sharing a common boundary and the issue was the positioning of the boundary. The person who has mandate under Section 18 and 19 of the Land Registration Act 2012 to establish and fix the boundary of registered land is the land registrar acting in concert with the surveyor. This is obviously because the land registrar and the surveyor are the custodians of the land records and the survey records and they possess the technical ability to carry out the exercise. The court of course lacks the technical capacity to undertake such an exercise and has to rely on the experts.

13. The court has carefully perused the record and notes from the plaintiff's bundle of documents that indeed the plaintiff had even before he filed suit lodged a boundary dispute with the land registrar, Nyamira in regard to land parcels 1230 and 1239 and this fortifies the determination by the court that the matter related to a boundary dispute which required to be handled by the land registrar. The proposed intended statement of defence annexed by the defendants merely denies the plaintiff's averments in the plaint and does not show that the dispute is not a boundary dispute. The defendants only state in their intended defence that they have not trespassed or encroached onto the plaintiff's land. That only served to place the land registrar and the surveyor in pole position to determine whether or not they were in encroachment once they established and determined the position of the common boundary.

14. I have carefully studied the reports by the surveyor and the land registrar. Both reports affirm the site was visited on 6th September 2019 and that both parties were represented. The list of participants recorded by the land registrar shows that Wilson Nyamwange (1st defendant) and Thomas Oseko (3rd defendant) were present which demonstrates the defendants were aware of the hearing of the dispute. The surveyor stated that the appropriate Registry Index Map (RIM) Sheet No. 6 was used in the exercise. The surveyor summed up the exercise thus:-

“The exercise was peaceful, scaled distances from RIM (Registry Index Map) showed that the owner of land parcel C/K/Mwogeto/1239 had encroached into land parcel C/K/Mwogeto/1230.”

He attached a sketch diagram illustrating the encroachment. The land registrar summed his report thus:-

“After taking measurements of the two parcels of land it was clear that the owner of parcel number Central Kitutu/Mwogeto/1239 had encroached into parcel number Central Kitutu/Mwogeto/1230 around approximately 12 metres

by 65 metres (see surveyor's sketch for exact size)".

15. The exercise delineating the two parcels of land was carried out in the presence of all the parties. The evidence that the defendants had encroached onto the plaintiff's parcel of land is irrefutable. The land registrar and the surveyor are government officers mandated under the law to carry out such exercises as the court mandated them to undertake. They are the custodians of all the necessary land records relating to registered land. They are expected to be impartial in the exercise of their functions conferred by state. The defendants in the replying affidavit sworn by Obiero Nyang'au at paragraph II have alluded to a survey report allegedly conducted earlier by the Ministry of Lands that had allegedly found the plaintiff to be the one who had encroached onto the defendants plot but had not annexed such a report. I am sure if there was such a report, the defendants would have by all means availed a copy. I hold there was no such report. In my view the report by the surveyor and the land registrar filed herein remains unchallenged and I find the same credible and well supported.

16. I do not accept the defendants averments that they were not served with summons to enter appearance or were not aware of the pendency of the suit. How did they get to participate during the exercise by the land registrar? They admit having been served with the decree. The record shows the same process server, Isaiah Miruka served them with the draft decree on 10th October 2018. The process server explained in the affidavit of service that he served the defendants at their places of residence and that he knew them as he had previously served them with court papers in the suit.

17. In view of the fact that I had earlier on in this ruling held that the court lacked the jurisdiction to deal with the matter as it related to a boundary dispute, even if I had held that the summons had not been served, it would not have been material. What is material is that the defendants participated in the exercise by the land registrar, and I have held that the exercise by the land registrar and the surveyor was properly conducted and was in conformity with the order of reference made by the court. I see no basis upon which I can fault the report by the land registrar and the surveyor and I accordingly uphold the same.

18. The net effect is that this court's ruling adopting the land registrar's report as a judgment of the court is uphold and I decline to set the judgment aside. The costs of the application are awarded to the plaintiff.

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