



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT KISII

CASE NO. 1201 OF 2016

(FORMERLY HCC NO. 115 OF 2009)

VINCENT MOSETI.....PLAINTIFF

VERSUS

CHARLE SOMOKE ONSASE.....1ST DEFENDANT

ZABLON GISEGE ABUGA.....2ND DEFENDANT

R U L I N G

1. This suit was filed on 25th September 2013 by way of originating summons (OS). The Plaintiff sought to be declared as entitled to be registered as the owner of a portion of land parcel **West Kitutu/Bomatara/3166** measuring Zero decimal six (0.6) hectares approximately (“**the suit premises**”) which he claimed to have adversely possessed for a period of over 30 years.

2. The suit was part heard before Okong’o, J. and he took the evidence of the Plaintiff (PW1) as the sole Plaintiff’s witness and the evidence of one Zablon Mahaga Okari (DW1) before he was transferred. The hearing of the suit proceeded before me on 18th May 2016 when John Omwando Tinga (DW2) testified but was stood down before cross examination could be completed as the Plaintiff had sought to introduce in evidence documents that had not been referred to and/or produced by the Plaintiff when he had testified. The Plaintiff wanted to be given an opportunity to review the matter and determine how to proceed in view of the predicament.

3. The Plaintiff on 19th September filed a Notice of Motion dated 15th September 2016 and inter alia sought the following orders:-

(i) That this honourable court be pleased to order that this case start afresh.

(ii) That this court be pleased to grant leave to the Plaintiff/Applicant to file and serve a fresh list of documents and copies thereof.

4. The Defendant opposed the application by the Plaintiff. The Court dismissed the Plaintiff’s application inter alia on the basis that the application had been made too late in the day and that the Plaintiff/Applicant had not acted with diligence while conducting the suit.

5. The Defendants have on their turn filed the instant Notice of Motion application dated 26th March 2019 which is the subject of this ruling. The application is expressed to be made under Articles 40 and 159(2) of the Constitution, Section 13(2)(e) as read with Section 13(7) Environment and Land Court Act and Sections 1A, 1B, 3 and 3A of the Civil Procedure Act.

6. The application inter alia prays for orders that:-

1. The Honourable Court be pleased to direct the Kisii County Land Surveyor to visit land parcel West Kitutu/Bomatara/3166 in the presence of the parties and do verify the nature and extent of land use by the parties and do file a report within a prescribed time.

2. Further to and consequent to the above, such directions as are just and expedient including the filing by the parties of their respective observations on the report filed by the Kisii County Land Surveyor be made.

7. The application was supported on the grounds set out on the body of the application and on the affidavit sworn by the Plaintiff in support

of the application dated 26th March 2019. The justification of the application by the Defendants is captured by grounds 1 and 2 of the application which are as follows:-

1. From the evidence taken so far, it is evident that whereas the Defendant claims that extensive developments have been done by the late Charles Omoke Onsase on the land parcel No. West Kitutu/Bomatara/3166 the plaintiff/respondent contends that the Applicant is a trespasser.

2. It is needful in the circumstances, appreciative of the rival positions assumed by the parties, that a report be filed to assist the court arrive at a fair and just determination of the dispute before it.

8. The Plaintiff filed a statement of grounds of opposition and a replying affidavit in opposition to the Defendants application. On the grounds of opposition the Plaintiff contended as follows:-

1. The provisions of Articles 40 and 159(2) of the Constitution will only be ventilated through a constitutional petition but not on an interlocutory application.

2. Sections 13(2)(e) and 13(7) of the Environment and Land Court Act give this court jurisdiction over the areas to arbitrate on and the reliefs it can give but not to be asked to look for evidence for a party before it.

3. The court should not be asked to use Sections 1A and 1B in favour of a party to the prejudice and detriment of another party.

4. The court's discretionary powers should be exercised judiciously but not to aid a party fish for evidence.

9. The parties canvassed the application by way of written submissions. The Defendants/Applicants submissions were filed on 20th May 2019 and the Plaintiff's submissions were filed on 13th June 2019. I have perused and considered the submissions filed by the parties together with the application and the affidavit in support and in opposition. The issue that arises for the court to determine is whether in the circumstances the court should exercise its discretion in favour of allowing the application by the Defendant.

10. Just as parties are bound by the pleadings, parties are equally bound by the rules of evidence. He who alleges must prove the facts that they allege exist if they are to get a determination in their favour. In the present suit, the Plaintiff testified and closed his case. The Defendants case has also been substantially heard. The Plaintiff as earlier indicated had applied to be allowed to introduce new documents that had not been discovered. Considering the Plaintiff had already testified and closed his case and one of the defence witnesses had testified, the court refused to grant the request as that would have meant virtually restarting the case and would have been prejudicial to the Defendant.

11. The Defendants by the present application are virtually asking the court to assist them to find evidence that could hopefully bolster their case. The Defendants submit that the Surveyor would be an independent witness as he would be mandated by the court and that his evidence would only relate to verification of the status of the disputed property in terms of the physical developments. The Defendants claim to have extensively developed the suit premises whereas the Plaintiff asserts the Defendants are but trespassers. In the Originating Summons Kisii ELCC No. 396 of 2013 the Defendants claim the suit premises as adverse possessors while in Kisii ELC No. 1201 of 2016 (formerly No. 115 of 2009) the Plaintiff claims the Defendants are trespassers in the suit premises. The burden of proof lies on he who asserts or alleges and it is the responsibility of the parties to marshal evidence to prove what they allege. The Court bears no responsibility to aid any party to assemble their evidence. It is noteworthy that the Court on 25th July 2017 made directions that Kisii HCCC No. 115 of 2009 be heard together with Kisii ELCC No. 396 of 2013 (OS). The court vide a ruling delivered on 25th July 2014 directed that:-

“The court files for the two suits shall be put together and the cases shall be heard one after the other with Kisii HCCC No. 115 of 2009 (now 1201 of 2016) being heard first followed by this suit (Kisii ELCC No. 396 of 2013 – OS)”

12. It behoves on the Plaintiff/Applicant in the originating summons to prove by evidence that he has been in possession of the suit premises as an adverse possessor for a period of 12 years or more if he is to get the orders that he seeks. Conversely, the Plaintiff in ELCC No. 118 of 2009 (now ELC No. 1201 of 2016) has the burden of proving that indeed the Defendant (who is the Plaintiff in the OS) is in the suit premises as a trespasser and not as an adverse possessor.

13. The instant application by the Defendant which the Plaintiff opposes, in my view amounts to an attempt on the part of the Defendants to seek the assistance of the Court in gathering evidence. If the application was not opposed by the Plaintiff and/or both parties had consented to an order of inspection of the suit premises by the valuer and/or a land surveyor, the Court would have had no difficulty making it but in the circumstances and having regard to the stage of the proceedings, the Court would exercise its discretion in disallowing the Defendants application.

14. The issue is not one of a boundary dispute where the law expressly mandates the Land Registrar as the person who has the mandate and authority to establish and fix boundaries under the provisions of Sections 18 and 19 of the Land Registration Act, 2012. If the issue was one of boundary dispute the court would have had no difficulty in exercising its discretion in favour of the Land Registrar visiting the site for purposes of establishing the boundary. In the present matter the Defendant could have easily obtained the evidence he seeks to obtain through the present application from either a valuer or even a surveyor without an order from the Court.

15. In the premises and for the reasons given hereinabove, I decline to grant the orders sought in the Defendant's Notice of Motion dated 26th March 2019. I dismiss the same with costs to the Plaintiff.

16. Orders accordingly.

RULING DATED AND SIGNED AT NAKURU THIS 27th DAY OF SEPTEMBER 2019.

J. M. MUTUNGI

JUDGE

RULING DELIVERED AT KISII THIS 8TH DAY OF OCTOBER 2019.

J.M.ONYANGO

JUDGE