



REPUBLIC OF KENYA

ELC CASE NO.361 OF 2016

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ESN.....PLAINTIFF

VERSUS

MNM.....1ST DEFENDANT

NYANG'AU OKACHI.....2ND DEFENDANT

RULING

INTRODUCTION

1. By a Plaint dated 25th October 2015 the plaintiff filed suit against the Defendant seeking an order of permanent injunction to restrain the defendants from accessing the land parcel known as SOUTH **[Particulars Withheld]**, and 25-**** which belongs the plaintiff. She alleged that the property was acquired by the 2nd defendant during the subsistence of her marriage to the 2nd defendant due to their joint efforts and it was developed by her over a span of several decades. The same was however registered in the 2nd defendant's name in line with the tradition among the senior Abagusii generation whereby title documents were registered in the name of the husband to hold the same in trust for the benefit of the family.

2. Sometime in mid -September 2016, the plaintiff discovered that the 2nd defendant had sub-divided the suit property which was originally known as SOUTH MUGIRANGO **[Particulars Withheld]**, and sold a portion registered as land parcel number SOUTH **[Particulars Withheld]**, and 2**** to the 1st defendant without the plaintiff's knowledge or consent.

3. In their joint Amended defence and Counterclaim filed on 22nd September 2017, the defendants deny the plaintiff's claim. In particular, the 2nd defendant denies that the suit property was acquired during the subsistence of his marriage to the plaintiff and states that he acquired it before he married the plaintiff. He further denies that he is holding the suit property in trust and for the benefit of his family. He states that he has settled his two wives on different parcels of land where he has established their matrimonial homes and the plaintiff has no lawful claim over land parcels number SOUTH **[Particulars Withheld]** and 2**** which belong to the 1st defendant.

4. In his counterclaim the 2nd defendant claims that the plaintiff has been trespassing on the suit property where she and her children have destroyed the 1st defendant's crops valued at Kshs. 119,837/=. He therefore seeks compensation of the said amount and an injunction restraining the plaintiff from interfering with the 1st defendant's occupation of the suit property.

5. Since the dispute involves family members, the court directed that the parties attempt an out of court settlement but this was not forthcoming. The court then ordered that the Land Registrar and County Surveyor visit the disputed parcels of land number SOUTH **[Particulars Withheld]** and 2**** now sub-divided into SOUTH MUGIRANGO **[Particulars Withheld]** and 2**** to delineate their physical boundaries on the ground, verify their respective acreages and file a report in court.

6. The Land Registrar and County Surveyor filed their joint report on 20th June 2018 in which they noted that land parcel no 1187 was sub-divided to give rise to parcels no. 2**** and 2****. Parcel no. 2**** was further sub-divided to give rise to parcel no 2***** and 2****. They also noted that the acreage on the ground did not tally with what was in the register. They then fixed the boundaries.

After the parties had studied the report the court directed that they file their submissions and comments on the same. Both parties filed their submissions which I have considered.

ISSUES FOR DETERMINATION

7. The singular issue for determination is whether the joint report of the Land Registrar and County surveyor, Nyamira resolves the dispute between the parties.

ANALYSIS AND DETERMINATION

8. Having considered the pleadings, the report and submissions thereon, I note that the dispute revolves around ownership of the suit property and the manner in which it was transferred to the 1st defendant rather than simply a delineation of boundaries. In the circumstances I am of the view that the report does not conclusively resolve the issues in controversy and the matter ought to be fixed for hearing so that the parties can adduce evidence, call witnesses and produce whatever documents they wish to rely on. Any of the parties may call the Land Registrar and County Surveyor as a witness if they so wish.

It is so ordered.

Dated, signed and delivered at Kisii this 21st day of November 2019.

J.M ONYANGO

JUDGE