



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**E.L.C CASE NO. 22 OF 2016**

**MELLEN SARANGE MAROKO.....PLAINTIFF**

**VERSUS**

**LEONARD ORORI OKIOGA.....1<sup>ST</sup> DEFENDANT**

**CHARLES OIRA OKORIGI.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Plaintiff who is the Registered owner of Land parcel **L.R NO. EAST KITUTU/BONYAMONDO/ 11/1045** (the suit property) filed suit against the Defendants claiming that they had trespassed on his land. In his Plaint he prays that the Defendants be evicted from the suit property and that the Defendants be restrained from interfering with the suit property.

2. In their Defence and Counterclaim dated 31<sup>st</sup> March, 2016 the Defendants denies the Plaintiff's claim and avers that the Plaintiff is holding land parcel **No. EAST KITUTU/BONYAMONDO 11/ 1045** fraudulently and that he is therefore not entitled to protection thereof. In their Counterclaim the Defendants pray that the Plaintiff be evicted from the suit property.

3. By consent of the parties the court issued an order dated the 24<sup>th</sup> July, 2017 directing the Land Registrar and County Surveyor Nyamira County to visit the suit property for purposes of marking the boundaries and fixing beacons on Land parcels **Number EAST KITUTU/BONYAMONDO/ 648, 952 AND 1045**. They were further required to delineate the Land parcels on a sketch map and show if there are any encroachments by either party after which they were required to file their report in court within 90 days.

4. Pursuant to the said order, the Land Registrar and County Surveyor visited the suit property and the above-mentioned land parcels, took measurements and filed their report dated 2<sup>nd</sup> April, 2019. In the said report they observed that land parcels **L.R No EAST KITUTU/BONYAMONDO/ 11/1045** and **648** exist on the ground and are being utilized. The said parcels of land and their neighboring parcels of land have no permanent boundaries. They also observed that the Defendants have encroached on parcel **No 1045** and they have been plucking tea and cutting down trees on the Plaintiff's land. The report concludes that each of the parties should utilize the land according to the portion he bought.

5. Both the Plaintiff and the Defendants filed their comments on the report.

6. The Defendants faulted the Land Registrar and County Surveyor for failing to use the Registry Index Map and instead using the mutation forms whose authenticity was said to be in doubt. They were of the view that the report failed to capture the nature and extent of their encroachment on parcel **No.1045**. Furthermore, it failed to capture the dates of creation of the various interests in land particularly the resultant sub-divisions of land parcel **No. EAST KITUTU/BONYAMONDO/11/952** and thereafter the creation of parcel **No. EAST KITUTU/BONYAMONDO/11/1045**. They submitted that the Land Registrar and County surveyor failed to inspect the original parcel of Land **No 648** which was later sub-divided into land parcel **No. 952** before it was further sub-divided into parcels **No. 873, 874**. In essence they were of the view that the report as presented could not conclusively resolve the dispute between the Plaintiff and the Defendants.

7. On the other hand, the Plaintiff was of the view that the report was accurate as it captured the nature and extent of encroachment by using her Registry index map as per the annexed sketch map. He submitted that the report ought to be adopted as judgment of the court.

8. Having considered the pleadings, the Nyamira County Surveyor's report and the rival comments on the report I am of the view that the dispute is not solely one concerning boundaries as it is necessary to understand the history of the land and how the defendants acquired their titles in addition to the issue of trespass. That being the position, I find and hold that the report does not resolve the issues in dispute and therefore it is necessary for the case to proceed to full hearing. The County Surveyor's report will form part of the court record and either party may call the County Surveyor as a witness to shed more light on his findings.

**Dated signed and delivered at Kisii this 17<sup>th</sup> day of December, 2019**

**J.M ONYANGO**

**JUDGE**