



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 487 OF 2016

(FORMERLY HCC NO. 168 OF 2011)

NYAMENO MAGETO.....PLAINTIFF

VERSUS

SIMION MAGETO NYAMENO.....DEFENDANT

J U D G M E N T

1. The plaintiff filed the instant suit vide a plaint dated 26th August 2011 filed in court on the same date. The plaintiff averred in the plaint that the defendant's claim that the plaintiff had interfered with or trespassed onto land parcel number **Central Kitutu/Mwogeto/383** was untrue maintaining that land parcels **Central Kitutu/Mwogeto/383, 384** and **1401** resulted from first registration and that their boundaries were intact as illustrated in the survey map. The plaintiff asserted that the claim of trespass was baseless and unfounded and intended to cause disharmony and hatred among the family members of the plaintiff.

2. Inter alia the plaintiff sought for judgment against the defendant for:-

- (a) A declaration that the land parcel in dispute does not form part of parcel number Central Kitutu/Mwogeto/383.**
- (b) That the court be pleased to set aside the ruling and/or quash the same as decided by the Nyanza Land Dispute Tribunal.**
- (c) To grant prohibition on the suit property and order that the defendant desists from interfering with the peaceful enjoyment of the suit property by the plaintiff.**

3. The defendant vide a statement of defence dated 23rd December 2011 filed in court on the same date averred that the plaintiff's suit lacked any basis and did not disclose any cause of action and the same ought to be struck out and dismissed with costs. The defendant further averred that there had been proceedings before the Manga Land Disputes Tribunal who determined the dispute in favour of the defendant and that the plaintiff's appeal to the Nyanza Provincial Appeals Committee against the Tribunal's decision was dismissed and the plaintiff did not appeal against the Appeal Committee's decision.

4. On 17th April 2013 when the matter was listed for mention for pretrial directions, the parties agreed by consent to refer the matter to the District Land Registrar and District Surveyor to establish and fix boundaries for land parcels **Central Kitutu/Mwogeto/3838, 384, 1941, 1942, 2170, 2172, 2173** and **2174**. The land registrar, Nyamira and the County Surveyor filed their reports dated 18th July 2013 and 10th July 2013 respectively. As per the land registrar's report, the boundaries of land parcels **383** and **384 (1942, 2170, 2174)** were found to be intact and there was no interference. The land registrar observed that the boundaries were not established and/or fixed as it was not necessary as the land records tallied with what was on the ground. Significantly, the land registrar stated that land parcel **383** and **384** were separated by a 120ft road and this demarcation has been in existence since the land adjudication process took place.

5. The surveyor's report which has an illustrated sketch plan in part stated:-

“Parcel number Central Kitutu/Mwogeto/383 and Central Kitutu/Mwogeto/384 are separated by the road of 120ft wide as per the RIM, and their boundaries were found to be intact. Though parcel number Central Kitutu/Mwogeto/384 has been subdivided into 1941 and 1942 and then parcel number Central Kitutu/Mwogeto/1941 has been subdivided into 2170, 2171, 2172, 2173 and 2174 respectively.”

An application by the plaintiff dated 18th February 2014 seeking judgment to be entered in accordance with the findings/verdict of the land registrar, Nyamira as per the report dated 18th July 2013 was disallowed by Okong'o J. in a ruling delivered on 15th August 2014. The judge in the ruling held that the report by the land registrar dealt solely with the issue of boundaries and not the other issues raised and pleaded by

the plaintiff in the plaint and could therefore not be the basis of a conclusive judgment on the issues prayed for by the plaintiff in the plaint.

6. On 9th May 2017 the suit was fixed for hearing before me when Mr. Marigi advocate appeared for the plaintiff and Mr. Momanyi advocate appeared for the defendant. It was Mr. Marigi advocate's position that in view of the fact that the land registrar had determined the boundaries of the plaintiff's and the defendant's land parcels, the suit had been disposed of and there was nothing to go for trial. Mr. Momanyi for his part was of the view that the plaintiff's suit was on the basis of the pleadings not sustainable and was of the opinion that the suit ought to be withdrawn. The parties were agreed however that viva voce evidence would add little or no value to the evidence on record and on that basis agreed that the court proceeds to review the pleadings and the documentary evidence on record including the land registrar's report and render a judgment. The parties filed written submissions in support of their respective positions.

7. From the plaint filed by the plaintiff dated 26th August, 2011 it is difficult to really decipher what the plaintiff's claim is. For instance, under paragraph 3 of the plaint, the plaintiff pleads thus:-

3. That the plaintiff has never interfered with or trespassed in land parcel number Central Kitutu/Mwogeto/383 as alleged by the defendant in land case No. 17 of 2009.

Paragraph 6 and 7 of the plaint are as follows:-

6. That the defendant's contention that the plaintiff had trespassed onto land parcel number Central Kitutu/Mwogeto/383 is not true and puts the defendant to strict proof.

7. That the disputed land is not registered in the name of the defendant.

8. The plaintiff as per the plaint appears to be responding to a claim that the defendant had lodged at the Manga Land Disputes Tribunal which the Tribunal had dealt with. The decision of the Land Disputes Tribunal could only be appealed to the provincial Appeals Committee or alternatively challenged by way of judicial review in the High Court. The decision of the Provincial Appeals Committee was appellable to the High Court on a point of law only under the provisions of the Land Disputes Tribunals Act, Cap 303A of the Laws of Kenya (now repealed). Section 8(1), (8) and (9) of the Act provides:-

8(1) Any party to a dispute under Section 3 who is aggrieved by the decision of the Tribunal may, within thirty days of the decision, appeal to the Appeals Committee constituted for the province in which the land which is the subject matter of the dispute is situated.

(8) The decision of the Appeals Committee shall be final on any issue of fact and no appeal shall lie therefrom to any court.

(9) Either party to the appeal may appeal from the decision of the Appeals Committee to the High Court on a point of law within sixty days from the date of the decision complained of.

9. The plaintiff acknowledges the proceedings before the land disputes in paragraphs 10, 11 and 13 of the plaint and in his list of documents has annexed a copy of the Tribunal proceedings and his appeal to the provincial appeals committee and the committee's decision dismissing his appeal. In instituting the present suit the plaintiff did not follow the procedure laid down in the Land Disputes Tribunal Act. The instant suit constitutes an abuse of the court process and cannot be sustained.

10. Additionally, even if the merits of the suit was to be considered, the suit does not disclose a cause of action. The plaintiff for instance does not state what his claim against the defendant is and/or how it arises. The plaintiff does not claim to be the owner of any specific parcel of land in respect of which the claim against the defendant arises. The plaintiff's prayer (1) is in the following terms:-

(1) A declaration that the land parcel in dispute does not form part of parcel number Central Kitutu/Mwogeto/383.

This prayer begs the question which land is in dispute and to whom does it belong? The court cannot grant an order that is incapable of being implemented and/or which is unclear and ambiguous. The court cannot act in vain or blindly. Granting such an order as sought by the plaintiff would result to giving an order that is incapable of being effected as it presumes there is an unidentified parcel of land that is in dispute and is not part of parcel 383.

11. As earlier observed in this judgment, the land registrar's report was to the effect the boundaries of all the parcels of land he was directed to inspect were intact on the ground and he did not say there was any encroachment by any party to the suit. The surveyor's report was clear and it had a sketch plan which illustrated the boundaries. The original parcels 383 and 384 were separated by 120ft road and there cannot therefore be an incidence of land parcel 383 trespassing onto land parcel 384 and vice versa.

12. I am on the basis of the material and evidence on record satisfied that the plaintiff's suit against the defendant does not disclose any or any reasonable cause of action against the defendant and the same is for dismissal. I accordingly order the plaintiff's suit against the defendant commenced by a plaint dated 26th August 2011 dismissed with costs to the defendant.

13. Orders accordingly.

JUDGMENT DATED, SIGNED and DELIVERED at KISII this 16TH DAY of FEBRUARY, 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Soire for Omwoyo for the plaintiff

Mr. Momanyi for the defendant

Ruth court assistant

J. M. MUTUNGI

JUDGE