



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NYERI
ELC NO. 604 OF 2014
(Formerly Nyeri HCC No.143 of 2008 and
Nairobi HCC No.1839 of 1999).

MAINGI NGETU PLAINTIFF

-VERSUS-

LAWRENCE WAITHAKA 1ST DEFENDANT

MUHIA WAITHAKA 2ND DEFENDANT

WAIRIA KAMAU 3RD DEFENDANT

ALLAN IRUNGU 4TH DEFENDANT

SIMON MAINA 5TH DEFENDANT

JUDGMENT

1. The suit herein relates to the parcel of land known as **Loc.12/Sub-Loc 4/409** (the suit property).
2. Maina Ngetu (now deceased and substituted with his son, John Irungu Maina) brought the suit herein to permanently restrain the defendants from encroaching and/or committing acts of waste on the suit property; an order of eviction and removal of the structures put up in the suit property; general damages; costs of the suit; any other orders which this court may deem just to grant and interest on the general damages and costs awarded.
3. The plaintiff's case is that the 1st defendant, Lawrence Waitthaka, with the knowledge of the other defendants, fenced off a portion of the suit property and deposited building materials thereon with intention of building permanent structures thereon.
4. The plaintiff states that attempts to restrain the defendants from committing acts of waste on the suit property through the local administration were in vain.
5. Apprehensive that unless restrained by this court the defendants would continue committing acts of waste on the suit property, the plaintiff filed the suit herein, seeking the reliefs listed herein above.

6. The defendants filed a statement of defence denying the allegations leveled against them and contending that the suit discloses no reasonable cause of action against them, is *res judicata* and time barred.

7. On 16th February 2006, the parties to this suit filed a consent in the following terms:

“By consent the Land Registrar Muranga District to visit the locus and ascertain the boundary. The parties to be present accompanied by their counsels. The report to be filed with 60 days.”

8. Although the Land registrar did not file his report within the time ordered by the court, the court record shows that pursuant to that order, the Land Registrar visited the locus on 24th October, 2007 and filed a report in respect of the visit on 22nd January, 2009. The report is in the following terms:

“RE: CIVIL SUIT NO.1839 OF 1999 LOC.12/SUB-LOC.4/409 VS T.5, T.18, T.9 & T17, T 297

The disputed plots were visited on 24th October, 2007 by the Land Registrar Muranga and the surveyor.

It was observed that the disputed boundary had some boundary features which were still intact. On the ground there is a 6.0 meter road which forms the boundary between the disputing plots. Although this road was not indicated on the map, the land registrar asked the surveyor to pick the road as it is on the ground so that the R.I.M can be amended accordingly.

After checking the area on the ground for parcel No. Loc.12/Sub-Loc.4/409 was found to be 2.20 Ha which is slightly bigger than the registered area in my office which is 2.02 Ha. This difference is acceptable.

I therefore file this report confirming to you that the road of access which is not on the map is the boundary between the disputing parties and the RIM has to be amended to include the same.

Enclosed is a copy of the report of the surveyor who accompanied the Land Registrar.”

9. The report by the Land Surveyor referred to above is in the following terms:

“LOC.12/SUB-LOC.4/409 VS LOC 12/SUB-LOC.4 GITHUNGURI/T.5, T.18, T.9 & T17, T 297

After visiting the site together as per the court order on the above mentioned case, the following observations were made:

(i) The surveyor observed that the disputed boundary had boundary features;

(ii) The surveyor carried out the perimeter survey of parcel Loc. 12/Sub-Loc.4/409 and found the area to be 2.20 Ha approximately.

(iii). The surveyor also observed that there is a 6.0m wide road between parcel Loc. 12/Sub-Loc.4/409 and parcels Loc.12/Sub.Loc.4 Githunguri/T.5, T.18, T9 and T17”.

10. On 22nd February, 2016 the court ordered that summons do issue to the Land Registrar to attend court and produce his report before the court retired to write the judgment having found no other issue pending to warrant the matter been set down for hearing.

11. The Land Registrar’s report was produced by the current Land Registrar, Muranga District, Nancy Nyambura Njenga.

12. Upon being cross examined by counsel for the plaintiff, the Registrar stated that she got the report from the file, having been prepared by the then Land Registrar, P.M Nyamweya.

13. The Land Registrar admitted that whilst the Registrar was supposed to visit the suit properties and file a report within 60 days, the report was filed outside the time ordered by the court and that there were no copies of witness statements in respect thereof. She further stated that she did not see any order extending the time within which the report ought to have been filed. She conceded that the report suggests that the Land Registrar did not measure the neighboring parcels of land.

14. She further stated that she was not aware whether there was an existing dispute before the parties came to court. She stated that she was also not aware that there was a time when the District Officer (D.O) visited the suit property and removed beacons thereon.

15. She admitted that the report she produced was not detailed enough to assist the court render an informed judgment.

16. The foregoing notwithstanding, she confirmed that the report was the one requested by the court and pointed out that in the report, the Land Registrar confirms that he visited the land with the Surveyor and recorded what they observed on the ground.

17. She stated that from the report, the measurements of Loc 12/Sub.Loc4/409 are confirmed in the report so that the owner of that parcel of land would not have any claim for a bigger portion.

18. Based on the letter by the Surveyor to the Land Registrar dated 4th February 2007, she stated that it is clear that the Surveyor took the measurements of the parcel in dispute and established its acreage as 2.20 Ha.

19. The Land Registrar produced certified copies of the reports dated 18th June 2008, the report by the District Surveyor dated 4th December, 2007 and the draft map attached to the Surveyor's report as her exhibits.

20. Counsels for the parties herein filed submissions which I have read and considered.

21. From the pleadings filed in this matter and the submissions, I find the issues for determination to be:

i. Whether the report filed by the Land Registrar and produced in court is valid or properly before court?

ii. Whether the Land Registrar exceeded his mandate under the consent order?

iii. Whether the Land Registrar was obligated to take measurements of all parcels of land which are the subject matter of this suit?

iv. Whether the report filed by the Land Registrar and produced in court is sufficient to determine the issues raised in this suit?

v. Whether the plaintiff's case discloses any reasonable cause of action against the 2nd to the 5th defendants?

vi. Whether the plaintiff has made up a case for being granted the orders sought or any of them?

vii. What orders should the court make?

22. As to whether the report filed by the Land Registrar and produced in court is valid or properly before court, on behalf of the plaintiff, it is submitted that the report is neither valid nor properly before court

because it was filed outside the time ordered by the court and that the Land Registrar who produced it knew nothing about it.

23. On behalf of the defendants, it is pointed out that it is the plaintiff's counsel who suggested that the dispute be referred to Muranga District Surveyor and submitted that the order was not in form of an arbitration reference for an award to be filed and challenged. According to counsel for defendants, even if the order was an arbitration award which the plaintiff was not satisfied with, the onus was on him to apply to have it set aside.

24. For the foregoing reasons, the plaintiff's arguments against the report by the Land Registrar are said to be incapable of holding any water.

25. My view on this issue is that, the fact that the report of the Land Registrar was filed out of the time ordered by the court, did not vitiate it. Despite having been filed out of time, the report remained the report ordered by the court pursuant to the consent order hereto. The applicant who had an opportunity of challenging the production of that report by the Land Registrar had no objection to its production. He has also not demonstrated what prejudice if any, he suffered by the report having been prepared and filed outside the time ordered by the court.

26. Concerning the fact that the report was produced by a person other than its maker, I take judicial notice that the report relates to an office as opposed to an individual and could therefore be produced by any person holding that office. It was not demonstrated to the court that the report was different from that which was prepared by the then Land Registrar and filed in court to warrant striking it off the court record.

27. For the foregoing reasons, I return a positive verdict to the 1st issue.

28. On whether the Land Registrar exceeded her mandate under the consent order by creating a six meter access road when no such road existed on the Registry Index Map (RIM), upon considering the consent order which *inter alia* required the Land Registrar to visit the locus and ascertain the boundary of the parcels of land in dispute and conscious of the powers of the Land Registrar while carrying out such an exercise, I find and hold that the Land Registrar did not exceed his mandate by finding that there existed an access road of 6 meters between the parcels of the land hereto and proposing amendment of the RIM to reflect that fact. If anything, the consent order in question did not prescribe to the Land Registrar how to ascertain the boundary to warrant the plaintiff arguing that by finding that there existed a six metre road of access between the parcels of land in dispute, the Land Registrar exceed his mandate.

29. The upshot of the foregoing is that the Land Registrar did not exceed his mandate either under the consent order or under applicable provisions of the law.

30. On whether the Land Registrar should have measured all the other parcels of land in question, I reiterate my finding that the consent order hereto did not prescribe any way or method of going about his mandate of ascertaining the boundary to the suit property. In the absence of such prescription, the Land Registrar was justified in carrying out the exercise in the best way he knew, provided that in so doing, he did not breach any person's right or the law applicable to search an exercise.

31. In the circumstances of this case, it was not demonstrated that the Registrar did something he ought not to have done or failed to do something he should have done or even violated the rights of any of the parties to the dispute herein in carrying out the exercise placed on him to carry out.

32. For the foregoing reasons, I return a negative verdict to the third issue framed for the court's determination.

33. As to whether the report filed by the Land Registrar and produced in court is sufficient to determine the issues raised in this matter, I reiterate my finding in the directions issued on 22nd February, 2017 to the effect that the report is sufficient for the reasons stated therein to wit the court has no role in

ascertaining and fixing of boundary disputes.

34. Although counsel for the parties and in particular counsel for plaintiff is of the view that the report is incapable of settling all issues raised in the suit property, it has not been demonstrated which issues cannot be settled using the report as the plaintiff's contention is that the 1st defendant has encroached into his parcel of land measuring approximately 2.02 Ha. The report by the Registrar settles that issue by showing that the plaintiff's parcel of land is intact and that it is separated from the other parcels of land by a road of access measuring 6 meters. In effect, the report settles the question as to whether or not the 1st defendant has encroached on the plaintiff's parcel of land and fenced off a portion thereof.

35. On whether the plaintiff's case discloses any reasonable cause of action against the 2nd to the 5th defendants, having reviewed the pleadings and evidence produced in this case, I agree with the defendant's submissions that the suit does not disclose any cause of action against the 2nd to 5th defendants as they are not said to have done anything wrong to the plaintiff. The only accusation levelled against the 2nd to 5th defendants is that they were aware of the alleged encroachment of the suit property by the 1st defendant. It was not demonstrated that the 2nd to 5th defendants owed the plaintiff any duty of care concerning the alleged awareness of the encroachment into the suit property by the 1st defendant to warrant them being made parties to this suit.

36. As to whether the plaintiff has made up a case for being granted the orders sought, having determined that the plaintiff has not demonstrated that the 1st defendant has encroached on his parcel of land and that his case discloses no reasonable cause of action against the 2nd to the 5th respondents, I need not say more to demonstrate that the plaintiff has not made up a case for being granted the orders sought or any of them. Consequently, I dismiss his suit with costs to the defendants.

37. Orders accordingly.

Dated, signed and delivered in open court at Nyeri this 15th day of February, 2018.

L N WAITHAKA

JUDGE

Coram:

N/A for parties

Court assistant - Esther