



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 59 OF 2016

ELMELDA KERUBO MECHAPLAINTIFF

VERSUS

CHARLES M. MOCHERE1ST DEFENDANT

DORCAH O. NYABICHA 2ND DEFENDANT

R U L I N G

1. The plaintiff vide a plaint dated 14th March 2016 brought the instant suit claiming that the defendants had wrongfully encroached and fenced off a portion of land **LR No. West Kitutu/Bogusero/3894 (“the suit property”)**. The plaintiff sought an order that the defendants remove the fence they had placed and an order of eviction from the portion they had encroached into. The plaintiff further sought an order for the removal of a caution that the 1st defendant had lodged against the suit property and damages for loss of user and violation of the plaintiff’s proprietary rights.

2. The 1st defendant in his defence denied that he has ever fenced off any portion of the plaintiff’s parcel of land and further stated he owns Plot Nos. **18B** and **35** Mosocho Market which he purchased from the County Council of Gusii (now Kisii County Government) and that he is the sole registered owner of the plots. He averred that the plaintiff’s home/parcel of land is separated from his said plots by a road of access. Owing to the conflicting and divergent contentions the court on 6th April 2016 made an order referring the dispute to the Land Registrar Kisii and the County Surveyor requiring them to visit land parcel **West Kitutu/Bogusero/3894** and to ascertain its boundaries and to confirm whether there was any encroachment on the parcel of land by the defendants. The land registrar was directed to file his report together with a sketch plan delineating the suit property and the adjacent plots and to further confirm whether there was any encroachment onto the suit property.

3. The land registrar and county surveyor prepared a joint report dated 17th July 2017 which was filed in court on 19th July 2017. From the face of the report, it is indicated that the officers visited the site on 6th July 2017 and the parties were present and each pointed to the disputed portion as forming part of their respective parcels of land.

4. The report makes the following findings:

(i) The market plots for Mosocho arose from allocations done to various individuals from Plot No. W. Kitutu/Bogusero/656 registered under Gusii County Council (defunct).

(ii) The boundary between the original Plot Bogusero/656 and Bogusero/3894 should define

the boundaries of the subsequent allocations thereof since it arose during adjudication period.

(iii) Plot No. W. Kitutu/Bogusero/3894 has been further subdivided to 9601 to 9603.

(iv) The market plots and the general boundary for the absolute titles have a straight alignment and are separated by 6m road which exists on the map but not on the ground.

(v) The existing road of access being used is actually inside the market plot W. Kitutu/Bogusero/656 (see sketch).

The report by the land registrar concluded that the disputed portion does not form part of the original land parcel **West Kitutu/ Bogusero/3894** but is infact part of the land owned by Gusii County Council.

5. On 20th July 2017 when the matter came up for mention the court directed the parties to be furnished copies of the report filed by the land registrar and the matter be mentioned on 12th October 2017 for purposes of adopting the report. When the matter came up for mention the plaintiff had filed a replying affidavit dated 5th October 2017 in which she accepted that indeed the Mosocho Market Plots were created out of land parcel **West Kitutu/Bogusero/656** but appears to question the positioning of the road on the ground. The plaintiff further avers an earlier site visit done by a different land registrar on 13th January 2016 was in conflict with the report made by the officers on 17th July 2017. The plaintiff filed a further replying affidavit dated on 9th November 2017 which for all intents is the same as the one dated 5th October 2017. The defendants did not file any affidavit in response to the plaintiff's affidavit.

6. As set out at the beginning of this ruling the court made the reference of the matter to the land registrar and the surveyor as they are the persons who the law gives the mandate to identify and fix boundaries that are disputed. In the instant matter, it was clear what was in issue were the dimensions and boundary delineations of the plaintiff's land parcel No. **West Kitutu/Bogusero/3894** vis-a-vis **Plot Nos 18B and 35** Mosocho Market claimed by the defendants. Under Sections 18 and 19 of the **Land Registration Act, 2012** it is the land registrar who is mandated to establish and fix the boundaries of any registered land.

7. In the present matter, there is no dispute that the plaintiff is the registered owner of land parcel number **West Kitutu/Bogusero/3894** which however has been subdivided to create parcels **9601 to 9603**. It is admitted that this Plot No. **3894** shared a common boundary with land parcel **656** which was owned by Gusii County Council and was subdivided to create the Mosocho Market Plots where the defendants' plots are located. The burden that the land registrar and the surveyor had was to identify the boundaries of the original land parcels **3894** and **656** on the ground. Their report shows they actually identified the boundary but the plaintiff is insistent that the disputed portion of land forms part of her plot based on the position of the road on the ground which the land registrar states is not on the map and the measurements do not confirm the assertion by the plaintiff. The sketch plan (survey map) confirms the report by the land registrar and the surveyor that there was an access road that was separating the Mosocho Market Plots and the adjacent freehold title holders.

8. Having considered the report furnished by the land registrar and the surveyor, I am satisfied that it indeed represents the actual status of the parcels of land on the ground. The court in the premises adopts the land registrar's report dated 17th July 2017 and directs that the same be implemented. The road of access serving the plaintiff's land parcel 3894 (9601-9603) and the Mosocho Market Plots should be established and opened up to obviate disputes such as the present one.

9. On the basis of the report by the land registrar and the surveyor it is clear that the defendants have not encroached onto the plaintiff's land and the claim is unsustainable. The land registrar's and surveyor's report dated 17th July 2017 is adopted as the judgment of the court and the plaintiff's suit is dismissed. I however order that each party will bear their own costs of the suit.

10. Orders accordingly.

RULING DATED, SIGNED and DELIVERED at KISII this 9TH DAY of MARCH, 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

Plaintiff present in person

N/A for the 1st and 2nd defendants

Ruth court assistant

J. M. MUTUNGI

JUDGE