



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 348 OF 2017

(Formerly Kisii ELC CASE No. 264 of 2014)

FRANCIS NYAKWAKA OMOLLO.....PLAINTIFF

VERSUS

1. ZACHARIA OGUTU NYAURA (Sued as the Legal

Administrator of ABISALOM OGUTU NYAURA, DECEASED)

2. COUNTY LAND REGISTRAR, MIGORI COUNTY

3. COUNTY SURVEYOR, MIGORI COUNTY

4. THE HON. ATTORNEY GENERAL.....DEFENDANTS

JUDGMENT

1. By a plaint dated 7th July, 2018 and filed on 10th July, 2014 the plaintiff has sued the defendant's jointly and severally. He is seeking the following orders:-

- i. Declaration that plaintiff is the lawful owner and/or proprietor of LR NO. KANYAMKAGO/KATIENO/381, measuring 4.31ha.
- ii. Declaration that the reports dated 14th day of May 2014 and 29th May 2014, by and/or on behalf of the 2nd defendants, were irregular, illegal and fraudulent, to the extent that same departs from and/or is at variance with the dimensions contained in the relevant registry index map.
- iii. Declaration that the 1st defendant has since encroached onto, excised and annexed portions of LR NO. KANYAMKAGO/KATIENO/381 and thereby trespassed onto the suit property without the permission and/or consent of the plaintiff, whatsoever and/or howsoever.
- iv. An order compelling the 2nd and 3rd defendants to re-visit the concerned parcel of land herein that is LR. NO. KANYAMKAGO/KATIENO/381 & 1494, respectively, and while thereat to demarcate the exact boundary position between the subject parcels of land in accordance with the records held and/or kept at the County Land Registry, Migori county.
- v. Permanent injunction restraining the defendants either by themselves, agents, servants and/or anyone claiming under the defendants from entering upon, re-entering, trespassing onto, cultivating, building structures, alienating, selling, leasing, interfering with and/or in any other manner dealing with the suit property, that is LR NO. KANYAMKAGO/KATIENO/381 and/or any portion thereof.
- vi. General damages for trespass.
- vii. Interest on (vii) above hereof at court rates.
- viii. Costs of tis suit be borne by the defendants.
- ix. Such further and/or other relief as the honourable court may deem fit and expedient so to grant.

2. The plaintiff is represented by Winny Ochwal learned counsel of Ogutu , Ochwangi, Ochwal and Co. Advocates.
3. The 1st defendant is represented by Mr. Odingo learned counsel.
4. The 2nd to 4th defendants are represented by Janet Chepkruai learned counsel.
5. I have looked at the plaint, statements of defence, dated 6th August 2014 and 3rd March 2015 and a report Reference No. Kisii ELC 1264.17/1 dated 20/9/2017 by the Land Registrar Migori on the matter further to court order of 28/9/16 made Pursuant to **Sections 18 and 19 Land Registration Act 2012.**
6. I heard the Land Registrar and County Surveyor of Migori on 26/7/2017. They referred to and relied on the report . It reads in part:-

“It’s noteworthy the boundary dispute determination which made the respondent in this case (Mr. Zacharia Nyaura) move the boundary or encroach was un- procedural as the land registrar lacked the mandate on land claims, it was also against the provisions of the limitation of actions act and flouted the provisions of Sections 21(1), 21(2), 21(3), and section 22 of the land registration act (now repealed) and the practice instruction cited hereinabove. It should therefore be set aside.”(Emphasis added)
7. I note the statement of agreed issues (plaintiff’s version) dated 4/9/2014 for determination by this court. I am guided by the case of **Galaxy Paints Co. Ltd –v- Falcon Grounds Ltd (2000) 2 EA 385** and issues as framed by plaintiff’s counsel.
8. The defendants are absent today yet the date was taken by consent of the parties. There is no reason for their absence or at all. The report is not opposed by the defendants.
9. I concur with the plaintiff’s counsel that the report affirms the plaintiff’s case. Therefore, I find that the plaintiff has proved his claim against the defendants jointly and severally on a balance of probability.
10. Accordingly I adopt the report as judgment of the court.
11. General damages as sought at order (viii) in the plaint, are within the discretion of the court and depends on circumstances of the case. In view of the plaintiff’s claim and bearing in mind the case of **Eric Adome & Anor –v- Pauline Kasumba Osebe & Anor (2014)eKLR**, general damages are assessed at **Kshs. 300,000/=** for the plaintiff against the defendant jointly and severally in the circumstances herein.
12. A fortiori, judgment is entered for the plaintiff against the defendants jointly and severally in terms of order (i) to (vii) sought in the plaint.
13. Costs of the suit shall be borne by the defendants jointly and severally.

DELIVERED, SIGNED and DATED in open court at MIGORI this 6th day of March 2018.

G. M. A. ONGONDO

JUDGE

In the presence of:

Mr. Ochwal learned counsel for the plaintiff

Tom Maurice -Court assistant