



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT KISII

CASE NO. 1117 OF 2016

(FORMERLY HCC NO. 277 OF 2010)

LABAN MONGARE BITANGE.....PLAINTIFF

VERSUS

JULIUS MOKAYA ONGERA.....1ST DEFENDANT

RONALD NYAKUNDI CLEMENT.....2ND DEFENDANT

ESTHER BARARE.....3RD DEFENDANT

R U L I N G

1. The plaintiff filed the instant suit vide a plaint dated 5th October 2010. The plaintiff averred that he is the registered owner of land parcel **Settlement Scheme/Mwongori/426** measuring 3.741Hectares or thereabouts. He claimed that the defendants on or about 22nd September 2010 trespassed and commenced construction of a petrol station and two semi permanent houses on his said land without his consent, knowledge or authority. He sought the following reliefs from the court:-

- (a) **An order of permanent injunction against the defendants.**
- (b) **An order for the eviction of the defendants.**
- (c) **General damages for trespass.**
- (d) **Costs of the suit.**

2. The defendants in their filed statement of defence stated that the petrol station was being constructed on land parcel number **Kericho/Manaret Settlement Scheme/660** registered in the name of Meshack Kipkirui Arap Rono while the semi permanent buildings were being constructed on land parcels **Kericho/Manaret Settlement Scheme/689** and **702** owned by Kennedy Kiplangat Ngasura and John Chepkwony Arap Langat respectively. The defendants contended their parcels of land were all within Sotik District in the Rift Valley Province (now Bomet County) they denied having trespassed onto the plaintiff's parcel of land asserting to have purchased their land lawfully from the registered owners.

3. The suit was part-heard before Okongo, J. on various dates before he was transferred out of the court station. On 12th October 2015 I gave directions that the hearing proceeds from where Okongo, J. had left. The suit was consequently fixed for hearing before me on 20th April 2017 when DW5, Ruth Cheronon Rono attended court to testify. In the course of her testimony it became clear that her late husband was the registered owner of land parcel **Kericho/Manaret Settlement Scheme/108**. This parcel was subsequently subdivided to create parcels **660** and **661**. The witness was emphatic that her land parcel 108 was in Bomet County and the same bordered the tarmac road from Kisii to Sotik which separates and is the boundary of Bomet and Nyamira Counties. She stated that after subdivision it is land parcel **660** which now extends to the tarmac road and parcel **661** where she resides is at the back. The witness affirmed that she sold to the 1st defendant a portion measuring 100feet by 150feet out of land parcel **660** and along the tarmac road where the 1st defendant has constructed a petrol station. She was insistent parcel 660 which runs along the Kisii-Sotik road was within Bomet County and not Nyamira County and that the tarmac road was the boundary between the two counties.

4. That during the course of DW5's evidence it became apparent to the court that what infact was in issue in the suit is not actually trespass as the case was presented but rather the delineation and physical locations of land parcels **Mwongori/426** owned by the plaintiff and land

parcel **Kericho/Manaret/108** (subdivided into parcels **660** and **661**). This prompted the court to make a direction *suo moto* for the court to visit the site in presence of the Land Registrar Nyamira County and the Land Registrar Bomet County together with their respective County Surveyors and to conduct proceedings thereon. The order was formally extracted and served on the Land Registrars. The order was in the following terms:

1. THAT the land registrar, Nyamira and the County Surveyor together with the land Registrar Bomet and the County Surveyor to attend court at the locus in quo at the disputed land parcel Mwongori Settlement Scheme/426 and Kericho Manaret Settlement Scheme/108 (now 660 and 661) on 16th June 2017 at 10.30am where the court will conduct a hearing.

2. THAT the land registrars to avail the parcels files and appropriate Registry Index Maps to aid the hearing.

5. The court visited the site of the disputed parcels of land on 16th June 2017 as scheduled in the presence of the land registrars and the surveyors. The court generally viewed the layout of the disputed site where a petrol station has been constructed and was in operation. The land parcel is on the right hand side of the main road Kisii-Sotik and borders the main road. The land registrar's explained that the exercise of taking measurements would take a long time and it was mutually agreed the land registrars would carry out a joint exercise and file their reports in court.

6. The land registrars did not file a joint report. The land registrar Nyamira County filed his report dated 3rd November 2017 on the same day. The land registrar, Bomet forwarded his report vide cover of his letter dated 15th November 2017 received by the court on 16th November 2017.

7. From the report filed by the land registrar, Nyamira, the following observations/findings are deducible:-

1. That adjudication for Mwongori Settlement Scheme Nyamira County was declared in 1966 while adjudication for Manaret Settlement Scheme in Bomet County was declared in 1967.

2. The old road was inside Bomet County but was shifted to the new tarmac road which forms the boundary between Nyamira County and Bomet County.

3. That the administrative boundary currently between Nyamira County and Bomet County is at the centre of the current highway road (Kisii/Sotik/Kericho).

4. That the Registry Index Map (RIM) is not in conformity with the status on the ground as the complainant (plaintiff) asserts that his land goes beyond the tarmac road to where the old road used to be and thus claims the portion occupied by the petrol station (Bomet side) is part of his land.

5. The distance from the new road to the old road is approximately 163metres (approx.535 feet) at the point measured. Between the old and new road there are occupancies by persons sold land by proprietors from Bomet County.

8. The land registrar in his concluding remarks opined that interfering with the status quo on the ground would generate unprecedented disputes from members of the Mwongori Settlement Scheme (Nyamira County) and members of Manaret Settlement Scheme (Bomet County) which could give rise to security issues. He recommended that the existing status quo where the new road is accepted as the rightful boundary between Nyamira and Bomet Counties should be maintained.

9. The land registrar, Bomet County filed a brief report where he observed as follows:-

(i) Mwongori Settlement Scheme was in the former Nyanza Province in Nyamira County while Manaret Settlement Scheme was in Rift Valley Province in Bomet County. The two provinces had the Kisii-Kericho road as the established boundary.

(ii) That the provincial boundary which is the Kisii-Kericho Highway has administratively existed since 1973.

(iii) That the plaintiff's land parcel Mwongori Settlement Scheme/426 boundary ought to be the Kisii-Kericho Highway and should not cross the road as it would then extend to Manaret Settlement Scheme which is in Bomet.

10. Land parcel **Settlement Scheme/Mwongori/426** clearly is registered in the plaintiff's name at the Nyamira County Land Registry. Land parcel **Kericho/Manaret Settlement Scheme/660, 689 and 702** are all registered at the Bomet County Registry. Mwongori Settlement scheme and Manaret Settlement Schemes clearly were two distinct land adjudication Sections/Areas falling under two distinct provinces. Presently, Mwongori Settlement Scheme falls under Nyamira County while Manaret Settlement Scheme falls under Bomet County. The two Counties share a common boundary where the two Settlement Schemes meet near the Chepilat Township. From the evidence it is apparent that the Kisii-Kericho Highway was accepted as forming the boundary between the former Nyanza Province and the Rift Valley at the Chepilat Township. When the court visited the site, it was not clear and it was not pointed out where the old Kisii-Kericho road passed. What was apparent was that all the persons whose land was on the Bomet side (Manaret Settlement Scheme) had fenced and developed their respective parcels of land up to the Kisii-Kericho Highway and generally the Highway was taken as the boundary. The plaintiff's assertion that his land parcel **426** crossed the road by as much as 163metres if accepted would mean the relocation of the boundary and that of necessity would affect the presumed county boundary between Nyamira and Bomet. The reports by the land registrars affirm that the Kisii Kericho Highway was the boundary between the defunct Nyanza and Rift Valley Provinces between the two Settlement Schemes. It is still the boundary between Nyamira County and Bomet County. The two land registrars appear to agree in their respective reports that the Kisii-Kericho Highway forms the boundary between Nyamira County and Bomet County. If the claim by the plaintiff that his land which is part of Mwongori Settlement Scheme in Nyamira County extends across the Kisii-Kericho Highway by as much as 163metres is accepted, that

would invariably mean altering the presumed boundary between the two Counties of Nyamira and Bomet.

11. Article 188(1) of the Constitution of Kenya provides how the boundary of a County may be altered. Article 188 of the Constitution provides as follows:

Article 188

(1) The boundaries of a County may be altered only by a resolution:-

(a) Recommended by an independent commission set up for that purpose by parliament, and

(b) Passed by:

(i) The National Assembly, with the support of at least two thirds of all the members of the Assembly; and

(ii) The Senate with the support of at least two thirds of all the County delegations.

(2) The boundaries of a County may be altered to take into account-

(a) population density and demographic trends;

(b) Physical and human infrastructure;

(c) Historical cultural ties;

(d) The cost of administration;

(e) The views of communities affected;

(f) The objects of devolution of government; and

(g) Geographical features.

12. Parliament and the Senate are yet to enact an enabling legislation to give effect to Article 188 of the Constitution. The County Boundaries Bill 2017 is pending before Parliament awaiting legislation. The Bill intends to define boundaries of Counties and to provide for the resolution of County Boundary Disputes through establishment of County Boundaries Mediation Committee as well as give effect to Article 188 of the Constitution on alteration of County boundaries. Until the Bill is enacted into law there exists a lacuna in law as there is no mechanism presently in place to deal with alteration of County boundaries and/or to resolve any disputes touching on County boundaries.

13. In the present matter the court is persuaded that the dispute does in fact touch on determination of and/or alteration of the boundary between the two counties Nyamira and Bomet at the point of the dispute. The determination of the dispute may result in the realignment of the boundary between the two Counties which may not only affect the disputants before the court. The court in terms of Article 188 of the Constitution lacks any jurisdiction to deal with the matter. One only hopes Parliament will move with haste to enact the County Boundaries Act now pending in Parliament as the County Boundaries Bill 2017 to enable disputes such as the present one to be handled through the mechanism to be established under such Act.

14. The court having held it lacks the jurisdiction to deal with this matter, it follows the court cannot entertain the suit and cannot grant the orders sought by the plaintiff in the plaint. Though the claim is couched as one of trespass, it is clear the determination thereof would of necessity lead the court to pronounce itself on the delineation of the boundary between Nyamira and Bomet Counties which the court has no jurisdiction to do in terms of Article 188 of the Constitution.

15. The upshot is that the plaintiff's suit is ordered dismissed but having regard to the circumstances of the matter, I direct that each party shall bear their own costs of the suit.

16. Orders accordingly.

RULING DATED, SIGNED and DELIVERED at KISII this 29TH DAY of JUNE 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Kaburi for the plaintiff

Mr. Anyona for Nyorei for the 1st defendant

N/A for the 2nd and 3rd defendants

Ruth Court Assistant

J. M. MUTUNGI

JUDGE