



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 49 OF 2016

FRANCIS KOROSO.....PLAINTIFF

VERSUS

JANE KOROSO.....1ST DEFENDANT

LAND REGISTRAR, KISII CENTRAL DISTRICT.....2ND DEFENDANT

R U L I N G

1. The plaintiff filed the instant suit vide a plaint dated 3rd March 2016. The plaintiff is the registered proprietor of land parcel **Nyaribari Masaba/Bokimotwe I/199** and his step brother Koroso Nyang'au (deceased) is the registered owner of land parcel **Nyaribari Masaba/Bokimotwe I/198**. The plaintiff claims that the defendant (wife to his step brother) on or about 23rd February 2016 in the company of the 2nd defendant unlawfully entered onto his parcel of land **Nyaribari/Masaba/Bokimotwe I/199** and hived out a portion of about 15feet by 60feet and annexed the same to land parcel **Nyaribari Masaba/Bokimotwe I/198** thereby denying the plaintiff any access and/or use of the said portion.

2. The plaintiff prays for judgment against the defendants for:-

(a) A declaration that the defendants are trespassers.

(b) An order of eviction of 1st defendant from the portion of land parcel Nyaribari Masaba/Bokimotwe I/199.

(c) An order of rectification of the register to restore parcels 198 and 199 as they were before the unlawful entry into the plaintiff's land parcel by the defendants.

(d) General damages

(e) Costs of the suit.

3. The plaintiff had filed the suit simultaneously with a Notice of Motion application seeking injunctive reliefs against the 1st defendant restraining her from interfering with the original boundary and/or demolishing any structures on the portion hived off from land parcel **199** belonging to the plaintiff pending the hearing and determination of the suit.

4. Upon being served, the 1st defendant filed a Notice of Preliminary Objection on the ground the application and the suit lacked merit and was incompetent and an abuse of the process of the court. The 1st defendant averred that the issue related to a boundary dispute and that the 2nd defendant acted properly and within the law in moving to resolve what was a boundary dispute.

5. On 15th February 2016 when the injunction application was scheduled for interpartes hearing all the parties were represented and they were all agreed that the matter raises a boundary dispute. The court in the premises issued an order in the following terms:-

1. That the Land Registrar and County Surveyor do visit the site which is Nyaribari Masaba/Bokimotwe I/198 and 199 and do establish and fix the boundaries in terms of sections 18 and 19 of the Land Registration Act, 2012 within the next 60 days.

2. That mention on 23rd May 2016.

3. That in the meantime the parties to observe the status quo.

6. The Land Registrar and the Surveyor filed their respective reports on 19th October 2016 and on 20th April 2017 the 1st defendant indicated that she was not agreeable to the reports filed by the land registrar and the surveyor. The court granted leave to either party to file an application challenging the report and the 1st defendant filed the Notice of Motion dated 5th May 2017 which is the subject of this ruling. By the application, the 1st defendant seeks inter alia an order:-

“That the honourable court do stay the adoption of the report by the County Surveyor dated 6th October and that of the Kisii County Land Registrar dated 1st August 2016 concerning boundary dispute between Nyaribari Masaba/Bokimote I/198 and 199.”

7. The application is supported on the grounds set out on the face of the application and on the affidavit sworn in support thereof by Jane Koroso, the 1st defendant/applicant. The 1st defendant avers that she was not present when the land registrar and the surveyor visited the site and therefore did not get the opportunity to ventilate her position and consequently her interests were not taken into account. The 1st defendant further avers that the original boundary between the two parcels had been agreed to by consensus and the same ought to have been respected. The 1st defendant avers that an earlier survey report dated 2nd March 2016 following the inspection of the site in her presence is at variance with the surveyor’s report dated 6th October 2016. She further states the adoption of the latest report would result in her being dispossessed of her portion of her land.

8. The plaintiff filed a replying affidavit in response to the application by the 1st defendant. In the replying affidavit the plaintiff deposes that the 1st defendant is the wife of Koroso Nyang’au (deceased) who was the registered owner of land parcel No. **Nyaribari Masaba/Bokimote I/198**. The plaintiff further deposes that at the time of making the application, the 1st defendant was in the USA and could therefore not have sworn the affidavit of 5th May 2017. The plaintiff further states that the 1st defendant was represented during the site visit by one Everlyne Koroso her eldest daughter. Paragraph 14 of the replying affidavit is in the following terms:-

14. That on 15th July 2016 the 1st defendant/applicant instructed one Everlyne Koroso (her eldest daughter) to represent her according to land registrar’s report. That in any case, the 1st defendant/applicant and one Everlyne Koroso are on the same footing as they are not the owners of land parcel No. Nyaribari Masaba/Bokimote I/198. They have not taken out succession proceedings to be administrators of the estate of their late father namely Koroso Nyang’au.

9. In the plaint the plaintiff under paragraphs 4 and 5 pleaded thus:-

4. That the defendant was the wife of one Koroso Nyang’au (deceased) who was step brother of the plaintiff and who shared the same name.

5. That said Koros Nyang’au (deceased) was the registered owner of land parcel No. Nyaribari Masaba/Bokimote I/198.

10. From the above pleadings it is evident that land parcel No. **Nyaribari Masaba/Bokimote I/198** is registered in the name of Koroso Nyang’au (now deceased) and that the 1st defendant has not been appointed as the administrator of the deceased estate. It is trite law that only a duly appointed administrator has capacity to represent the estate of a deceased person and that a person who has no letters of administration cannot sue and/or be sued on behalf of a deceased estate.

11. Section 82(a) of the Law of Succession Act, Cap 160 Laws of Kenya provides:-

82 Personal representatives shall, subject only to any limitation imposed by their grant have the following powers:-

(a) To enforce by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative.

Section 80(2) of the Act provides when the grant of letters of administration takes effect.

80(2) A grant of letters of administration with or without the will annexed shall take effect only as from the date of such grant.

12. The 1st defendant not being the registered owner of land parcel No. **Nyaribari Masaba/Bokimote I/198** and having not been appointed as the administrator of Koroso Nyang’au, the registered owner she lacked the capacity and/or *locus standi* to be sued on behalf of the deceased. The 2nd defendant equally could only deal with the registered owners of the subject properties in establishing and fixing their respective boundaries. In the case of land parcel **Nyaribari Chache/Bokimote I/198** whose proprietor had died, the land registrar could only deal with the duly appointed administrator of his estate.

13. The plaintiff’s suit commenced by a plaint dated 3rd March 2016 is thus incompetent and constitutes an abuse of the process of the court. The suit is hereby ordered dismissed but I make no order for costs considering that the 1st defendant was all through a willing participant in the exercise which in any event was null and void *abinitio* for want of *locus standi* on the part of the 1st defendant.

14. Orders accordingly.

RULING DATED, SIGNED and DELIVERED at KISII this 28TH DAY of SEPTEMBER 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Okenye for Sagwe for the plaintiff

Mr. Ollando for Nyagaka for the 1st defendant

N/A for the 2nd defendant

Ruth court assistant

J. M. MUTUNGI

JUDGE