



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 466 OF 2013**

**MANENGA OMAORE.....1<sup>ST</sup> PLAINTIFF**

**JOSEPH NYANGAU NYAROO.....2<sup>ND</sup> PLAINTIFF**

**JOHN OSIANGO OGECHI.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**DANIEL OSEBE.....DEFENDANT**

**R U L I N G**

1. The plaintiffs by a plaint dated 22<sup>nd</sup> November 2013 brought the instant suit praying for:-

- (a) A declaration that the 1<sup>st</sup> plaintiff is the owner of parcel of land known as North Mugirango/Boisanga 1/1209 and 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs are the sole legal administratixes to their fathers estates of Nyaroo Mesa and Ezekiel Ongechi Mesa.**
- (b) An order of eviction directing the defendant to give vacant possession of the suit portion of lands to the plaintiffs.**
- (c) Any other relief the honourable court may deem fit to grant in the circumstances.**

2. The defendant vide a defence and counterclaim filed on 11<sup>th</sup> May 2015 denied being in trespass on the land claimed by the plaintiff. The defendant acknowledged being the registered owner of land parcel **North Mugirango/1909** and having occupied the land claimed by the plaintiff over the last 50 years and consequently averred the plaintiffs suit was statute barred under Section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya. The defendant in the counterclaim sought orders barring the plaintiff permanently from entering and interfering with land parcels **North Mugirango/1210** and **1211** and further that he has acquired by adverse possession a portion of land measuring approximately 2½ acres which ought to be transferred and registered in his name.

3. The suit came up for mention on 27<sup>th</sup> October 2016 to confirm compliance with Order 11 of the Civil Procedure Rules and/or further directions. Mr. Ogari advocate for the defendant indicated that the matter raised a boundary dispute and sought a reference to the land registrar for the resolution of the boundary dispute. Mr. Kaburi advocate for the plaintiff agreed with Mr. Ogari advocate and the court accordingly made an order referring the matter to the land registrar in the following terms:

**“The parties are in agreement that the real issue in this matter is whether any parties has encroached onto another party’s parcel of land. The land registrar would be best suited to establish and fix the respective boundaries. The court in the premises directs the land registrar, Nyamira and the county surveyor to visit land parcels North Mugirango/Boisanga/1209, 1210 and 1211 and to establish and fix the boundaries in terms of Sections 18 and 19 of the Land Registration Act 2012. The report to be filed within the next 90 days from today. Mention on 8/3/2017 for further directions.”**

4. On the 8<sup>th</sup> March 2017 the order given on 27<sup>th</sup> October 2016 was varied to include land parcel **LR No. North Mugirango/Boisanga/1908** which was affected in as far as establishing the parcel boundaries was concerned. The extracted order arising from the variation inter alia was in the following terms:-

**1. That the land registrar Nyamira, and the county surveyor to visit land parcels North Mugirango/Boisanga/1209, 1210, 1211 and 1908 to establish and fix the boundaries in terms of Section 18 and 19 of the Land Registration Act, 2012.**

**2. ....**

3. ....

5. The land registrar and the surveyor filed their respective reports on 19<sup>th</sup> October 2017. The land registrar affirmed that the owner of land parcel 1908 had encroached onto land parcels **1209, 1210 and 1211**. The land registrar stated that measurements were taken to delineate and establish the boundaries of the parcels of land. The report by the surveyor confirmed that indeed the owner of land parcel **North Mugirango/Boisanga/1908** had encroached onto land parcels **1209, 1210 and 1211**. The surveyor attached an illustrated sketch plan and a copy of the Registry Index Map (RIM) showing the extent of the encroachment.

6. I have perused the reports filed by both the land registrar and the surveyor and I am satisfied that indeed this was a matter that involved the determination of the correct boundaries in respect land parcels **North Mugirango/Boisanga/1209, 1210, 1211 and 1908** and that the reference to the land registrar and the surveyor to make a determination was appropriate. It is apparent that the parties have had a running dispute respecting the positioning of the boundary of the parcels of land as is attested by the institution of Kisii HCCC No. 269 of 1991 where the issue was one of trespass but the suit was dismissed for want of prosecution in 2000 without the issue being determined.

7. The parties in the present matter acknowledged the issue was one of establishing and fixing the boundaries of the respective parcels of land prompting the court to make the order of reference to the land registrar and the surveyor to have the boundaries fixed. The court as per the provisions of Section 18(2) of the Land Registration Act, 2012 has no jurisdiction to entertain matters touching on boundary disputes. Section 18(2) provides:

**“The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this Section.”**

8. The report by the surveyor is clear that the defendant who is the owner of land parcel **North Mugirango/Boisanga/1908** has encroached onto land parcels **1209, 1210 and 1211**. The sketch plan furnished by the surveyor illustrates the extent of the encroachment vis-à-vis the official Registry Index Map (RIM). The defendant it is clear has extended the boundary of his land parcel 1908 and occupied a portion of land parcels **1209, 1210 and 1211**. That constitutes unlawful encroachment.

9. The report by the land registrar and the surveyor disposes of the issues raised in this suit and I accordingly enter judgment in terms of the land registrar’s report. The net effect is that the defendant is found to have encroached onto the plaintiffs three parcels of land and is hereby ordered to vacate from the portions of land belonging to the plaintiffs he has encroached into within a period of sixty (60) days from the date of this ruling failing which the plaintiffs shall be at liberty to apply for the forcible eviction of the defendant from the portion he has encroached upon.

10. Each party will bear their own costs of the suit.

11. Orders accordingly.

**RULING DATED, SIGNED and DELIVERED at KISII this 12<sup>TH</sup> DAY of OCTOBER 2018.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

Mr. Godia for Kaburi for the plaintiffs

Mr. Kimaiyo for the defendant

Ruth Court assistant

**J. M. MUTUNGI**

**JUDGE**