



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 31B OF 2006

FRANCIS NYAUMA OBARE1ST PLAINTIFF

SAMWEL ONYINKWA OMASIRE.....2ND PLAINTIFF

THOMAS MOMANYI..... 3RD PLAINTIFF

JOHN MISUKO OBARE 4TH PLAINTIFF

VERSUS

MAINA MARWANGA OMWAMIRE.....1ST DEFENDANT

PETER MAINA.....2ND DEFENDANT

J U D G M E N T

(1) By an amended plaint dated 16th June 2010 the plaintiffs sought the following orders:-

(a) A declaration that land parcels North Mugirango/Boisanga/1485, 4361, 4362, 1494 and 1496 extend to where present physical boundaries are and that if the registry index map does not reflect that then it is an error on the face of record.

(b) Cancellation and rectification of registers to reflect the true position on the ground of land parcels No. North Mugirango/Boisanga/1485, 4361, 4362, 1494 and 1496 and errors on the face of record be rectified.

(c) A permanent injunction to restrain the defendants successors in title assigns or however from interfering with the quiet possession and existing boundaries of the said land parcels.

(d) Costs of the suit.

(e) Any other relief that this honourable court may deem fit and just to grant

2. The 1st plaintiff has stated in his amended plaint that he is the legal administrator of the estate of one Obare Nyauma (hereinafter also known as the deceased) who is also the registered owner of land parcel No. **North Mugirango/Boisanga/1485** whereas the 2nd, 3rd and 4th plaintiffs occupy land parcels No. **1485, 4361, 4362, 1494 and 1496** as defendants of the registered owners. The plaintiffs have further

stated that the suit properties adjoin with one another as reflected in the registry map sheet No. 8 third edition of 1970.

3. The plaintiffs further stated that the boundaries between the suit properties and the acreage as reflected on the register do not reflect the true position on the ground and that the physical boundaries existing have been in existence from the time of adjudication and have been taken as such for over 30 years. The plaintiffs further contended that they have continually, peacefully and with knowledge of the 1st and 2nd defendants occupied their suit parcel according to the existing boundaries without any interference from anybody for over 33 years.

4. The plaintiffs however aver that the 1st and 2nd defendants between the period of December 2004 and April 2005 did a mutation and proceeded to survey parcel number **North Mugirango/Boisanga/1487** owned by the 1st defendant beyond the existing boundaries and thus encroaching into parcel numbers **North Mugirango/Boisanga/ 1485, 4361, 4362, 1494 and 1496** thereby adversely prejudicing the interests of the plaintiffs as the occupants of the adjacent parcels of land.

5. It is thus the plaintiffs' case that the registry index map may not reflect the true position on the ground to the extent that it appears to give more land to the defendants than they are actually entitled to on the ground. The plaintiffs aver that if the Registry Index Map (RIM) contains such an error, the same ought to be rectified to conform with the position on the ground.

6. The defendants on their part filed an amended defence dated 30th June 2010 and denied the plaintiffs allegations contained in their amended plaint. The defendants stated in their defence that they are the duly registered owners of land parcels **LR No. North Mugirango/Boisanga/4361 and 4362** respectively and have been using and occupying the said land as ancestral land.

7. Following closure of pleadings the matter was heard before **Okong'o J.** on diverse dates when the 1st, 2nd and 4th plaintiffs testified and called one additional witness one Hezekiah Mokogi Arogo as PW4 in support of the plaintiffs case. The 1st and 2nd defendants testified in support of the defence case and called no other witness.

8. The evidence adduced by the 1st, 3rd and 4th plaintiffs who testified as PW1, PW2 and PW3 respectively was to the effect that they were the sons of the late Obare Nyauma who was the registered owner of land parcel **North Mugirango/Boisanga/1485**. The 1st plaintiff was appointed the administrator of his late father's estate in HC Succession Cause No. 87 of 2005 (Kericho) though the certificate of confirmation issued on 25/7/2006 is headed Nairobi (PEx2). The plaintiffs testified their late father's land parcel **North Mugirango/Boisanga/1485** was five (5) hectares and that all the five (5) sons have shared the land with each getting approximately 1Ha. as shown in the certificate of confirmation of grant **"PEx.2"**. The plaintiffs testified that their father's land parcel has retained the physical boundaries that were marked and put on the ground at the time of adjudication. The plaintiffs' further testified that in 2005 they got summons from the D.O Ekerenyo Division that the 2nd defendant had lodged a claim that they were occupying a portion of the 2nd defendants land. The 2nd defendant filed a dispute before the Ekerenya Land Disputes Tribunal who upon hearing the dispute made a verdict to the effect that the Registry Index Map (RIM) was erroneous and needed to be rectified and/or amended. The Tribunal's award though filed before the Senior Magistrate's Court Nyamira vide Misc. App. No. 42 of 2005 was not adopted as judgment as the magistrate ruled that it had been prematurely filed before the expiry of 30 days allowed for appeal. Proceedings before the magistrate's court were produced as **"PEx.3 and 4"** respectively.

9. The gist of the plaintiffs evidence was summed up by the evidence given by the 1st plaintiff when he testified in his evidence thus:-

"...on the ground, our deceased father's Plot No. 1485 does not share a boundary with the 2nd defendant's plot. It also does not share a boundary with the 1st defendant's plot on the

ground. The 1st defendant owned Plot No. 1487 which was subdivided into Plot Nos. 4361 and 4362. When the 2nd defendant accused us before the D.O we realized that the 2nd defendant wanted a portion of our land. Our father's Plot No. 1485 and the 1st defendant's Plot No. 1487 were registered on the same day on 14th March 1993.

During the time of registration of these parcels there were physical boundaries on the ground and the two plots were not neighbouring one another. According to the survey map for Boisanga registration section, the plot on the immediate left of Plot No. 1485 is Plot No. 1484 which is owned by my uncle, Nyaboto Nyauma. On the ground, our plot does not share a boundary with the 2nd defendant's Plot No. 4362 at the lower end as indicated on this map. It was in the year 2005 that the 2nd defendant claimed our plot shares a boundary with the 2nd defendant's plot and that we had taken a portion of his plot."

10. The plaintiffs produced in evidence Registry Index Map (RIM) for Boisanga Registration Section as "PEX.5" which they stated the defendants are relying on and which they state is at variance with the situation on the ground as relates to the location of the parcel boundaries. PW4 Hezekia Mokogi Arogo testified in support of the plaintiffs' case that the Registry Index Map (RIM) does not reflect the true position as is existing on the ground. The witness stated that as per the map "PEX.5" his father's parcel of land No. 1496 is shown as extending southwards beyond the road yet it does not. He stated the land below the road belongs to the 2nd defendant. He stated in evidence thus:-

"The boundaries on the ground remain the same and have remained the same over the years. The boundaries on the ground have been in existence since 1964. The tribunal directed that the map be rectified."

11. The defendants' evidence in the main was given by the 2nd defendant, Peter Maina who is the son of the 1st defendant. The 1st defendant adopted the evidence given by the 2nd defendant. The defendants admitted that Plot No. 1487 was subdivided to create Plot Nos. 4361 and 4362. The defendants produced the green cards for the 2 parcels as "DEX. 1 and 2" respectively. A Registry Index Map for the area was produced as "DEX.3". The 2nd defendant stated that their disputes with the plaintiff started in 1985 when the plaintiffs destroyed the boundaries of their parcels. The defendants produced a letter from D.O dated 16th April 1996 as "DEX.4" where the D.O had summoned parties to a site dispute. The defendants claim the plaintiffs land is 4Ha. yet they occupy 5Ha. The 2nd defendant testified that the 3rd and 4th plaintiffs have encroached onto his parcel of land stating that the plaintiffs have created new boundaries which they wish to be sanctioned.

12. The 2nd defendant admitted that he is the one who referred the dispute to the Tribunal and that the Tribunal directed the parties to adhere to the boundaries that had been fixed at the time of adjudication and that surveyors should re-establish the boundaries.

13. The 1st defendant in his evidence reiterated that the plaintiffs damaged the boundary in 1995 and forced them out of the disputed portion. He dismissed the evidence of PW4 as inconsequential since PW4 was a new-comer in the area only having purchased the land and he therefore did not have the history of the parcels of land.

14. The parties filed their final written submissions; the plaintiffs on 19th December 2014 and the defendants on 3rd October 2016. I have considered the pleadings, the evidence by the parties and the parties written submissions and the following issues arise for determination:-

(i) Whether this court is seized with jurisdiction to entertain the instant suit.

(ii) Whether there is any basis to order for the rectification of the register in respect of the

plaintiffs and the defendants parcels of land.

(iii) By whom are the costs payable?

15. The defendants under paragraph 3 of their amended defence had served notice that they did not admit the jurisdiction of the court and indicated they would raise a preliminary objection. The record does not show any preliminary objection was taken and it therefore is necessary to consider and determine the issue. The defendants in the written submissions argue that the plaintiffs' suit essentially involves dispute as to boundaries of the defendants' respective parcels of land. That under Section 21 of the repealed **Registered Land Act**, Cap 300, Laws of Kenya the power to establish and fix boundaries was the preserve of the Land Registrar. The defendants argue the same position obtains under Section 18 of the Land Registration Act No. 3 of 2012.

Section 18 (2) of the Land Registration Act, 2012 provides:

“(2) 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.”

The rationale for this provision is easy to appreciate. The land registrar maintains the records of all registered land and has the technical capacity alongside the department of survey to carry out the mandate. The court is ill equipped for that kind of function.

16. Having made the above observation it is necessary to consider what the plaintiffs' case is about. Interalia the plaintiffs are seeking orders for the cancellation and rectification of registers to reflect the true position on the ground of land parcels North **Mugirango/Boisanga/1485, 4361, 4362, 1494 and 1496** on the basis there are errors apparent on the face of the record.

17. The power to rectify any register or title is vested in the land registrar under Section 79 of the **Land Registration Act No. 3 of 2012**. Section 79 (1) provides thus:-

79(1) The registrar may rectify the register or any instrument presented for registration in the following cases;-

(a) In formal matters and in the case of errors or omissions not materially affecting the interests of any proprietor;

(b) In any case and at any time with the consent of all affected parties; or

(c) Upon resurvey, a dimension or area shown in the register is found to be incorrect, in such case the registrar shall first give notice in writing to all persons with an interest in the rectification of the parcel.

The court also has powers under the provisions of Section 80 (1) of the **Land Registration Act, 2012** to order rectification of title or register. Section 80 (1) provides:-

(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

18. In the case of **Mary Ruguni Njoroge –vs- John Samuel Gachuma Mbugua & 4 Others [2014] eKLR Onguto, J.** held:

“In my view, the mistake referred to under section 80 (1) includes both a slip like a typographical error and a substantive mistake like the registration of a wrong or erroneous name. In short, the court wields powers equivalent to those donated by statute to the

registrar under Section 79 of the Land Registration Act. A party seeking rectification may therefore elect to attend before the registrar or appear before the court and prompt the process of rectification of a title or a register.”

19. In the present case the plaintiffs contend that the title registers of the parcels of land Nos. **North Mugirango/Boisanga/1485, 4361, 4362, 1494 and 1496** have variances in area and that their physical locations on the ground do not correspond with the Registry Index Map and that there is need for rectification of the registers and amendment of the Registry Index Map (RIM). The plaintiffs’ evidence points to there being a problem on the ground. The Tribunal which heard a dispute referred by the 2nd defendant made a finding after visiting the locus in quo that the RIM had errors or mistakes that required to be corrected. For the record the Tribunal had jurisdiction under Section 3 (1) of the **Land Disputes Act, No. 18 of 1990** to entertain the dispute before them as it related to boundaries to land and claim to occupy or work land and/or trespass. The plaintiffs’ case relates to both boundary dispute and rectification of the registers and records once the issue of boundary is cleared. The court therefore has jurisdiction to entertain the suit.

20. On a balance of probability, I am satisfied the plaintiffs have proved there may be a case for rectification of the registers of the affected parcels of land namely Land Parcels **North Mugirango/Boisanga/1485, 4361, 4362, 1494 and 1496**. I accordingly enter judgment in favour of the plaintiffs in the following terms:-

(1) That the land registrar, Nyamira County be and is hereby directed and ordered to visit land parcels North Mugirango/Boisanga/1485, 1487 (now 4361 and 4362), 1494 and 1496 and to establish and fix the boundaries on the basis of the boundaries established and maintained after the land adjudication process was completed.

(2) The land registrar be and is hereby directed and ordered to effect rectification of the registers of the said parcels of land (referred to in (1) above in case it is necessary) on the basis of the boundaries that he will have ascertained.

(3) The land registrar to cause the Registry Index Map (RIM) relating to the affected parcels of land to be appropriately amended.

(4) The land registrar to implement orders (1) to (3) above within 180 days from the date of this judgment.

(5) Any party to be at liberty to apply.

(6) Each party to bear their own costs of the suit.

Judgment dated, signed and delivered at Kisii this 17th day of February, 2017.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Ochwangi for Masese for 1st, 2nd, 3rd and 4th plaintiffs

Ms. Mogushe for Bosire for 1st and 2nd defendants

Milcent Court assistant

J. M. MUTUNGI

JUDGE