



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 272 OF 2013

BEATRICE MATOYA1ST PLAINTIFF

TABITHA BONARERI MATOYA2ND PLAINTIFF

VERSUS

HENRY MANYANGE MATOYA

Alias HENRY MATOYA MANYANGE.....1ST DEFENDANT

TERESA KEMUNTO OBIRI2ND DEFENDANT

DAVID NYAKERIGA BOSIRE AND

ELIZABETH OMWENGA DAVID3RD DEFENDANTS

R U L I N G

1. The plaintiffs filed the instant suit on 19th June 2013 against Henry Manyange Matoya alias Henry Matoya Manyange, Teresa Kemunto Obiri and David Nyakeriga Bosire & Elizabeth Omwenga David as the 1st, 2nd and 3rd defendants respectively, seeking inter alia an order for the land registrar – Kisii to rebeacon land parcel **Central Kitutu/Daraja Mbili/508** and a further order for the defendants and their co-beneficiaries and servants to be permanently restrained by injunction from interfering, wasting or encroaching on the parcel of land **Central Kitutu/Daraja Mbili/508**. Simultaneously with the plaint the plaintiffs filed a notice of motion application seeking inter alia an order of temporary injunction and an order directing land registrar Kisii and the District Surveyors to rebeacon and/or demarcate the boundaries of land parcel **Central Kitutu/Daraja Mbili/508**.

2. Hon. Justice Okong’o heard the interlocutory application and delivered a ruling on 4th April 2014 dismissing the same. He held that the order seeking rebeaconing and demarcation of the boundaries of the suit property was one of the main prayers in the plaint and could not be granted at the interlocutory stage and further that the order was directed against the land registrar and the district surveyor who were not parties to the suit and hence the orders could not be issued against them without being heard. The judge was equally not satisfied the conditions for grant of an interlocutory injunction were met as no prima facie case with a probability of success had been demonstrated by the plaintiffs.

3. Although the court record does not show that the pleadings in the instant suit were amended and/or leave granted for joinder of additional parties, the plaintiffs/applicants vide a Notice of Motion dated 7th December 2016 expressed to be grounded under Section 80 of the Land Registration Act, 2012 brought

the present application the subject of this ruling. The application seeks diverse orders as set out hereunder:-

1. The court be pleased to certify this application extremely urgent to be heard and determined on a priority basis so as to settle the intricacies that surround the Estate of Walter Otworu Matoya in Central Kitutu/Daraja Mbili/508 and one third (1/3) of Kisii Town/Block III/140 which have caused psychological torture, fear, embarrassment, deprivation that are actually unwarranted to allow and grant the applicant peace and security which has evaded her since 2009; and which condition could not allow her to attend court on 28th July 2014 when Misc. Application 124 of 2014 was to be heard; so as to avert all nasty eventualities that are posing as threat to life and peace to the applicants, even from the neighbourhood as stated in the applicant's statement in police occurrence books.

2. The court direct and order the registrar to forthwith reclaim any part of the land of Central Kitutu/Daraja Mbili/508 that has been encroached by the estates Central Kitutu/Daraja Mbili/507, Central Kitutu/Daraja Mbili/2031, Central Kitutu/Daraja Mbili/2139 and director of public roads back to Central Kitutu/Daraja Mbili/508 so as to reinstate it to its original size as held in the map sheet diagram No. 8 of Central Kitutu/Daraja Mbili, and as adjudicated on 12th March 1971 and recorded on 16th March 1971 under the Land Adjudication Act No. 35 of 1968 as held in Adjudication record 255308.

3. The honourable court to order land registrar and surveyor Kisii County to permanently define the missing boundaries of Central Kitutu/Daraja Mbili/508 on the ground with beacons as held in the title issued in 1973 in the name of Walter Otworu Matoya at their own cost, since this omission was caused by the criminal negligence to duty as committed by the respondent civil servants in the offices of the land registrar and surveyor in Kisii District/County respectively and successively being abetted by the officers through the years and; also to correct the record on the map sheet diagram no. 8 by marking Central Kitutu/Daraja Mbili/508 with actual boundary lines to avoid entering future will continue to be generational struggle.

4. The land registrar and surveyor Kisii County be compelled by order of this honourable court to use the aerial scale used for diagram no. 8 of Central Kitutu/Daraja Mbili/508 and place actual boundaries with beacons, factoring the obvious features provided for by the diagram.

5. The honourable court to order and compel the director of public roads – Kisii County to erect/plant a perimeter fence and restore/construct the gate pole as measure to restore the applicants to conducive and secure living environment that the applicants lost during his upgrading of the road that extended the access road into Central Kitutu/Daraja Mbili/508 which act resulted and exposed the applicants to a range of criminal intrusion and threats since then.

6. The honourable court to order and compel the director of public roads – Kisii County to compensate the applicants maintenance and costs to nurture the planted perimeter fence that borders the access road to maturity of seven (7) feet height and compensate them their eight (8) blue gum trees, an avocado tree with fruit of the season and landscape the applicants' front yard that was disfigured by deposits of earth that were maliciously destroyed during their road upgrading exercise that maliciously intruded and trespassed Central Kitutu/Daraja Mbili/08 outside its area as provided for in Map Sheet No. 8 and which road was at the time of his upgrading exercise and still is a historic private road for accessing the Matieka (Applicant's Great Grandfather's) family.

Further, that the Director of Public Roads – Kisii County be compelled to make/repair the access road to all season passable status which otherwise was left in shamba form by that exercise.

7. The court be pleased to compensate by awarding general damages suffered by the beneficiaries of Central Kitutu/Daraja Mbili/508 occasioned by malicious destruction of their property by Director of Public Roads – Kisii committed during their upgrading exercise of the access road for not being guided by the scale and width of the road as provided on diagram sheet no. 8 and; against 4th, 5th, 6th and 7th respondents for their persistent willful intimidation and encroachment, threat to life against the applicants and forceful excision and occupation of the reclaimed land which has caused the applicant to suffer malicious arrests, trauma, frustration, embarrassment, exposure to danger and threat to life that have been experienced on every time the beneficiaries exercise their land rights, over property. This has also denied full usage and peaceful occupation of their property by the respondents.

8. Costs in the cause.

4. The application was supported on the grounds set out on the body of the application and the supporting affidavit sworn by Beatrice Matoya on 7th December 2016. The orders sought by the applicant in the main constitute mandatory orders as evidenced by prayers 2, 3, 4, 5 and 6 of the Notice of Motion. The prayers seek the court to make orders directing and/or compelling the land registrar and the surveyor to undertake and/or carry out specific functions and/or duties. The applicants also seek orders compelling the Director of Public Roads, Kisii County to undertake specific tasks under prayers 5 and 6 of the Notice of Motion.

5. It is noteworthy that the Notice of Motion is shown to be made in Misc. Civil Application No. 272 of 2013 yet the instant suit was commenced by way of plaint as earlier indicated in this ruling. The Notice of Motion further names the Attorney General, District Land Registrar - Kisii County Surveyor Kisii and Director of Public Roads - Kisii County as 1st, 2nd, 3rd and 4th respondents and defendants in the suit as the 5th, 6th and 7th respondents. It does appear as though the applicants' intention was to convert the plaint into a miscellaneous application to support the instant application. That is not practical. A substantive suit may only be commenced by way of a plaint, petition, originating summons and/or a judicial review. The applicants having commenced their suit by way of plaint cannot properly convert the same to a petition and/or a judicial review as the instant application appears to attempt to do. The prayers sought by the applicants in the petition/application have a tinge of finality in them and cannot in my view be granted in an interlocutory application as sought by the applicants without oral evidence being taken where all the affected parties will have the opportunity to interrogate all the evidence by way of cross examining the witnesses. Further the applicants having not sought leave to enjoin the 1st – 4th respondents in the suit cannot out of nowhere make an application seeking orders against them. The essence of seeking leave to enjoin new parties to a suit is to enable the parties to the suit and the court to know the basis upon which the injunction is sought and for the court to determine whether the party sought to be enjoined is indeed a necessary party in the suit to enable all the issues in the suit to be finally adjudicated.

6. Section 80 of the Land Registration Act, 2012 on which the Notice of Motion is predicated is in the following terms:-

80(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 any registration was obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified, to affect the title of a proprietor unless the proprietor had knowledge of the omission fraud or mistake in consequence of which the rectification is sought or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

7. Before a court can make an order for rectification of the register it must be satisfied that the registration sought to be rectified was obtained, made or omitted by fraud or mistake and the registered proprietor who is to be affected must be shown to have been a party to the fraud and/or must have contributed to the

mistake and/or omission that resulted in his/her registration. The fraud, mistake or omission must be proved by way of evidence. The applicants have not discharged this burden and cannot in my view do so through an interlocutory application such as the instant one. Evidence of fraud can only be adduced at the trial.

8. The 1st, 2nd and 3rd respondents filed grounds of objection to the applicant's Notice of Motion dated 7th December 2016, dated 1st February 2017 and averred thus:-

1. The Notice of Motion has no merit, is bad in law and an abuse of the court process.

2. The Notice of Motion is untenable in law.

3. The Notice of Motion is frivolous, vexatious and embarrassing.

4. The Notice of Motion is subjudice in that a similar matter concerning one of the suit land namely Kisii Town Block III/140 in the subject matter in Kisii HCC No. 255 of 2009 and similar issues have been raised in the said suit.

The 3rd and 4th respondents in their grounds of objection dated 2nd May 2017 inter alia stated that they had not been served with any pleadings in the suit. That the suit is fatally defective and the prayers sought could not be granted in a miscellaneous suit. The 3rd and 4th respondents averred that the issues raised by the applicants could only be addressed in the substantive suit by way of viva voce evidence.

9. I have earlier in this ruling held that the application by the applicants was erroneously made as a miscellaneous application, the suit having been commenced by way of a plaint. The plaint remains the pleading that originated the instant suit and it is upto the plaintiff to prepare the suit for trial to enable the issues to be canvassed by way of evidence. Short cuts will not do. The 1st, 2nd, 3rd and 4th respondents named in the Notice of Motion were not parties to the plaint and they cannot be properly enjoined in the suit without the leave of the court. Further the orders sought in the Notice of Motion are final orders that cannot be made at an interlocutory stage without formal hearing and proof by way of evidence at the trial. The application undoubtedly is incompetent and misconceived and is brought in abuse of the court process. The applicants may be well advised to have a relook at their pleadings and determine whether or not they may need to amend the same.

10. The upshot is that I find no merit in the Notice of Motion dated 7th December 2016. I dismiss the same but I make no order for costs.

11. Orders accordingly.

Ruling dated, signed and delivered at Kisii this 29th day of September, 2017.

J. M. MUTUNGI

JUDGE

In the presence of:

Plaintiff present

Sagwe for Onsembe for the 1st, 2nd and 3rd defendants

Ruth court assistant

J. M. MUTUNGI

JUDGE