



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 120 OF 2016

BEATRICE MGHAMBA ONYONKA PLAINTIFF

VERSUS

SAMWEL ONSARIGO OOGA DEFENDANT

RULING

1. The plaintiff instituted the instant suit vide a plaint dated 28th April 2016 claiming that she is the registered proprietor of Plot No. **Nyakoe Market/37** while the defendant is the registered proprietor of land parcel No. **West Kitutu/Bogeka/3681**. The plaintiff asserts that Plot No. **Nyakoe Market/37** is distinct and separate from the defendant's land parcel **West Kitutu/Bogeka/3681**. She however alleges that the defendant in mid 2015 illegally and wrongfully entered onto her plot and constructed some temporary iron sheet structures which he rented out to tenants.

2. The plaintiff filed a complaint with the land registrar, Kisii county who caused his officer to visit the site where they ascertained the physical locations of **Plot No. 37 Nyakoe Market** and land parcel **West Kitutu/Bogeka/3681** and prepared a report dated 15th October 2015 which confirmed the defendant to have encroached onto the plaintiff's said **Plot No. 37 Nyakoe Market**. The plaintiff states that the defendant has refused and/or neglected to vacate her plot and persist in unlawful occupation and use of the same.

3. The plaintiff prays for judgment against the defendant for:

1. A declaration that the plaintiff is the rightful owner of all that land known and/or described as LR No. Nyakoe Market, Plot No. 37.

2. A permanent injunction restraining the defendant whether acting by himself, his servants, employees, agents and/or any other person acting on his authority and/or on behalf or otherwise from entering into, wasting, alienating, disposing, dealing and/or interfering with in whatsoever manner and/or doing anything whatsoever with and/or on the plaintiff's LR No. Nyakoe Market Plot No. 37.

3. An order compelling the defendant to demolish and in default this Honourable Court be pleased to grant the plaintiff an order authorizing her to demolish the defendant's structures illegally and unlawfully erected on the plaintiff's LR No. Nyakoe Market Plot No. 37 at the defendant's cost.

4. Mesne profits.

5. Costs of and incidental to this suit.

4. The defendant filed a statement of defence dated 14th July 2016 denying that he has encroached onto the plaintiff's plot. The defendant in his defence states that he purchased a portion of land measuring 50feet by 100feet from one Rosalia Mongina Mwebi (deceased) out of land parcel **West Kitutu/Bogeka/3681** which he took possession of and constructed some structures thereon. Under paragraph 6 of the defence the defendant states thus:-

6. "The defendant avers that the suit land herein has been and/or is a portion of LR No. West Kitutu/Bogeka/3681 which ceased upon subdivision whereof now a portion of LR No. West Kitutu/Bogeka/ 4137 registered in the name of Rosalia Mongina Mwebi (deceased)."

Both the plaintiff and the defendant have filed together with their pleadings witness statements and bundles of documents.

5. The plaintiff on 3rd October 2016 filed a Notice of Motion dated 2nd October 2016 expressed to be brought under Order 40 Rule 42, Order 36, Rule 1(1) (b) and Order 51 Rule 1 and Sections 3 and 3A of the Civil Procedure Act and inter alia seeks the following orders:-

1. That the Honourable court be pleased to grant a temporary injunction restraining the defendant/respondent from commencing construction of permanent premises/structures, alienating, wasting, interfering with, and/or dealing with and/or doing anything of whatsoever nature or manner with the plaintiff/applicant's LR No. Nyakoe Market Plot No. 37 pending interpartes hearing of the application.

2. That the honourable court be pleased to enter judgment in favour of the plaintiff/applicant as prayed in the plaint.

3. That costs of and incidental to this application and the main suit be provided for.

6. The application is supported on the grounds set out on the face of the application and on the annexed affidavit of Beatrice Mghamba Onyoka the plaintiff herein. The plaintiff/applicant's position is that she is the lawful owner of Plot No. 37 Nyakoe Market as evidenced by a plot card issued to her by the County Council of Gusii exhibited as **"BM0-001"**. The plaintiff avers that the defendant has illegally and unlawfully encroached onto her said plot claiming that the plot is comprised in land parcel **LR No. West Kitutu/Bogeka/3681** which he allegedly purchased from one Rosalia Mongina Mwebi – deceased pursuant to an agreement of sale dated 16th February 2009. The plaintiff/applicant further states that the defendant/respondent has in fact ceded ownership of **LR No. West Kitutu/Bogeka/3681** to one Damaris Nyaboke Manyange who became registered as owner on 16th September 2013 but still continues in occupation of the plaintiff's Plot No. 37 Nyakoe Market. The plaintiff/applicant further contended that Plot No. 37 Nyakoe Market is separate and distinct from land parcel **West Kitutu/Bogeka/3681** citing a report dated 18th June 2015 prepared by Kisii County Surveyor following a visit to the site annexed and marked **"BM0-005"**. The plaintiff/applicant in the premises avers that the location and position of Plot No. 37 Nyakoe Market having been ascertained there is nothing left for the court to try and determine and consequently an order for summary judgment was merited.

7. The defendant vide a replying affidavit sworn on 14th November 2016 maintained that he purchased a portion of land measuring 50ft by 100ft from Rosalia Mongina Mwebi (deceased) out of land parcel **West Kitutu/ Bogeka/3681** vide a sale agreement dated 16th February 2009. The defendant states he took occupation and possession of the portion he purchased and constructed structures thereon without any interruption from anybody. He denies having interfered with the plaintiff's plot No. 37 Nyakoe Market at all.

8. The parties filed brief submissions in support of their respective positions. Having considered the pleadings and the application by the plaintiff, the issue for determination is whether firstly, the

plaintiff/applicant has satisfied the conditions for grant of an injunction and secondly whether on the material placed before the court, the plaintiff would be entitled to summary judgment as sought in the application.

9. The plaintiff/applicant as tendered documents in support of her claim that Plot No. 37 Nyakoe Market is registered in her name. A plot card for Plot No. 37 Nyakoe Market duly certified by the Kisii County Government on 21st April 2016 (**BM0-001**) showing the plaintiff as the owner of the Plot is annexed and there are receipts of payment of plot rent and survey fees annexed as (**BM0-002**). An abstract of the Minute 22/2010 of the Town Planning and Market Committee meeting held on 10th June 2010 which approved the transfer of Plot No. 37 Nyakoe Market from Richard Aminga Nyakundi to the plaintiff is also annexed. The defendant has not disputed that the plaintiff is the owner of Plot No. 37 Nyakoe Market but rather asserts that the said plot is not located on the portion that was sold to him which he claims to be part of land parcel **West Kitutu/Bogeka/3681**. The sale agreement the defendant relies on dated 16th February 2009 indicates the defendant's portion was to be hived out of land parcel No. **West Kitutu/Bogeka/3861** and not parcel No. **West Kitutu/Bogeka/3681** as pleaded by the defendant.

10. The abstract of title (green card) in respect of land parcel **West Kitutu/Bogeka/3681 "BM0-004"** annexed to the plaintiff's affidavit shows the land parcel was a subdivision of land parcel 3557. The plaintiff has in his further list of documents filed on 19th July 2016 included abstracts of title (green cards) for land parcels **West Kitutu/Bogeka/4137** and **4138** which the abstracts show were resultant subdivisions of land parcel **West Kitutu/Bogeka/3861** and not **3681** as pleaded by the defendant. The plaintiff also erroneously states under paragraph II (ii) of her supporting affidavit that parcels **4137** and **4138** are subdivisions of land parcel No. **3681**. That indeed is not the case as they are subdivisions out of land parcel No. **3861**. The confusion appears to have clouded the parties in the pleadings thereby occasioning a distortion of the facts.

11. The facts however remain that the plaintiff is the registered owner of Plot no. 37 Nyakoe Market and the defendant was registered as owner of **LR No. West Kitutu/Bogeka/3681** on 18th June 2009 and transferred the same to Damaris Nyaboke Manyange who was registered as owner on 16th September 2013. The issue however remains as to whether the structures claimed by the defendant are on the plaintiff's Plot No. 37 Nyakoe Market and/or the same are on land parcel **West Kitutu/Bogeka/3681** which was at least until 16th September 2013 owned by the defendant. The plaintiff has urged the court to accept the report by the county surveyor dated 18th June 2015 as having determined the issue as the report made a finding that Plot No. 37 was situated on the portion disputed by the parties on the ground while parcel No. **3681** was at a different position. The report did not annex a sketch plan showing the positions of the two properties. The report was thus in my view incomplete as it was critical for the surveyor to illustrate the positioning of the two parcels on the ground.

12. In the premises therefore, I cannot hold that a clear case for the grant of an injunction as sought by the plaintiff/applicant has been made out. An order of injunction on terms sought by the plaintiff would virtually amount to ordering the eviction of the defendant who it is admitted is in possession and occupation and has structures on the disputed portion. That would amount to granting final orders at an interlocutory stage without hearing the parties on the evidence. There are no special and/or peculiar circumstances for the court to grant what in essence would be a mandatory injunction. The order that would commend itself is for the parties to maintain and observe the status quo until the matter is heard and finally determined. It is so ordered.

13. As I have virtually isolated the only issue that needs determination to be where Plot No. 37 Nyakoe Market and land parcel **West Kitutu/ Bogeka/3681** are physically located on the ground it is my view that justice would be better served if I invoked the overriding objective of this court under Section 3 of the Environment and Land Court Act No. 19 of 2011 and cause the matter to be referred for adjudication by the land registrar and county surveyor Kisii County. Section 3(1) of the Environment and Land Court Act provides:-

3(1) The principal objective of this act is to enable the court to facilitate the just, expeditious,

proportionate and accessible resolution of disputes governed by this Act.

(2) The court shall, in the discharge of its functions under this Act give effect to the principal objective in subsection (1).

14. Accordingly, I hereby order and direct the land registrar, Kisii and the County Surveyor and the Physical Planner Kisii County to visit and delineate the physical boundaries of Plot No. 37 Nyakoe Market and land parcel **West Kitutu/Bogeka/3681** on the ground and provide a sketch plan/map showing the location of both plots on the ground in relation to each other. The land registrar/county surveyor to file their report in court within 90 days from the date of this ruling. Mention on 7th February 2018 to confirm compliance for further directions and/or orders. The costs of the application shall be in the cause.

15. Orders accordingly.

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

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Obure for the plaintiff

Mr. Sagwe for Ayienda for the defendant

Ruth court assistant

J. M. MUTUNGI

JUDGE