



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KISII

CASE NO. 553 OF 2015

JAMES CHARANA OTORE.....PLAINTIFF

VERSUS

JEREMIAH MASESE.....DEFENDANT

RULING

1. The plaintiff filed the instant suit vide a plaint dated 16th December 2015 and states he is the registered owner of land parcel number **Nyansiongo/Settlement Scheme/149** measuring 1.0Ha and the defendant is the registered owner of land parcel number **Nyansiongo Settlement Scheme/527**. The plaintiff alleges that the defendant has trespassed onto his (plaintiff's) land parcel staking claim to a part of the same. Under paragraph 9 of the plaint the plaintiff pleads thus:-

9. The plaintiff states that the defendant has curved out and/or incised a portion of land measuring approximately 1½ acres from the plaintiff's said parcel of land known as Nyansiongo Settlement Scheme/149 and included it in his (defendant's) land known as Nyansiongo Settlement Scheme/527 and claiming the same as his.

The plaintiff seeks a declaration that the 1½ acres occupied by the defendant forms part of his land parcel number 149 and seeks an order of eviction of the defendant from therefrom.

2. The defendant filed a statement of defence dated 25th January 2016 affirming that he is the registered owner of land parcel **Nyansiongo Settlement Scheme/527** and denied being in trespass on the plaintiff's parcel of land as alleged by the plaintiff. The defendant stated that he is in possession and occupation of his parcel of land 527 which has clearly delineated boundaries and which he has occupied and developed since 1976.

3. The matter was listed for directions before me on 6th June 2015 when both counsel, Mr. Momanyi advocate for the plaintiff and Mr. Obure for the defendant appeared. After reviewing the pleadings and hearing counsels submissions the court gave directions on the following terms:-

“What is clear from the counsels' submissions is that the defendant who claims to own parcel 527 denies being in encroachment of parcel 149 belonging to the plaintiff. This bring to the fore the issue of a boundary dispute. The court in the premises directs the land registrar Nyamira County and the County Surveyor to visit land parcels Nyansiongo Settlement Scheme/149 and 527 and to in terms of section 18 and 19 of the Land Registration Act, 2012 establish and fix the boundary between the two parcels of land. The land registrar to file the

report complete with a sketch plan showing the occupation between the parties and a RIM within the next 90 days from today.”

4. The order of directions was extracted and served on the Land Registrar, Nyamira County. The Land Registrar filed his report dated 21st March 2017 in court on 7th April 2017. The county surveyor likewise filed his report dated 30th March 2017 on 7th April 2017. On 20th June 2017 the parties appeared before me for directions respecting the filed reports. Mr. Momanyi advocate for the plaintiff was of the view that the reports were not conclusive while Mr. Obure advocate for the defendant was of the contrary view that the reports were conclusive as the boundary issue between the plaintiff and the defendant had been determined. The court faced with the varying positions directed the parties to file written comments/observations respecting the filed reports for the court's consideration and ruling.

5. The defendant filed his submissions on 22nd June 2017 and the plaintiff filed his on 24th July 2017. As per the reports filed by the land registrar and the surveyor, land parcel **149** shares boundaries with land parcels **11** and **527**. The reports indicate land parcel **149** was initially a public interest (PI) plot but during the construction of the public road was converted into a quarry and was a source of material for the construction of the road. The land registrar's report makes the following observations:-

(i) Parcel number 149 was previously a quarry and excavation was done on the said land for the construction of public road; hence there remains a well cut out features of the extent of the excavation on the ground.

(ii) Parcel number 527 was never at any given point part of the said quarry and it is intact on the ground bordering parcel 149 on the upper side and on the left from the main road.

(iii) Parcel number 11 although not included in the court order borders parcel number 149 on the upper side on the right side from the main road.

(iv) The extent of parcel 149 can be ascertained by looking at the shape of the quarry given it is visible on the ground from the road.

As per the land registrar's report the boundary relating to land parcels **149** and **527** was established and fixed although the boundary as relates to parcel **11** and **149** though established was not fixed because the owner of land parcel **11** was not a party to the suit and the court order did not incorporate it.

6. The surveyor's report notes that the cliff/steep sides where quarrying was done were visible and that they mark the boundaries of parcel No. **149**. The surveyor further confirmed that measurements were taken and the boundaries were shown and marked as per the sketch plan annexed to the report. From the sketch plan the area marked as WXYZ measuring 0.58Ha or 1.42acres approximately forms part of parcel **149** and in case the defendant, owner of parcel **527** occupies this portion he ought to yield vacant possession to the plaintiff. The report also indicates the owner of land parcel **11** also occupies a portion of land parcel **149** as shown by the sketch plan. The shaded area as per the sketch plan comprises parcel **149**. The boundaries of parcel **149** and **527** having been established, that disposes the suit between the plaintiff and the defendant. They should abide with the boundaries as fixed between them by the land registrar and the surveyor. The court having held that the dispute between the plaintiff and the defendant related to the positioning of the boundaries of their respective land parcel **149** and **527**, the court lacked the jurisdiction to determine the dispute in terms of Section 18(2) of the Land Registration Act, 2012 and in exercise of its authority and power pursuant to the overriding objective of the court to render justice as it is enjoined to do under Section 1A and 1B of the Civil Procedure Act and Section 3(1) and (2) of the Environment and Land Court Act, 2011, the court referred the dispute to the land registrar who is the person mandated under the law to deal with such disputes.

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

18(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.

7. I have carefully reviewed and considered the respective reports filed by the land registrar and the surveyor and I am satisfied the two officers established and fixed the boundaries of land parcel **149** and **527**. In the premises, I approve and adopt the report by the land registrar and the surveyor as judgment of the court. In case the defendant is in occupation of the portion of land parcel **Nyansiongo/Settlement Scheme/149** marked “**XYWZ**” on the attached plan by the surveyor measuring 0.58Ha or 1.42acres approximately, the defendant is ordered to vacate within a period of 30 days from the date of this ruling failing which an eviction order will issue on application by the plaintiff. The plaintiff will have liberty to have the boundary between land parcel number **Nyansiongo Settlement Scheme/11** and **149** established and fixed by the land registrar upon notice to the proprietor of land parcel number **11**. The court makes no order for the costs of the suit and each party will bear his own costs of the suit.

8. Orders accordingly.

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

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Momanyi for the plaintiff

Mr. Obure for the defendant

Ruth court assistant

J. M. MUTUNGI

JUDGE