



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 1163 OF 2016

(FORMERLY HCC NO. 82 OF 2011)

ANDREW MARIGWA PLAINTIFF

VERSUS

JOSEPHAT ONDIEKI KEBATI..... DEFENDANT

R U L I N G

1. The present suit quite clearly involves a boundary dispute between land parcel **West Mugirango/Bonyamatuta/1724** and **1726**. Under paragraph 5 and 6 of the plaint, the plaintiff pleads thus:-

5. At all material times LR Nos. West Mugirango/Bonyamatuta/1724 and 1726 share a common boundary.

6. In or about the year 2004 the defendant wrongfully and unlawfully entered and took possession of a portion of land measuring approximately 0.004Ha part of land parcel No. West Mugirango/Bonyamatuta/1724 and started claiming ownership of the same and that the plaintiff had trespassed onto his land No. West Mugirango/Bonyamatuta/1726 and erected thereon a fence.

The plaintiff in the plaint inter alia seeks a declaration that the defendant has encroached and incised a portion measuring approximately 0.004Ha forming part of LR No. **West Mugirango/Bonyamatuta/1724** and an order of eviction or surrender of vacant possession of the suit of land.

2. To further illustrate that the issue in this suit relates to boundary and/or the physical location of parcels **1724** and **1726** on the ground I reproduce herewith paragraphs 5, 6 and 7 of the defendant's statement of defence:

5. The defendant however denies the contents of paragraph 5 of the plaint and shall aver that LR Nos. West Mugirango/Bonyamatuta/ 1724 and 1726 are separated by the tarmac road leading to Nyamira Town. Consequently, the two (2) parcels of land herein do not adjoin and/or share a common boundary, as alleged.

6. The defendant denies the contents of paragraph 6 of the plaint. In particular, the defendant denies ever having entered onto and/or trespassed onto a portion of LR No. West Mugirango/Bonyamatuta/ 1724, measuring 0.004Ha. either as alleged or at all.

7. In further answer to the contents of paragraph 6 of the plaint, the defendant contends that

it is the plaintiff, who encroached upon and/or trespassed on a portion of LR No. West Mugirango/ Bonyamatuta/1726 under the guise that the said portion, formed part and parcel of LR No. West Mugirango/Bonyamatuta/ 1724.

3. When the suit was listed for directions before me on 7th June 2016 after hearing counsel for the respective parties and being satisfied that the dispute related to boundary and the delineation of the parcels of land on the ground, I gave directions that the land registrar and the county surveyor do visit the land parcels and to fix and establish their respective boundaries. the order extracted respecting the directions was in the following terms:-

(a) The land registrar Nyamira County and the county surveyor to visit land parcels LR Nos. West Mugirango/Bonyamatuta/1724, 1725 and 1726 and establish and fix their respective boundaries under the provisions of Sections 18 and 19 of the Land Registration Act, 2012.

(b) The land registrar to prepare a report incorporating a sketch plan and indicating whether there is any encroachment by either of the parties onto the other's parcel of land.

(c) The report to be filed in court within the next 90 days from today.

(d) Mention on the 11th day of October 2016 for further directions.

(e) The parties to equally share the costs.

4. The Land Registrar and the County Surveyor filed their reports dated 20th September 2016 on 26th September 2016. The plaintiff/applicant being dissatisfied with the land registrar's and the County Surveyor's said reports, filed the Notice of Motion dated 26th October, 2016 which is the subject of this ruling. By the application the plaintiff/applicant sought the following orders:

1. That this honourable court be pleased to disregard the Nyamira County Land Registrar's and County Surveyor's report both dated 20th September 2016 and order the matter to be listed for hearing.

2. That costs of the application be provided for.

5. The application was supported on the grounds set out on the body of the application and on the supporting affidavit sworn by the plaintiff on 26th October 2016. The applicant inter alia claims that the land registrar and the surveyor did not disclose the documents they relied on to establish the boundaries and further the applicant claims the officers failed to use the mutation form dated 5th November 1992 which was used to subdivide land parcel Nyamira **West Mugirango/Bonyamatuta/73** to create land parcels **West Mugirango/Bonyamatuta/1724, 1725 and 1726.**

6. The defendant filed a statement of ground of opposition dated 29th November 2016 in opposition to the plaintiff's application. The defendant averred that the court lacked the jurisdiction to entertain the plaintiff's application in the face of order of reference of the matter to the Land Registrar made on 7th June 2016. The defendant further avers that by dint of the provisions of Sections 18 and 19 of the Land Registration Act, 2012 the plaintiff's application was unsustainable.

7. In view of the positions taken by the parties in regard to the reports filed by the Land Registrar and the County Surveyor, the court directed the land registrar and the surveyor to be summoned to present their reports. The Nyamira Land Registrar, Mr. Bosire and the County Surveyor Mr. Robert Torori attended court on 19th April 2017 and presented their respective reports and were cross examined by counsel for the parties. The Land Registrar clarified that there had been a rerouting of the main Kisii-Kericho road at Kebirigo Market and stated that there was no clear delineation of the three parcels of land in the Registry Index Map. He stated that they took physical measurements on the ground to enable them to fix the

boundaries in the presence of all the 3 affected parties. The Land Registrar stated they did not require the mutations to be able to fix the boundaries since they had the Registry Index Map. It was the Land Registrar's position that no party had encroached onto another's plot but that all the parties had encroached onto the road reserve. In particular he observed that parcel 1724 did not extend to the upper part of the road stating that the portion on the upper part is wholly part of the road reserve. He recommended an amendment of the Registry Index Map to correspond with the position on the ground.

8. The Ag. County Surveyor's evidence wholly supported the evidence by the Land Registrar. He stated that the sketch plan he had prepared represented the status on the ground and agreed with the Land Registrar that the Registry Index Map did not tally with what is on the ground. He affirmed all the parties were present when they took measurements on the ground to establish the boundaries of the plots on the ground.

9. The parties counsel made submissions in regard to the application. The plaintiff/applicant's submissions were filed on 9th May 2017 and the defendant's were filed on 23rd May 2017.

10. At the beginning of this ruling, I set out the appropriate pleadings by the parties which without doubt illustrated that the dispute herein related to the positioning of the boundary between land parcels **1724** and **1726**. Under the provisions of Section 18(2) of the Land Registration Act, 2012 the court lacks the jurisdiction to entertain disputes relating to boundaries of registered land unless the boundaries have been determined. Section 18(2) of the 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.

11. Under Section 19 of the Land Registration Act, 2012 it is the Land Registrar who is mandated to establish and fix boundaries of registered land. Section 19 of the Act provides:-

19(1) If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.

(2) The Registrar shall, after giving all persons appearing in the register an opportunity of being heard cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.

(3)

12. Recognizing the instant suit related to a boundary dispute which definitely the court lacked the technical ability to deal with, the court made a reference of the matter to the Land Registrar and the County Surveyor who are the persons mandated under the Act to deal with disputes relating to boundary. The Land Registrar is the custodian of the records relating to land, have the technical ability or capacity to determine, establish and fix boundaries of parcels of land as required under the Land Registration Act, 2012.

13. The Land Registrar and the Surveyor duly implemented the order of the court in the presence of the plaintiff and the defendant and filed their reports dated 20th September 2016. I have reviewed and considered the filed reports in the light of the presentation of the reports made by the Land Registrar and the Surveyor in court and I see no basis for interfering with them. The officers were emphatic that what the plaintiff is claiming to be part of his land is in fact a road reserve. From the observations and findings

by the Land Registrar and the Surveyor there is infact a need for the Registry Index Map to be amended to reflect the correct status as appears on the ground. The applicant by his application seeks an order that the Land Registrar's and the Surveyor's report be disregarded and the matter fixed for hearing. What would the court proceed to hear? The dispute would still remain a boundary dispute which the court cannot entertain under the provisions of Section 18(2) of the Land Registration Act, 2012.

14. My view is that the Land Registrar's reports have finally disposed of this matter. I hereby endorse the reports as judgment of the court and direct that the same be implemented. The Land Registrar/Surveyor should proceed to effect the necessary amendments to the Registry Index Map (RIM) to reflect the actual status on the ground as set out in the reports.

15. The net effect is that the plaintiff's Notice of Motion dated 26th October 2016 is hereby ordered dismissed. As the report by the Land Registrar and the Ag County Surveyor have determined the matter against the plaintiff, the plaintiff's suit is also hereby ordered dismissed. As the portion the defendant has occupied and which the plaintiff claims has turned out to be part of a road reserve, I do not consider that any party would be entitled to be awarded costs. I order that each party will bear his own costs.

16. Orders accordingly.

Judgment dated, signed and delivered at Kisii this 6th day of October, 2017.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Momanyi for the plaintiff

N/A for the defendant

Milcent court assistant

J. M. MUTUNGI

JUDGE