



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**E.L.C CASE NO. 27 OF 2014 (O.S)**

THE REGISTERED TRUSTEE

CATHOLIC DIOCESE OF MURANGA....PLAINTIFF/RESPONDENT

VERSUS

1 MICERE NJAU

2 JACKSON WACHIRA NJAU .....DEFENDANTS/APPLICANTS

3 SYMON KIBARA NJAU

4 LYDIA WAGITWE

**RULING**

The plaintiff moved to this Court by Originating Summons on 19th February 2014 seeking the main order that it has acquired land parcel No. INOI/KERUGOYA/194 now purportedly sub-divided into INOI/KERUGOYA/3069, 3070, 3071 and 3072 by adverse possession and should be registered as the sole proprietor thereof and that the defendants hold the said land in trust for the plaintiff.

The Originating Summons was opposed by the defendants through a replying affidavit filed by **JACKSON WACHIRA NJAU** (the 2nd defendant) and sworn on behalf of the 3rd and 4th defendants.

The contents of those pleadings and the rival affidavits are not necessary for the purposes of this ruling.

When the suit came up for hearing on 14th March 2016, counsel for the plaintiff **MR. MUCHIRA** and counsel for the defendants **MS RUGAITA** recorded the following order by consent:

***“The Land Registrar and Surveyor Kirinyaga do visit the suit premises and give a report to this Court indicating the acreage or size of the portion of the original land parcel No. INOI/KERUGOYA/194 now sub-divided into INOI/KERUGOYA/3069 which have been built on and are occupied by the Applicants. The report to be filed within 60 (sixty) days from to-day. Both parties to share the costs”.***

The report was not filed within the required sixty (60) days but that time was extended and on 16th September 2016, report dated 14th September 2016 and signed by the District Land Registrar Kirinyaga **MR. J.K. MUTHEE** was filed.

The defendants were aggrieved with the report and on 20th December 2016 filed a Notice of Motion citing **Section 3A of the Civil Procedure Act** and all enabling statutes seeking an order that the said report

be set aside and expunged from the record. The application is premised on the grounds set out therein and is supported by the affidavit of **SIMON KIBARA NJAU** the 3rd defendant herein.

The gravamen of the application is that there was professional misconduct on the part of the Land Registrar and that his report is therefore biased and does not reflect the position on the ground since he did not interview the defendants present and failed to consider their views. That the Land Registrar declined to have the defendant's private surveyor participate in the exercise and so his report is prejudicial.

The plaintiffs filed grounds of opposition describing the application as incompetent and not disclosing any misconduct on the part of the Land Registrar. The plaintiffs similarly filed a replying affidavit sworn by **SISTER CONSOLATA WANGARI GAKURU** the Secretary to the Management of St Michael Girls Boarding School Kerugoya in which she deponed, inter alia, that she was present when the Land Registrar visited the land in dispute and the proceedings were conducted calmly and is a true reflection of what transpired. That the Land Registrar correctly found that the plaintiff has fully occupied the land parcel No. INOI/KERUGOYA/194 measuring 2.6 Hectares which is occupied by St. Michael Girls Primary School. That she did not hear the defendant requesting for their private surveyor to be present and so it is not true that the Land Registrar failed to consider the defendant's views.

The application was canvassed by way of written submissions which have been filed both by **MR. MUCHIRA** advocate for the plaintiff and **MS RUGAITA** advocate for the defendants.

I have considered the application, the rival affidavits and the submissions by counsel.

In her submissions, counsel for the defendants has referred the Court to the provisions of **Section 19 (2) of the Land Registration Act** and submitted that the Land Registrar was required to give all affected parties an opportunity to be heard before defining the boundaries but did not do so. The consent order recorded by the Court on 14th March 2016 and which was to guide the Land Registrar was simply to confirm the acreage of the land in dispute which is occupied by the plaintiff. The reference to the Land Registrar was therefore not for purposes of determining any boundary dispute as provided under **Section 19 (2) of the Land Registration Act**. Indeed the report is clear and states that land parcel No. INOI/KERUGOYA/194 measures 2.6 Hectares and is occupied by the plaintiff. He adds that there could have been no sub-division of the land as there are no boundary marks visible.

It is also the defendant's case that the Land Registrar was biased and declined to have their surveyor participate in the exercise. The plaintiff has averred through the replying affidavit of **SISTER CONSOLATA W. GAKURE** that she was present and did not see any person purporting to be a private surveyor nor hear any request by the defendants for such a private surveyor to participate. The report of the Land Registrar contains the names of those who were present. The defendants were represented by **JOSPHAT NYAGA** and the 4th defendant while **SISTER CONSOLATA GAKURE** represented the plaintiff. The County Surveyor **MR. KINUTHIA** was present as were two Security officers namely **WEKESA AKELLO** and **MWENDA FESTUS**. There is no evidence that a request was made by the defendants to have their private surveyor present and that it was declined. In any event, the consent order did not have a provision for the attendance of the parties' private surveyors during the exercise.

The defendants also make an un-substantiated allegation of bias against the Land Surveyor without giving details of the same. The Land Registrar was not required to conduct any hearing at the site. His duty was simply to confirm the acreage of the land and what is on it. That is precisely what is contained on the report which shows that there are class-rooms, Staff Quarters, washrooms, a borehole etc on the land together with an area used as Agricultural utilities. Surely what other views was the Land Registrar required to consider? Misconduct is defined in **BLACK'S LAW DICTIONARY** as:

***"A dereliction of duty, unlawful or improper behavior".***

I see no evidence of that on the part of the Land Registrar and must therefore reject that allegation.

However, I must disabuse the defendants of any fear that the report by the Land Registrar has finally determined this dispute. Far from it. In his supporting affidavit at paragraph eight (8), **SIMON KIBAARA** has averred:

***“That I therefore pray that this Honourable Court do order the matter to proceed for hearing”***

The report by the Land Registrar only confirms who is in possession and occupation of the suit land and its acreage. As indicated at the commencement of this ruling, the plaintiff’s claim to the land parcel No. INOI/KERUGOYA/194 and the resultant sub-divisions is based on adverse possession and trust. Those are issues that will be determined by this Court on the evidence to be adduced. The defendants should therefore not jump the gun.

The up-shot of the above is that the defendants’ Notice of Motion dated 20th December 2016 is devoid of merit. It is hereby dismissed with costs to the plaintiff.

As pre-trial has been finalized, the parties should now have this case listed for hearing.

**B.N. OLAO**

**JUDGE**

**6<sup>TH</sup> OCTOBER, 2017**

Ruling dated, delivered and signed in open Court at Kerugoya this 6<sup>th</sup> day of October 2017

Mr. Muchira for Plaintiff present

Ms Rugaita for Defendants absent but 3<sup>rd</sup> and 4<sup>th</sup> Defendants present.

**B.N. OLAO**

**JUDGE**

**6<sup>TH</sup> OCTOBER, 2017**