



**REPUBLIC OF KENYA**

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

**CASE NO. 78 OF 2016**

**EZEKIEL MAIRURA ..... PLAINTIFF**

**VERSUS**

**JOHNSON ANYEGA OIGARA ..... 1<sup>ST</sup> DEFENDANT**

**ZABLON ANYEGA ..... 2<sup>ND</sup> DEFENDANT**

**R U L I N G**

1. The plaintiff by the plaint dated 22<sup>nd</sup> March 2016 sought inter alia an order directing the defendants to open up the road of access leading to his parcel of land **LR No. Nyaribari Chache/B/B/Boburia/8525**. The plaintiff claimed the defendants had blocked the access although the same is a duly surveyed road and that the defendant constructed a latrine on the access thereby blocking the plaintiff from accessing his parcel of land.

2. The defendants were served with the plaint and summons on 6<sup>th</sup> April 2016 as per the filed affidavit of service dated 23<sup>rd</sup> May 2016 and filed on the same date. They did not enter appearance and/or file any defence. The plaintiff on 26<sup>th</sup> September 2016 filed a Notice of Motion application dated on the same date where he sought for an order:-

**“That this Honourable court be pleased to issue an order directed at the County Land Registrar and County Surveyor Kisii County to visit LR No. Nyaribari Chache/B/B/Boburia/8525 to establish the boundaries and open up the road of access.”**

3. This application was served on the defendants on 28<sup>th</sup> October 2016 together with a mention notice of the matter on 3<sup>rd</sup> November 2016 for directions. The 1<sup>st</sup> defendant attended court on the scheduled date but there was no attendance by the 2<sup>nd</sup> defendant. On the said date the court upon review of the plaintiff's Notice of Motion made an order referring the matter to the land registrar and surveyor in the following terms:-

**1. That the County Land Registrar and Surveyor, Kisii County be and are hereby directed to visit LR No. Nyaribari Chache/B/B/ Boburia/8525 to establish the boundaries and open up road of access.**

**2. That the plaintiff do bear the costs of the exercise.**

**3. That the OCS Kisii Central station do provide security.**

**4. That the matter be mentioned on the 7<sup>th</sup> day of March, 2017.**

4. The land registrar and the County Surveyor filed a joint report dated 20<sup>th</sup> April 2017 annexing a sketch plan and a copy of the Registry Index Map (RIM). The report confirmed the site was visited on 7<sup>th</sup> March 2017 and after inspection the following were the findings:-

- (i) That there exists a road of access 4m wide serving Plot No. Boburia/8525 (as per sketch).**
- (ii) The road was created during a subdivision of an original Plot No. Boburia/7782 registered in the name of Johnson Oigara Anyega (1<sup>st</sup> defendant herein).**
- (iii) The road was created to serve parcel No. Kisii/Nyaribari Chache/B/B/Boburia/8525.**
- (iv) After marking the road of access, a pit latrine constructed by the defendants was partly found to be on the road of access (illustrated in the sketch).**

5. The matter was listed for mention on 26<sup>th</sup> June 2017 for directions in regard to the adoption of the report. The 1<sup>st</sup> defendant stated he was not satisfied with the report. The court directed the 1<sup>st</sup> defendant to make any appropriate application within 30 days of the date of the mention.

6. The 1<sup>st</sup> defendant filed a replying affidavit on 17<sup>th</sup> May 2017 ostensibly in response to the report filed by the land registrar and the surveyor, and further filed written submissions on 27<sup>th</sup> September 2017. The 1<sup>st</sup> defendant through the filed replying affidavit states that the plaintiff had an alternative road of access other than the one the land registrar and the surveyor marked and caused to be opened. The plaintiff further complained that the land registrar visited the site without a court order intimating that the land registrar and the surveyor had connived with and/or had been influenced by the plaintiff to go to the site to open a road of access where there was none.

7. I have carefully reviewed and considered the report filed by the land registrar and the surveyor and the annexures thereof and I have considered the replying affidavit and submissions made by the 1<sup>st</sup> defendant and make the following observations:-

- (i) That the 1<sup>st</sup> defendant and the plaintiff were indeed present when the land registrar and the surveyor visited land parcel Kisii/Nyaribari Chache/B/B/Boburia/8525.**
- (ii) That the sketch prepared by the surveyor is indeed a representation of what appears in the Registry Index Map (RIM).**
- (iii) That the RIM clearly shows that land parcel No. 8525 abutts two roads of access on the lower side and the upper side.**
- (iv) The copy of mutation form for land parcel Kisii/Nyaribari Chache/B/B/Boburia/7782 shows the access road on the upper side running partly on land parcel 8524 and 7783. This is the access the 1<sup>st</sup> defendant claims was doctored in favour of the plaintiff. The plaintiff signed this mutation form dated 25<sup>th</sup> July 2009 which was registered on 7<sup>th</sup> September 2009 by the land registrar**
- (v) The copy map sheet 8 annexed to the 1<sup>st</sup> defendant's affidavit is unhelpful because it does show where parcels 8524 and 8525 are located.**

8. In the present suit the plaintiff's complaint was that the defendants had blocked the road of access to his plot. On the basis of the RIM which the District Surveyor certified as a true copy of the original on 12<sup>th</sup> April 2017 the plaintiffs parcel of land 8525 is served by two roads of access. As per the copy of the

mutation form, when the 1<sup>st</sup> defendant subdivided his land parcel 7782 and transferred parcel 8525 being a resultant subdivision to the plaintiff an access road was provided. This access road is surveyed and the RIM incorporates the same which effectively renders it official.

9. The plaintiff formally moved the court vide the Notice of Motion dated 26<sup>th</sup> September 2016, to have the issue of identification of and the opening of the road of access referred to the Land Registrar and the County Surveyor who are the officers mandated under the law to establish and fix boundaries of registered land. The court recognizing that it lacks the capacity and/or competence to define and/or establish parcel boundaries acceded to the plaintiff's request and made a reference to the Land Registrar and the County Surveyor as indicated earlier in this ruling. Indeed the court under Section 18(2) of the Land Registration Act, 2012 lacks the jurisdiction to deal with disputes relating to boundaries of registered land.

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, the boundaries have been determined in accordance with this section.**

10. In the premises, I am satisfied that the Land Registrar and the County Surveyor were properly seized with the matter and they appropriately executed their mandate as required of them under the law. Their report is well documented and is supported and I find no basis to fault the same. Once a subdivision is carried out and documented as in the case of the 1<sup>st</sup> defendant who subdivided land parcel 7782 to create parcels 8524 and 8525 the records held by the lands office constitute prima facie conclusive evidence of the state of the property. If the 1<sup>st</sup> defendant had any issue with the survey and/or survey map (RIM) that would have been an issue to take up with the Land Registrar and the Survey Department.

11. On the basis of the Land Registry records, I am satisfied that the report by the Land Registrar and the Surveyor represents the correct status as regards the positioning of the roads of access that serve the plaintiff's land parcel 8525. It is not unusual to have a parcel of land served by several access roads particularly when subdivisions are carried out after the initial survey. I accordingly adopt the report as filed by the Land Registrar and the Surveyor as judgment of the court as it finally disposes of this matter and direct that the same be implemented. Each party shall bear their own costs of the suit.

12. Orders accordingly.

**Judgment dated, signed and delivered at Kisii this 24<sup>th</sup> day of November, 2017.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

M/s Momanyi for Bosire for the plaintiff

1<sup>st</sup> defendant present

Ms. Milcent court assistant

**J. M. MUTUNGI**

**JUDGE**