



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 491 OF 2015

CHARLES NDIGITI MAKORI ATANDI PLAINTIFF

VERSUS

MARTHA MORAA ACHOKI 1ST DEFENDANT

TOM NYAKAMBI 2ND DEFENDANT

R U L I N G

1. In the instant case the plaintiff has contended that he is the registered owner of land parcel **East Kitutu/Mwamangera/3914** and that the defendants had put up structures thereon which the plaintiff wanted to be demolished. The defendants denied that the structures they had put up were on land parcel **East Kitutu/Mwamangera/3914** insisting they had put up the structures on land parcel **East Kitutu/Mwamangera/3591**.

2. The court on 7th November 2016 appreciating that the dispute between the parties related to the physical location and the delineation of their respective parcels of land on the ground made a reference to the land registrar, Nyamira and County Surveyor to do a physical inspection of the parcels of land to verify their physical location. The court in making the reference expressed itself thus:

“There is contestation by the defendant that her son is constructing on land parcel East Kitutu/Mwamangera/3591 while the plaintiff asserts the activities are on land parcel East/Kitutu/Mwamangera/ 3914. There is need for a site inspection to be undertaken to verify and establish the physical location of these parcels on the ground. I direct that the land registrar, Nyamira County and the County Surveyor do visit the two land parcels and delineate the boundaries of the same and confirm if there is any encroachment by the defendants on the plaintiff’s parcel of land. The land registrar/surveyor to file a report within 90 days from today.”

3. The land registrar and the surveyor inspected the site and filed their respective reports. The land registrar and the surveyor were unanimous that the defendants were building on their land parcel **East Kitutu/ Mwamangera/3591** in respect of which they held title and that they had not encroached onto the plaintiff’s land parcel **3914** as alleged by the plaintiff. The reports by the land registrar and the surveyor indicated that there had been irregular subdivisions of land parcels **3780** and **1370** to create new parcels **3913, 3914, 4018** and **4019**. The land registrar indicated land parcel 3445 said to be a subdivision out of parcel No. **2830** does not exist on the ground and recommended that it should be expunged from the registry records. The land registrar further recommended the annulment of the subdivision of LR No. **3780** which created parcels **3913** and **3914** and an amendment of the RIM be made to reflect only parcels **3780, 3591, 3592** and **1370** to confirm with the situation as obtains on the ground.

4. The plaintiff objected to the reports by the land registrar and the surveyor stating they did not represent the true position. The court summoned the land registrar to attend court to present and explain his report. When the land registrar appeared on 19th June 2017 he maintained land parcel **3914** had dislodged land parcel **3591** and **3592** on the ground and that land parcel **3445** did not exist on the ground. The land registrar's position is that the situation on the ground is not correctly represented by the amended RIM and that a re-amendment of the RIM would need to be done to reflect the status on the ground. Faced with this scenario the court resolved to visit the locus in quo so that the parties and the land registrar and the surveyor could identify the respective land parcel on the ground for the court's better understanding and appreciation of the situation on the ground.

5. The court visited the disputed site on 13th October 2017 where the land registrar and the surveyor in the presence of the parties illustrated the positioning of the respective parcels on the ground vis-à-vis the RIM. The land registrar Mr. Bosire indicated that as per the mutations parcels **3591** and **3592** were properly positioned on the ground. He however stated when parcels **3913** and **3914** were created no mutation appears to have been done and that in the amended RIM they were super imposed on parcels **3591** and **3592** effectively shifting these parcels to another location on the ground. The location of parcel **3445** could not be identified on the ground and does not exist.

6. The surveyor corroborated the land registrar's evidence and stated that the original land parcels were parcel **856** and parcel **458**. Parcel **856** had frontage to the murram road where parcels **3591** and **3592** are situate and are resultant subdivisions of parcel **2830** which in turn was a subdivision of land parcel **856**. Land parcel **458** which was subdivided into parcels **1370** and **1371** did not extend to the murram road and had its access to the main tarmac road which was at the back as illustrated in the sketch plan drawn by surveyor. Parcels **3913** and **3914** which were subdivisions out of land parcel **1370** could not therefore have frontage to the murram road (Nyabiemba-Keroka). Their positioning in the area where parcels **3591** and **3592** are located was clearly not correct. Parcel **458** was subdivided on 13th May **1981** to create parcels **1370** and **1371**. The access road of parcel **1371** which basically was in the nature of a plot by virtue of its size was provided via the tarmac road. If parcel **458** touched the murram road there would have been no necessity to create the access for parcel **1371** via the tarmac road which was way at the back.

7. Having carefully considered and evaluated the reports from the land registrar and the surveyor, Nyamira County and having visited the locus in quo in the presence of all the parties where the land registrar and the surveyor pointed out the location of the various parcels of land on the ground, I am satisfied the reports filed by the Land Registrar and the Surveyor represent the correct status of the parcels of land as obtains on the ground. The inspection of the site by the technical officers clearly show that the subdivision of land parcel **3780** to create land parcels **3913** and **3914** may have been irregular and so was the subdivision of parcel **1370**. Land parcel **3445** according to the land registrar does not exist in their records and neither does it exist on the ground. What was further clear from the reports was that land parcels **3591** and **3592** exist as per the records and their physical location is where they are shown to be on the ground.

8. During the court session at the site it was evident that the defendants who are the registered owners of land parcels **3591** and **3592** were at advanced stages of developing commercial units on the parcels of land. The defendants have held title to the parcels of land since 2012. The land registrar has held the defendant titles to have been properly processed and regularly obtained and have held that the defendants have not encroached onto the plaintiff's land as alleged.

9. In the instant suit the plaintiff sought orders for the defendants to be ordered to demolish the structures which he claimed were constructed on his land and for the eviction of the defendants from his land parcel East **Kitutu/Mwamangera/3914**. The land registrar and the surveyor have stated the creation of land parcel **3914** was irregular and that the defendants have constructed on their proper land parcels **3591** and **3592** and have not encroached onto the plaintiff's land. The land registrar under Sections 18 and 19 of the Land **Registration Act, 2012** is the person entitled to establish and verify the boundaries of registered land. This was the exercise that the court mandated the land registrar to undertake when it made an order of reference to his office. As the custodian of all the records relating to registered land, the land registrar

is the person best suited to carry out that function and in the instant matter he did so.

10. I am satisfied the land registrar's report filed in court has fully resolved this matter and I accordingly adopt the land registrar's report dated 17th February 2017 as judgment of the court. The plaintiff may wish to pursue the recommendations made in the land registrar's report for implementation to cure the anomalies that are evident as relates to the subdivision of his parcel of land.

11. On adopting the land registrar's report the net effect is that the plaintiff's suit is not proved on a balance of probabilities and the same is dismissed with costs to the defendants.

12. Orders accordingly.

Ruling dated, signed and delivered at Kisii this 17th day of November, 2017.

J. M. MUTUNGI

JUDGE

In the presence of:

N/A for the Plaintiff

Mr. Ochoki for Obwocha for the 1st and 2nd Defendants

Ruth court assistant

J. M. MUTUNGI

JUDGE