



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 505 OF 2013

JACKSON NYAKWARA MOGUSU..... PLAINTIFF

VERSUS

NEMWEL NYAMARI ONTITA.....1ST DEFENDANT

EVANS GISORE.....2ND DEFENDANT

RULING

1. The plaintiff brought this suit against the defendants vide a plaint dated 19th December 2013 seeking :-

- (a) An order for the eviction of the defendants from land parcel number LR North Mugirango/Bokeira/354 (hereinafter referred to as “the suit property”).**
- (b) An order restraining the defendants by themselves or through their agents, servants or employees from wasting, damaging and/or alienating the suit property.**
- (c) An order that the District Surveyor do demarcate the suit property.**
- (d) Any other relief the court may deem fit to grant.**

2. Honourable Justice Okong’o heard the matter and in a judgment delivered on 14th November 2014 the judge held that the plaintiff was the registered owner of the suit property but there was no proof that the defendants had encroached onto the plaintiff’s land. The judge further ruled that on the basis of the evidence adduced by the plaintiff, there was the possibility that the plaintiff had a boundary dispute with the defendants. The Judge in his judgment disallowed the prayer for eviction of the defendants and consequent injunction but entered judgment in favour of the plaintiff and made the following orders:-

- (i) The District Land Registrar and District Surveyor Nyamira District shall visit and fix the boundaries of LR Nos. North Mugirango/Bokeira I/354, 1200 and 1594 and shall indicate if there has been any encroachment on LR No. North Mugirango/Bokeira I/354 and if so to what extent and by the owner or occupant of which plot.**
- (ii) The officer commanding the nearest polling station (OCS) shall provide security to the said officers if necessary while undertaking the exercise.**
- (iii) The cost of demarcation of the said boundaries shall be met by the plaintiff.**
- (iv) The district land registrar, and the surveyor shall file their report in court within 45 days from the date of service upon them of the order herein.**
- (v) Upon filing of the said report, the plaintiff shall be at liberty to initiate new proceedings as he may deem fit to safeguard his interest in the suit property in the event that it is established that there has been an encroachment on the property.**
- (vi) This matter shall be mentioned on 19th December 2014 to confirm if the reports by the district land registrar and the district land surveyor have been filed in court.**
- (vii) Each party shall bear its own costs of this suit.**

3. After various mentions and summons to the land registrar, the land registrar finally filed the report dated 9th November 2016. The land registrar made a presentation of the report in court on 25th July 2017. In his report the land registrar observed that the parcel boundaries were intact and there was no evidence of interference. He further observed that the plaintiff appeared to have been away from his land for a very long time (over 30 years) and that during his absence distinct boundaries had been established and maintained. The plaintiff according to the land registrar could not even show where the presumed boundary for his land was supposed to be.

4. The land registrar in his report observed that the original land parcel **North Mugirango/Bokeira I/1200** was registered in the 1st defendant's name but the same was subdivided to create parcels **2342** and **2343**. The latter parcel **2343** of land which borders the plaintiff's land on the right is registered in the name of Samson Baraka Mokaya who is not a party to the instant suit. On the left the plaintiff's land borders land parcel **1594** which the land registrar indicated had been subdivided into three portions for the sons of the registered proprietor (now deceased) though the subdivision has not been formally registered. The land registrar indicated that the parcels of land that border the plaintiff's land are not owned by the defendants and that the defendants lack capacity to represent the said owners. Specifically, the owners of the land bordering the plaintiff's land resisted efforts by the land registrar to have the measurements of their land taken arguing that they were not parties to the suit. The persons named as defendants in the suit according to the report by the land registrar are not neighbours of the plaintiff on the ground.

5. From the report by the land registrar it is apparent that the 1st defendant, Nemwel Nyamari Ontita is not a neighbour of the plaintiff. The 2nd defendant, Evans Gisore Mogusu is a beneficiary of a portion of land parcel 1594 whose owner is deceased and no letters of administration have been taken out. He lacks the capacity to represent the deceased owner. The land registrar in his report states that the portion of parcel 1594 which borders the plaintiff's land belongs to one Silas Ondieki Mogusu who stated that the 2nd defendant had no right or authority to represent in the suit.

6. Taking into account the totality of the land registrar's report, it is clear that it has not been demonstrated that the defendants have encroached onto the plaintiff's land parcel **354**. The plaintiff in fact appears to have instituted a suit against parties who do not border his land and who therefore could not be in encroachment. The evidence as per the land registrar's report indicates other persons parcels of land border the plaintiff's parcel of land. As observed by Okongo, J. vide his order (f) in his judgment, the plaintiff remains at liberty to initiate new legal proceedings to assert and safeguard his property rights if any encroachment was established by the report by the land registrar. The report has failed to pinpoint any encroachment by the defendants though other persons may in fact be in encroachment but have not been made parties to the present suit.

7. While land parcel **1200** appears to have been subdivided and the owner of the land parcel **1594** appears to be deceased, the plaintiff's suit appears to have ignored those developments and that may have accounted for the pitfalls that the plaintiff has encountered in the suit as there is every possibility that he instituted the suit against the wrong parties. The plaintiff nonetheless still has the opportunity whenever he verifies the ownerships of the parcels of land bordering his land to apply to the land registrar under Sections 16, 18 and 19 of the **Land Registration Act, 2012** to have the boundaries established and fixed in accordance with the provisions of the law.

8. The upshot is that I decline to endorse and/or approve the report of the land registrar dated 9th November 2016 filed in court on 18th November 2016 for implementation. The net effect therefore is that the plaintiff's suit against the defendants stand dismissed considering that Okongo, J. had in his judgment declined to grant prayer (a) of the plaint where the plaintiff prayed for an order of eviction and injunction. There will be no order for costs.

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

J. M. MUTUNGI

JUDGE

In the presence of:

Plaintiff present in person

N/A for the 1st and 2nd Defendants

Ruth court assistant

J. M. MUTUNGI

JUDGE