



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 323 OF 2016

ISAAC MOCHABO PLAINTIFF

VERSUS

RICHARD ONGERI 1ST DEFENDANT

THOMAS MOENGA MAOBE 2ND DEFENDANT

RULING

1. The plaintiff is the registered owner of land parcel **Wanjare/Bogiakumu/ 2627**. Vide a plaint dated 10th October 2016 filed in court on 11th October 2016 the plaintiff averred that the defendants during the month of July, 2015 unlawfully encroached onto his said parcel of land and that despite protest by the plaintiff, the defendants have persisted in such encroachment and trespass onto the plaintiff's parcel of land. The plaintiff in the suit against the defendants seeks inter alia:-

(i) An order of permanent injunction restraining the defendants from trespassing into and/or in any manner interfering with land parcel Wanjare/Bogiakumu/2627 and/or any portion thereof.

(ii) A declaratory order that the plaintiff is the exclusive owner of the title number Wanjare/Bogiakumu/2627.

2. The defendants vide a joint statement of defence dated 26th October 2016 filed in court on 28th October 2016 denied that they were in trespass or had encroached onto the plaintiff's parcel of land. The defendants asserted that the plaintiff's land parcel **2627** and parcel **2628** were subdivisions out of land parcel **1811** and that land parcel **2628** was further subdivided and gave rise to land parcels **Wanjare/Bogiakumu/7656** and **7657**. Land parcel **7657** was transferred to the 1st defendant who later sold and transferred the same to the 2nd defendant. The documents filed by the parties affirm that the land parcels are resultant subdivisions from the original land parcel **1811**. It is the defendants' contention therefore that their activities are on land parcel **7657** and not on the plaintiff's land parcel **2627** as alleged by the plaintiff.

3. The court on 31st October 2016 upon appreciating that the dispute between the parties was one that related to boundary between land parcel **2627** owned by the plaintiff and parcel number **7657** owned by the 2nd defendant made a reference of the matter to the land registrar, Kisii and surveyor to visit the two land parcels and establish and fix their boundaries and to file their report in court.

4. The land registrar and the surveyor filed a joint report in court dated 3rd April 2017. The report

confirmed the plaintiff is the registered owner of land parcel **2627** while the 2nd defendant is the registered owner of land parcel **7657** which was a resultant subdivision from land parcel **2628**. The subdivision of land parcel **2628** was carried out in July 2015. The report made the following observations:-

- Boundaries between the two parcels (2627 and 7657) actually exist on the ground. This consists of cedar posts and barbed wire fence.

- The position and boundaries of parcel 7657 was confirmed on the ground and reference made to its abutments which was re-affirmed by both parties.

The report concluded as follows:-

“The boundaries and positions of the two parcels in question were confirmed and there was no new boundary planted.

The report annexed copies of the mutations to support the subdivision of land parcel 1811 into parcels 2627 and 2628 and land parcel 2628 into parcels 7656 and 7657.”

5. The plaintiff on 20th June 2017 indicated he did not agree with the land registrar’s and the surveyor’s report while the defendants stated they had no issue with the report. The court invited the parties to make written comments on the report for consideration by the court. The plaintiff’s comments/observations were filed on 26th September 2017 while the defendants were filed on 27th September 2017.

6. The plaintiff’s observations/comments raise issue as to the authenticity of the subdivision of land parcel **Wanjare/Bogiakumu/1811** to create parcels **2627** and **2628**. The plaintiff also takes issue regarding the validity and genuineness of the mutations that resulted in the creation of land parcels **2627** and **2628** and further avers that the transfer of parcel **2628** to Rose Kwamboka Maiteka is not supported by any documents. Apparently, the plaintiff also appears to question the process that culminated with the registration of his title in respect of land parcel **Wanjare/Bogiakumu/2627**. The plaintiff further observed that the surveyor treated the matter as a boundary dispute whilst it was not.

7. On their part the defendants were emphatic that the land registrar’s and the surveyor’s report had absolved them from claims that they had encroached and trespassed onto the plaintiff’s land. They argued that the report constitutes a final determination of the issues raised in the suit and ought to be adopted as the judgment of the court.

8. Having considered the pleadings, the report by the land registrar and the surveyor and the observations by the parties regarding the report the question for the court to determine is whether the plaintiff is the owner of parcel **2627** and if so whether the defendants had encroached and/or trespassed onto the plaintiff’s said property. That the plaintiff is the registered owner of land parcel **Wanjare/Bogiakumu/2627** is not disputed. The plaintiff in his bundle of documents annexed a copy of title deed and a copy of official search which showed that the plaintiff was registered as owner of land parcel **2627** on 4th April 2016 and issued a title in his name on the same date. Both the copy of the title (proprietorship section) and the copy of official search show that the plaintiff’s land parcel was a subdivision of land parcel 1811. The copy of the mutation form for land parcel **Wanjare/Bogiakumu/1811** was subdivided into parcels **2627** measuring 0.50Ha and 2628 measuring 0.06ha on 5th April 1995. The mutation was registered on 7th June 1995 and that is consistent with the registration of land parcel **2627** as per the copy of the title.

9. The mutation form for the subdivision of land parcel **2628** to create land parcels **7656** and **7657** each measuring 0.03Ha was registered on 27th July 2015. Land parcel **Wanjare/Bogiakumu/7657** is registered in the 2nd defendant’s name the same having been sold and transferred to him by the 1st defendant. The defendants by their defence denied being in trespass or having encroached onto the plaintiff’s land parcel **2627**. The defendants’ position was that the 2nd defendant was the owner of land

parcel 7657 which shared a common boundary with the plaintiff's parcel and that there was no encroachment/trespass by them. This position precipitated the court's direction for the experts report through the land registrar and the surveyor as they were the only competent persons who could have ascertained the parcel boundaries and confirmed whether or not there was encroachment or trespass as alleged by the plaintiff. Under Sections 18 and 19 of the **Land Registration Act, 2012** the land registrar has the mandate to establish and fix boundaries of land registered under the Act.

10. I am satisfied the land registrar and the surveyor duly exercised their mandate under the provisions of the Land Registration Act, 2012. Their report is well supported and I accept their finding that they confirmed the existing boundaries of land parcels 2627 and 7657 on the ground and that there was no encroachment by the defendants on the plaintiff's land parcel. I accordingly adopt the land registrar's and surveyor's report dated 3rd April, 2017 as judgment of the court.

11. The net effect is that I find the suit by the plaintiff not proved on a balance of probabilities and to be lacking in merit. I order the suit dismissed but I direct that each party is to bear their own costs of the suit.

Ruling dated, signed and delivered at Kisii this 10th day of November, 2017.

J. M. MUTUNGI

JUDGE

In the presence of:

Ms. Kebungo for Mose for the Plaintiff

Mr. Soire for the 1st and 2nd Defendants

Ruth court assistant

J. M. MUTUNGI

JUDGE