



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 25 OF 2012**

**KENNEDY MAKWAYE GEKONGE ..... PLAINTIFF**

**VERSUS**

**ZAKKIET MOCHOGE .....DEFENDANT**

**RULING**

1. On 5<sup>th</sup> May 2014 this matter was scheduled for hearing before honourable Justice Okong'o. On the date the parties agreed the dispute related to a boundary dispute and by consent agreed that the matter relating to the boundary dispute be referred to the land registrar, Kisii Central for resolution. The order extracted was on the following terms:-

**1. That the parties should have the boundaries of the two parcels of land in dispute fixed by the district land registrar, Kisii Central before proceeding further in this matter.**

**2. That the matter shall be mentioned on 7<sup>th</sup> October 2014 to confirm the progress made towards the fixing of the land boundaries.**

2. The land registrar filed a report dated 12<sup>th</sup> February 2015 which included a sketch plan showing the layout of parcel number **West Kitutu/Bogeka/1544**. The report shows the plaintiff and the defendant were present during the site visit. The relevant part of the report states:-

**“The boundary of the parcel West Kitutu/Bogeka/1544 was fixed according to the mutation form that produced the parcel. The observation made on the ground is that the parcel at the moment of site visit there is an old live fence separating the two parcels in boundary dispute.”**

3. When the parties appeared before Okong'o J on 26<sup>th</sup> May 2015 following the filing of the report, counsel for the defendant stated that the report filed was inconclusive and counsel for the plaintiff agreed that though the report mentioned there was encroachment the report was not explicit. Owing to the sentiments of the parties, the court on 10<sup>th</sup> February 2016 issued summons for the land registrar and the county surveyor to attend court on 30<sup>th</sup> March 2016 to produce and explain their said report.

4. On 30<sup>th</sup> March 2016 the surveyor, one Nicodemus Nyamari who made the site visit with the land registrar when they fixed the boundaries in regard to land parcel 1544 attended court and sated that he and the land registrar visited parcel 1544 and fixed and showed the boundary to the parties. The surveyor further stated thus:-

**“We found the defendant had encroached onto the plaintiff's land as shown on the sketch**

**attached to the report dated 5<sup>th</sup> February 2015. Both parties were present when we fixed the boundaries...”.**

The court accepted the report as duly filed and explained. The defendant on 1<sup>st</sup> April 2016 filed the Notice of Motion dated 31<sup>st</sup> March 2016 the subject of this ruling and seeks orders that:-

**1. The land registrar’s report dated 12<sup>th</sup> February 2015 and filed in court on 19<sup>th</sup> February 2015 be set aside or be expunged from the record.**

**2. The costs of the application be provided for.**

The application is supported on the grounds set out on the body of the application and on the annexed affidavit of the plaintiff. Interalia the defendant sets out the following grounds in support of the application:-

**1. That the land registrar and surveyor misconducted themselves in that they used a mutation form to fix the extent and size of the plaintiff’s land in total disregard of the size and extent of the defendant’s.**

**2. That the report is biased in that it was instigated by the plaintiff.**

**3. The land registrar and surveyor relied on a mutation form whose origin and authorship was not disclosed.**

**4. That the land registrar and surveyor failed, neglected and/or refused to take, listen and consider the views of the parties and their witnesses.**

**5. That it is only fair and just that the report be set aside and/or expunged from the court record.**

**6. That since the status quo will be maintained until the suit is heard and determined the plaintiff will not suffer any prejudice.**

5. The defendant/applicant avers in his affidavit that the plaintiff instigated the making of the report resulting in the land registrar making a biased report that did not even make any reference to the defendant’s parcel of land. He asserts the report is inconclusive and ought to be set aside. The plaintiff filed a replying affidavit sworn on 21<sup>st</sup> April 2016 in opposition to the application and denies instigating the making of the report by the land registrar pointing out that the land registrar was mandated by the court to visit the site and make a report. The plaintiff’s position is that the land registrar acted diligently and that he made use of documents and records usually held by the lands office and the question of bias on his part is baseless.

6. The parties argued the defendant’s said application by way of written submissions. I have considered and reviewed the application, the affidavit in support and in opposition and I have perused and considered the submissions filed by the parties. The only issue for determination is whether the defendant has established any basis upon which the court can set aside the report by the land registrar as sought in the application.

7. That the dispute between the plaintiff and the defendant is a boundary dispute is admitted by both parties. That being the case, the court properly made a reference to the land registrar to have the boundaries of the two parcels of land fixed. The court order as extracted did not mention the affected parcels of land but going by the pleadings the plaintiff’s land parcels is **West Kitutu/Bogeka/1544** while the defendant’s parcel is **West Kitutu/Bogeka/2306**. The material order of reference was that:-

**“The parties should have the boundaries of the two parcels of land in dispute fixed by the**

**district land registrar, Kisii Central before proceeding further in this matter.”**

Did the land registrar give effect to this order?

8. The report by the land registrar dated 12<sup>th</sup> February 2015 only makes mention of land parcel **West Kitutu/Bogeka/1544** owned by the plaintiff and states that the boundary of the parcel was fixed. There is no indication that the boundaries of land parcel **West Kitutu/Bogeka/2306** were ascertained. To be able to confirm the boundaries of the two parcels as ordered by the court it was necessary for the boundaries of the two parcels to be established through measurements. The sketch plan made by the surveyor only related to parcel 1544 whose measurements are given. This leaves the court wondering where parcel 2306 is and what its measurements are and why they were not picked by the surveyor so that the court could have a complete picture.

9. Under Section 18 of the **Land Registration Act, 2012** it is the land registrar who is mandated to establish and fix boundaries and indeed the court has no jurisdiction by virtue of Section 18 (2) of the **Land Registration Act, 2012** to entertain proceedings relating to a boundary dispute unless the dispute has been determined in accordance with Section 18 (1) of the Act. Looking at the report filed by the land registrar and the surveyor in this matter I am not able to hold that the boundaries of the two subject parcels have been determined and fixed as envisaged under the Act.

10. Under Section 19 (2) of the **Land Registration Act, 2012** the land registrar is required to give all affected parties an opportunity to be heard before defining the boundary by survey. The defendant states he was not accorded a hearing and looking at the report there is nothing to show that the land registrar took any evidence from the parties and/or indeed heard the parties. For the foregoing reasons I find and hold that the report filed by the land registrar is deficient and inconclusive and I therefore set the same aside. I accordingly order and direct that the land registrar, Kisii County and the County surveyor do revisit land parcels **West Kitutu/ Bogeka/1544** and **2306** and thereat establish and fix the boundaries of the two parcels of land and file their report in court incorporating a sketch plan and/or an abstract of the registry index map (RIM) covering the two parcels of land within 90 days of service of this ruling/order upon them. The court will mention the matter on 14<sup>th</sup> November 2016 to confirm compliance and for further directions and/or orders. The costs of the application will be in the cause.

11. Orders accordingly.

**Ruling dated, signed and delivered at Kisii this 22<sup>nd</sup> day of July, 2016.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

Plaintiff present in person

M/s Nyandika for Masese for the defendant

Mr. Ngare

Court Assistant

**J. M. MUTUNGI**

**JUDGE**