



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 44 OF 2003**

**NYAMOKIA NDIEGE ..... 1<sup>ST</sup> PLAINTIFF**

**MWAMBA NDIEGE ..... 2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**WILSON MOCHENGO NYAMBANE ..... DEFENDANT**

**RULING**

1. The court vide an order given on 3<sup>rd</sup> March 2011 by Makhandia, J. (as he then was) directed the District Land Registrar and the surveyor Kisii Central to visit land parcel **No. Nyaribari Masaba/Boguche/976 and 968** to mark and fix the boundaries. The land registrar after a rather long period of delay and several reminders and summons by the court to explain the delay on 7<sup>th</sup> August 2015 filed a report dated 5<sup>th</sup> August 2015.

2. The land registrar's report states the plaintiff Nyamokia Ndiege and Mwamba Ndiege were absent during the site visit despite having been summoned to be present. The Ag. Chief of the area and two Assistant Chiefs of Misarisari sub-location and Nyamesocho sublocations were present as well as security officers from Masimba Division. The land registrar in the report states that he and the surveyor identified and beacons the perimeter boundaries of the defendant/applicant's parcel of land in the presence of the administration officers and the elders named in the report. The land registrar further states he and the surveyor advised the applicant to reinforce the fence boundary as shown which he did with the assistance of the elders and the area administration officers who were present.

3. The court gave the parties notice of the filing of the land registrar's report on 11<sup>th</sup> February 2016 when the matter came up for mention and directed a further mention of the matter on 22<sup>nd</sup> March 2016 for further directions. The plaintiffs not being satisfied with the registrar's report filed the instant application dated 17<sup>th</sup> March, 2016 which is the subject of this ruling. The application brought under Order 46 Rule 16 of the Civil Procedure Rules and Sections 3 and 3A of the Civil Procedure Act seeks an order:-

**“That the land registrar's and surveyor's report dated 5<sup>th</sup> August 2015 and on 7<sup>th</sup> August 2015 filed in court be set aside”.**

4. The application is supported on grounds set out on the face of the application and the annexed affidavit sworn in support by the 1<sup>st</sup> plaintiff, Nyamoko Ndiege on 16<sup>th</sup> March 2016. The applicant relies on the following grounds:-

**1. That the land registrar and surveyor misconducted themselves in conducting the**

**proceedings in the absence of the plaintiffs/applicants.**

**2. That the plaintiffs/applicants were not informed of the day and time of the proceedings.**

**3. That as a result of the ex parte proceedings the plaintiffs/applicants land has been curved out and given to the defendant who has never owned land in the area.**

**4. That in the circumstances it would be fair and just that the land registrar's and surveyor's report be set aside and the case be fixed for hearing on evidence.**

**5. That since status quo will be maintained until the suit is heard and determined the defendant will not suffer any loss or prejudice.**

5. In the sworn affidavit in support, the plaintiffs insist they were not notified of the land registrar's and surveyor's visit to the disputed land parcels. The plaintiffs aver that the land registrar heard the defendant and did not afford the plaintiffs a chance to be heard and consequently the plaintiffs assert that they were condemned unheard contrary to the rules of natural justice. On that account the plaintiffs pray that the report by the land registrar be set aside.

6. The defendant/respondent filed a replying affidavit in opposition to the plaintiffs' application. The defendant in the replying affidavit sets out what perhaps is the historical background to the dispute but falls short of responding to the plaintiffs' complaint that they were not given a notice to attend when the land registrar and the surveyor were to visit the site for purposes of fixing the boundaries for their respective parcels of land. The defendant avers that to his knowledge summons were sent to the area sub-chief and chief and that the applicants were very much aware and opted to skip the exercise. The defendant further states that the land registrar and the surveyor executed their mandate as they were required to and there is no basis for the applicants to seek to set aside the report.

7. In view of the alleged misconduct on the part of the land registrar, the court directed the application to be served on the land registrar and for him to attend court to present the report dated 5<sup>th</sup> August 2015. The land registrar attended court on 27<sup>th</sup> September 2016 and affirmed that he and the surveyor visited the site but the plaintiff/applicants were not present though they had been summoned. He denied they misconducted themselves in any manner.

8. The principal order arising from the court's order of 3<sup>rd</sup> March 2013 was order No. (2) which was in the following term:-

**2. The District Land Registrar and Surveyor Kisii Central to visit land parcel Nos. Nyaribari/Masaba/Boguche/967 and Nyaribari Masaba Boguche/ 968 and mark and fix boundaries.**

The land registrar was therefore called upon and expected to carry out his mandate as required under the provisions of Sections 18 and 19 of the Land Registration Act, 2012 in fixing and establishing the boundaries of the two parcels of land. Notably the land registrar was required to give notice and to hear all the parties who stood to be affected by his decision. Although the land registrar indicated the applicants had been summoned, no evidence of any summons for the applicants to attend hearing on 5<sup>th</sup> August 2015 have been exhibited. While the respondent had in support of the Notice of Motion dated 30<sup>th</sup> April 2015 annexed various summons when the land registrar failed to attend no summons were exhibited to show that the plaintiffs were summoned to attend and be present on 5<sup>th</sup> August 2015 when the land registrar is said to have visited the site. In those circumstances I am not able to hold that the plaintiffs had been notified of the visit of the land registrar to the site and the purpose of the site visit.

9. The land registrar as per the report filed on 7<sup>th</sup> August 2015 heard the evidence of the defendant who was present. As concerns the plaintiffs he stated as follows:-

**“All are absent however it has emerged that they were summoned to appear on site today.”**

10. Who summoned them and how? It was the land registrar who was obliged to issue the summons to them. Did he do so? He did not say he summoned them and no summons was made available and in those circumstances the court can only come to the conclusion that they were not summoned and hence the rules of natural justice were not satisfied. No party ought to be condemned without being heard.

11. Although that should be sufficient for me to set aside the report, I must state that having perused the report, I find the same to be deficient. The report did not have any measurements to indicate the delineation of the two parcels of land that the land registrar was ordered to fix the boundaries. Though the order required the boundaries of the two parcels to be fixed the report appears to only have been in respect of the defendant’s parcel of land. The report further did not annex a sketch map or part of the Registry Index Map (RIM) to illustrate the delineation of the two parcels of land. The report is thus not useful to anyone other than the land registrar. The court would have expected the land registrar and the surveyor to be more thorough rather than casual as they appear to have been.

12. I therefore, for the reasons I have given in this ruling set aside the report filed by the land registrar dated 5<sup>th</sup> August 2015 and direct that the land registrar and the County Surveyor do revisit land parcels, **Nyaribari Masaba/Boguche/967** and **Nyaribari Masaba/968** and to refix and re-establish the boundaries of the two parcels of land. The report to be filed to include a sketch map (plan) showing the delineation of the two parcels of land with measurements. The report to be filed within the next 90 days from the date of this ruling. The parties to share the cost of the exercise equally. Mention on 15<sup>th</sup> March 2017. There will be no order for costs of the application and each party will bear their own costs.

13. Orders accordingly.

**Ruling dated, signed and delivered at Kisii this 28<sup>th</sup> day of October, 2016.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

..... for the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs

..... for the defendant

..... Court Assistant

**J. M. MUTUNGI**

**JUDGE**