



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO.103 OF 2014

CHEMOIWA OLE SAYIALEL1ST PLAINTIFF

NARIKULMURAN ENE SAYIALEL 2ND PLAINTIFF

VERSUS

JOSEPH SAITIAN 1ST DEFENDANT

DOMIC NUNA SAITIAN 2ND DEFENDANT

RICHARD JUJU SAITIAN 3RD DEFENDANT

RULING

1. The plaintiffs brought this suit against the defendants on 13th March 2014 seeking an order that the titles for **LR No. Transmara/Ololchani/ 944, Transmara/Ololchani/945 and Transmara/Ololchani/946** (hereinafter referred to as “**the suit properties**”) which are owned by the defendants be cancelled. In their plaint dated 13th March 2014, the plaintiffs averred that they are the proprietors of all those parcels of land known as **LR Nos. Transmara/Ololchani/585 and Transmara/Ololchani/586** (hereinafter referred to as the “**the plaintiffs’ parcels of land**”). The plaintiffs averred that the plaintiffs’ parcels of land originated from **LR No. Transmara/Ololchani/8** (“hereinafter referred to as “**Plot No. 8**”). The plaintiffs averred that the defendants started encroaching on the plaintiffs’ parcel of land in the year 1998 and continued doing so upto a time when they caused a portion of the plaintiff’s parcels of land to be registered in their names as **LR Nos. Transmara/Olochani/944, 945 and 946** (“**the suit properties**”). The plaintiffs have averred that the suit properties were registered in the names of the defendants unlawfully. It is on account of the foregoing that the plaintiffs have sought for the cancellation of the titles of the suit properties.
2. The defendants filed a joint statement of defence in which they denied the plaintiffs’ claims in their entirety. The defendants contended that the suit properties are a product of first registration and as such there is no way the same could have been created from a portion of the plaintiffs’ parcels of land or from Plot No. 8 for that matter. The defendants contended that the dispute between the plaintiffs and the defendants concerns the boundary between the suit properties and the plaintiffs’ parcels of land and that this suit has been brought by the plaintiffs to prevent the land registrar from determining the said boundary dispute. The defendants have contended that the land registrar was scheduled to visit the site of the disputed parcels of land on 19th March 2014 to determine the said boundary, which visit aborted following the filing of this suit on 13th March

2014. The defendants have denied that they have encroached on the plaintiffs' parcels of land. The defendants have contended that it is the plaintiffs who have encroached on the suit properties.
3. What I now have before me is the defendants' Notice of Motion application dated 17th May 2014 in which the defendants have sought an order for the District Land Registrar, Transmara District and the District Surveyor Transmara District to determine the boundaries of the suit properties on the one hand and the plaintiff's parcels of land on the other hand. The defendants have sought a further order that the OCS Kilgoris Police Station do provide security during the exercise. The defendants' application was brought on the grounds that there is a dispute between the plaintiffs and the defendants concerning the boundary of the suit properties and the plaintiffs' parcels of land and that when the plaintiff filed this suit, the District Land Registrar, Trans-Mara District was scheduled to visit the properties in question to resolve the said dispute. The exercise did not take off due to this new development because the District Land Registrar was reluctant to proceed further in the matter without a court order now that the dispute is in court. The defendants have contended that the determination of the boundary between the suit properties and the plaintiffs' properties would save this court a lot of time as the dispute herein is over a boundary and can only be determined by the District Land Registrar and District Surveyor aforesaid. The defendants have contended that the plaintiffs have used and are continuing to use the said boundary dispute as an excuse to trespass on the suit properties and that the plaintiffs have thwarted previous attempts to resolve the dispute through the office of the District Land Registrar through the use of violence. The defendants annexed to the affidavit sworn by the 1st defendant; copies of title deeds for the suit properties in the names of the defendants, a copy of the registry index map for Transmara/Ololchani registration section and copies of several summons by District Land Registrar, Trans-Mara District to the parties to appear at the site of the disputed boundaries for the purposes of determination of the dispute.
 4. The defendants' application was opposed by the plaintiffs through a replying affidavit sworn by the 1st plaintiff and filed in court on 29th September 2014. In the said affidavit, the plaintiffs have stated that the titles held by the defendants were created from the plaintiffs' parcels of land and as such are illegal and should be cancelled. The plaintiffs have contended that the said titles were created on paper and that the land parcels referred therein do not exist on the ground. The plaintiffs have contended that the court should first determine whether the titles for the suit properties are genuine or valid before the issue of the boundaries between the same and the plaintiffs' parcels of land can arise. On 16th October 2014, the advocates for the parties agreed to argue the defendants application by way of written submissions. The defendants filed their submissions on 6th November 2014. The plaintiff's advocates did not file their submissions as had been directed by the court by consent of the parties. I have considered the defendants' application together with the affidavit filed in support thereof. I have also considered the plaintiffs' affidavit filed in opposition to the application. Finally, I have considered the written submissions filed by the defendants' advocates. The following is my view of the matter.
 5. On the material before me, there is no doubt that the titles for the suit properties and the plaintiffs' parcels of land originated from the adjudication process at Ololchani location, Trans-Mara District. The plaintiffs and the defendants hold titles that were created on a first registration. There has been a dispute going back to the time of adjudication regarding the boundary of the parcel of land that gave rise to the suit properties and the other parcel of land from which the plaintiffs' parcels of land originated. The dispute is well captured in the various correspondences between the Trans-Mara District Land Adjudication and settlement officer, the District Commissioner, Trans-Mara District, the District Land Registrar, Trans-Mara District and the parties. These correspondences which go back to the year 2009 are annexed to parties' respective affidavits in support of and in opposition to the application herein. The dispute has also given rise to a number of criminal cases at the resident magistrate's court at Kilgoris. The gist of the plaintiffs' claim herein is that the suit properties which are owned by the defendants were created illegally from the plaintiff's parcels of land.
 6. In other words, the properties were carved out from the plaintiffs' parcels of land. The plaintiffs have contended that the creation of the suit properties amounted to an encroachment on the plaintiffs' parcels of land. On the other hand, the defendants have contended that the suit properties were created at the same time as the plaintiffs' parcels of land during the land adjudication process at Ololchani and as such the issue of the suit properties being created or

curved out of the plaintiffs' parcels of land does not arise. Whereas the plaintiffs have contended that the dispute between the parties concerns the legality of the defendants' titles over the suit properties, the defendants' position is that the dispute revolves around the boundary of the suit properties and the plaintiffs' parcels of land. In determining the legality of the titles held by the defendants over the suit properties, the court will have to consider the ground location of the said parcels of land and how they sit on the ground in relation to the plaintiffs' parcels of land. The issue of the boundaries of the suit properties and the plaintiffs' parcels of land will therefore have to be determined at the trial of this suit. I am of the view that the determination of the boundaries of the suit properties and the plaintiffs' parcels of land by the District land registrar and surveyor, Trans-Mara District would help in narrowing down the issues to be determined by the court herein having regard to the fact that the jurisdiction to determine boundaries is conferred upon the land registrar by law.

7. See, section 18 of the Land Registration Act, 2012. I have noted from the record that by the time this suit was filed, the defendants had already petitioned the land registrar to determine the boundaries between the suit properties and the plaintiffs' parcels of land in accordance with the provisions of section 18 aforesaid. The land registrar had fixed a date for the site visit on 19th March 2014 when this suit was filed on 13th March 2014. The land registrar has since declined to proceed with the exercise on the ground that the matter is now in court. Whether this suit was filed to forestall the exercise as claimed by the defendants or not, I cannot say. What I can say is that, I see no reason why the defendants' statutory right to have the boundary of their parcels of land determined by the land registrar should be curtailed by these proceedings in which the court would not be able to determine the issue in the first instance. The defendants having commenced the process under section 18 of the Land Registration Act, 2012, to have the boundaries aforesaid determined, I can see no reason why the court should not allow the process to proceed to conclusion. The plaintiffs have not contended that they would suffer any prejudice or injustice if the orders sought herein are granted. The determination of the boundaries of the disputed parcels of land would not confer upon either party right over the said properties which they did not have prior to the exercise. The same will also not prejudice the rights of any of the parties in these proceedings. If anything, the exercise would assist the court in expeditious determination of this suit.
8. For the foregoing reasons, I find no merit in the objections that have been put forward by the plaintiffs to the application before me. It is my finding that the application is well founded. The defendants' Notice of Motion application dated 17th May 2014 is allowed in terms of prayers 2 and 3 thereof. The defendants shall meet the costs associated with the exercise. The District land registrar and District surveyor, Trans-Mara District shall file their reports in court within ninety (90) days from the date of service upon them of this order. The costs of the application shall be in the cause.

Delivered, signed and dated at KISII this 13th day of February, 2015.

S. OKONG'O

JUDGE

In the presence of:-

N/A for the plaintiffs

N/A for the defendants

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE

