



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 41 OF 2019

PRISCILLA MUTHONI NJAGI.....PLAINTIFF/RESPONDENT

VERSES

ESTHER MUTHONI NYAGA.....1ST DEFENDANT/APPLICANT

SYMON NJIRU NYAGA.....2ND DEFENDANT/APPLICANT

JANE KANINI NYAGA.....3RD DEFENDANT/APPLICANT

RULING

The Defendants/Applicants moved this Honourable Court vide a Notice of Motion dated 19th May 2021 seeking the following orders:-

- 1) (Spent).
- 2) **THAT this Honourable Court do issue eviction orders against the Respondents from the Applicant's parcel of land and for the uprooting of her coffee stems from the land.**
- 3) **THAT this application be heard inter-partes on such date at such time as this Honourable Court may direct.**
- 4) **THAT the In- Charge Kianyaga Police Station do supervise the above exercise.**
- 5) **THAT the costs of this Application be provided for.**

The said Application is premised on the following grounds;

- (1) **THAT the Respondent herein initiated this suit against the Applicants jointly for determination on whether her occupation of 2 acres out of land parcel number NGARIAMA/RUNG'ETO/494 amount to Adverse possession**
- (2) **THAT in pursuit of settling the matter amicably out of Court, the Applicants then agreed to curve out the two (2) acres out of the land and have a title deed issued in favour of the Respondent.**

(3) THAT on 2nd February 2021, the Respondent through her then Advocate confirmed that indeed she had received her title deed.

(4) THAT despite having participated in the survey exercise, and having already been issued with a title deed for the 2 Acres she claims in this suit and which she currently utilizes and occupies solely, the respondent wrongfully continues to utilize land belonging to the Applicants which is beyond the portion curved out in her favour.

APPLICANTS SUMMARY OF FACTS

The Applicants filed an affidavit in support of the application where they deposed as follows:-

1) THAT the Respondent herein initiated this suit against the Applicants jointly for determination on whether her occupation of two (2) acres out of land parcel number NGARIAMA/NANG'ETO/494 amounts to Adverse possession.

2) THAT in pursuit of settling the matter amicably out of Court, the Applicants then agreed to curve out the 2 Acres out of the land and have a title deed issued in favor of the Respondent.

3) THAT on 2nd November, 2020 when the matter came up for mention to confirm filing of the surveyors report, the Respondent's Advocate confirmed that the surveyors for both parties had visited the suit land and fixed boundaries in the presence of all parties which reports are in the Court record and confirmed that all parties were present during the survey exercise and that they were all satisfied with the outcome of the exercise.

4) THAT vide an order issued on 7th February 2021, the Honourable Court directed that the parties do comply with the directions given by the surveyors.

5) THAT subsequently on 2nd February 2021, the Respondent through her then Advocate confirmed that indeed she had received her title deed for the portion of 2 acres claimed.

6) THAT despite having participated in the survey exercise, and having already been issued with a title deed for the two acres she claims in this suit and which she currently utilizes and occupies solely, the Respondent wrongfully continues to utilize land belonging to the Applicants which is beyond the portion curved out in her favor.

7) THAT on 10th February 2021 when the matter came up for further directions, the Respondent asked for 2 months within which to uproot coffee stems from the Applicants' land.

8) THAT when the matter came up again on 3rd May 2021, it was reported that the Respondent was yet to vacate and/or uproot the coffee stems from the Applicants land thereby necessitating this Application.

9) The Respondent opposed the application and filed a Replying Affidavit on 5th July 2021. In addition, the Respondent filed a Notice of Preliminary objection dated 15th July, 2021.

RESPONDENT'S SUMMARY OF FACTS

In her replying affidavit, the Respondent made the following depositions:-

1) THAT the Applicants agreed to give me 2 Acres out of NGARIAMA/RUNG'ETO/493 which was subdivided into two portions and I was given my 2 Acres.

2) THAT the boundaries were fixed by the private surveyors which coincided with the original boundary that was fixed by the District Surveyor about 10 years ago when the defendants father was alive a survey carried out on 15th October, 2020.

- 3) THAT the defendants disputed the said boundary and their brother Mathew Mugo Nyaga on 7th December 2020, did willfully damage iron sheet and timber fence I had placed after the joint survey had been done on 15th October 2020 and he uprooted the boundary.
- 4) THAT I reported at Kianyaga Police Station on 12th February 2020 and the said Mathew Mogo Nyaga who is my current neighbor was charged with the offence of malicious damage to property.
- 5) THAT on 8th April 2021, he was found guilty and convicted at Kianyaga Principal Magistrates Court Criminal Case No. 458 of 2020.
- 6) THAT I do not utilize the defendants' parcel of land, in fact the dispute is between myself and the Mathew Mugo Nyaga, a boundary dispute.
- 7) THAT the Applicants have no locus to file the suit since we have no relationship since the issue now is a boundary dispute.
- 8) THAT I have fully developed my 2 acres, the defendants allege my land is too big and if at all they dispute the boundaries placed by the surveyors Bernard Kamau and their surveyor Jackson Munene, I am open to have the District Surveyor to come and place the boundaries again.
- 9) THAT the defendants are purporting to file a suit on behalf of their brother.
- 10) THAT orders of eviction cannot be issued against me on a parcel of land that I have a title deed.
- 11) THAT the Applicants are merely trying to twist the report on record in their favor since I am not in occupation of their land and no evidence on record has been filed claiming I am on their land.
- 12) THAT I am in occupation and user of 2 Acres only as per my title deed.
- 13) THAT the application lacks merit and should be dismissed with costs.

ANALYSIS AND DECISION

I have considered the application, the supporting affidavit and the annexures thereto. I have also considered the pleadings and proceedings as well as the rival submissions by the parties. The Plaintiff/Respondent commenced these proceedings by way of Originating Summons to be registered as proprietor of 2 acres out of the suit land parcel No. NGARIAMA/RUNG'ETO/494 on grounds that she had acquired the same through Adverse possession. When the matter came up for pre-trial direction on 22/01/2020, the Defendants who were acting in person were not opposed to the claim by the Plaintiff and that they had even signed an Agreement to give the plaintiff the 2 acres she was asking and that she was free to get a surveyor of her own choice to do the mutation for the two Acres. The parties then requested for time to engage a surveyor to do the survey work which application was allowed. The Court kept mentioning the matter from time to time and the parties updated the Court on the survey progress and issuance of title in favor of the Plaintiff. During one of the mentions on 02/02/2021, the counsel for the plaintiff informed the Court that the surveyor had finished with his work and a title deed had been issued to the Plaintiff.

The defendants on their part reported that the plaintiff had refused to vacate from their portion of land. On 10/02/2021, this matter had come up for a further mention when counsel for the Plaintiff requested for two months to have the Plaintiff remove some coffee plantation that had encroached the defendants portion of land and vacate from their land. The Plaintiff also confirmed and undertook to vacate from the Defendants portion of land after the two months. The matter was fixed for mention on 03/05/2021. When the matter was called out on the said date, the Defendants reported that the Plaintiff had not moved out from their land. The Advocate for the Plaintiff filed an application to cease Acting. The Defendants who were acting in person decided to engage the present firm of Advocates who filed the application now under review. The plaintiff appointed a new firm of Advocates to act for her in place of the hitherto firm of R. MUTHIKE MAKWORO & COMPANY ADVOCATES.

From their Supporting affidavit, the Applicants contend that despite having participated in the survey exercise and having already been issued with a title deed for the 2 acres she claims and which she currently utilizes and occupies solely, the Plaintiff/Respondent wrongfully continues to utilize land belonging to the Defendants/Applicants which is beyond the portion carved out in her favor.

Though the application is opposed, the Plaintiff/Respondent has not denied the authenticity and veracity of the proceedings in Court leading to the compromise and final settlement of this suit. The Plaintiff does not deny that a surveyor visited the suit property and conducted survey exercise where beacons were placed and a title deed issued to her for the 2 acres she was claiming. The Plaintiff does not also deny that on 10/02/2021 when this matter came up for mention for further directions, she admitted that she was wrongfully occupying the Defendants portion of land and requested for two months to uproot the coffee stems on the land before vacating.

Instead of responding to those issues, the Defendant is raising diversionary matters not relevant in the case. In the Notice of Preliminary Objection dated 15/07/2021, the Plaintiff/Respondent stated that the application violates **Order 3 Rule 1(1) C.P.R** on institution of suits and secondly, this Honourable Court lacks jurisdiction to entertain boundary disputes. First, the present application is not a new cause of action by the Defendants but an enforcement of the consent judgment which gave the Plaintiff the 2 acres she had sought in this suit. She had sued the Defendants for the 2 acres and cannot now turn around and state that the same

Defendants whom she sued for the 2 acres which she succeeded and now has a title deed do not have locus to ask that she moves out of the portion she is wrongfully occupying. In any event, she is on record having admitted wrongfully occupying the defendants' portion of land and requested time to uproot coffee stems on the land but failed to vacate.

The upshot of my finding is that the Notice of Motion dated 19/05/2021 is merited and the same is hereby allowed as prayed with costs.

RULING READ, DELIVERED AND SIGNED IN OPEN COURT AT KERUGOYA THIS 19TH DAY OF NOVEMBER, 2021.

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HON. E.C. CHERONO

ELC JUDGE

In the presence of:-

1. *Mr. Asimwe holding brief for Muriuki Muriithi*
2. *Ms Nyangati for the Applicant*
3. *Kabuta, Court clerk.*



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