



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL CASE NO. 72 OF 2007**

**SULEIMAN KARUGA NJOROGE...PLAINTIFF/RESPONDENT**

**-VERSUS-**

**HENRY AMAI.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**JOSEPH CHACHA.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. The Notice of motion application dated **4<sup>th</sup> November 2014** was by the instance of the **1<sup>st</sup> Defendant Henry Amai**. He approached the court under provisions of **Section 1A, 1B, 3A and 63(e) of the Civil Procedure Act and Order 51(1) of Civil Procedure Rules**.
2. Judgment in the suit was delivered on the **12<sup>th</sup> May 2010** and it is his statement that the said judgment (D.K. Maraga J) is incapable of enforcement against himself as he was not in occupation of the suit property **Nakuru/Kapsita/1131** but rather in occupation of neighbouring land being **Nakuru/Kapsita/1133**.
3. He therefore sought that the court do order a stay of execution of the judgment and all consequential orders including contempt proceedings against him and urged the court to visit the suit property to determine whether he is in occupation or not.
4. I have seen the decree drawn and dated **9<sup>th</sup> August 2010**.

It reads

- 1. That a perpetual injunction be and is hereby issued restraining the 2<sup>nd</sup> Defendant from entering and or subdividing the suit land Nakuru/Kapsita/1131.**
- 2. That the 1<sup>st</sup> defendant to be evicted from the suit land Nakuru/Kapsita/1131 if he does not vacate within 30 days of service of the court order upon him.**
- 3. That the plaintiff shall have costs of the suit against both the defendants plus interest at court rates.**

5. Considering the averments in the supporting affidavit and in the replying affidavit as well as in the submissions filed by all parties, a licensed land surveyor was ordered to move onto the suit property and determine the extent of the 10 acres bought by the **1<sup>st</sup> defendant** and the plaintiffs extent of entitlement of the suit land and to determine the boundaries, on the ground between the two properties **Nakuru/Kapsita/1131 and 1133**.

6. Under its inherent power provided under **Section 1A, 1B and 3A of the CPR**, and for the ends of justice to be done, **a joint survey report was prepared. It is dated the 11<sup>th</sup> October 2016**. Earlier the **1<sup>st</sup> defendant** had caused a survey report to be prepared dated **23<sup>rd</sup> December 2013** which the other parties could not agree with hence the joint report afore stated by order of the court.

They survey reports in my view will be able to resolve the boundary dispute and extent of each party's entitlement in line with the court's judgment.

7. The joint Survey Report dated **11<sup>th</sup> October 2016** makes factual observations.

This report was prepared by C.O. Ouma the District Surveyor and Wahome Werugia, a Land Surveyor on the 17<sup>th</sup> July 2016.

Incidentally, it is the land surveyor C.O. Ouma who had prepared the earlier survey report dated 24<sup>th</sup> December 2014 under instructions of the 1<sup>st</sup> Defendant, the applicant herein which the plaintiff could not agree on, hence the joint survey.

**8. Observations in the joint survey report dated 24<sup>th</sup> December 2014**

***1. That according to the Registry index map, parcel numbers***

***1131 and 1133 is not “contiguous”. They are separated by seven other parcels.***

***2. That the District Surveyors report only covered the situation found on Parcel No 1131 and the report is an accurate representation of the ground situation at the time.***

***3. That the ground location of parcel No. 1131 is as indicted on the Registry index map.***

***All the surrounding parcels are as shown on the map.***

***4. That the owner of Parcel No.1133 has settled and is claiming land within parcel No.1131 and in a location far removed from where he is supposed to be.***

**Ground findings**

***The 1<sup>st</sup> defendant was noted to have erected temporary house within parcel 1131 which is registered under the names of the plaintiff (Suleiman).***

***Parcel Number 1133 is registered under Eunice Chemutai and is very far from parcel 1131 as per the R.I.M.***

9. Considering the above findings I find no need for the court to visit the site to determine the boundaries or the situation on the ground. The surveyors are professional persons and the court will rely on their report unless a challenge is mounted, which is not the case here.

Thus prayer No. 3, 4 of the application are resolved.

10. **On prayer No. 6**, I find that the judgment of the court is capable of enforcement. It is evident from the survey report **that the applicant has trespassed onto the plaintiff’s suit property No. 1131 and has erected a temporary structure. He is ordered to remove the structure forthwith and remove himself, his servants or agents therefrom and settle onto his land parcel No. 1133.**

11. Having made the above observations, I find the application by the 1<sup>st</sup> defendant without any merit and exposes himself as the trespasser onto the plaintiff’s parcel. As I have directed, **let him remove his structure from the plaintiff’s parcel forthwith and in any event within 30 days of this order; failing which the Decree holder, the plaintiff will be at liberty to execute the decree against the 1<sup>st</sup> defendant without further recourse to the court as litigation must come to an end.**

12. Costs of this application shall be paid by the 1<sup>st</sup> defendant to the plaintiff.

**Dated, signed and delivered this 31<sup>st</sup> Day of January 2019.**

**J.N. MULWA**

**JUDGE**