



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC NO. 139 OF 2013

CHARLES MERISIA.....1ST PLAINTIFF/RESPONDENT

ABRAHAM M. LIMAKWANY.....2ND PLAINTIFF/RESPONDENT

(Suing as the administrators of the estate of ROCHULEM AMOYWAL)

DANIEL ROTICH NGURIAPUS.....3RD PLAINTIFF/RESPONDENT

(Suing as the administrator of the estate of KABELI MOLER KORINYANG)

VERSUS

PETRO KALUNGOKOR.....DEFENDANT/APPLICANT

RULING

1. Before me for determination is a Notice of Motion dated 1/11/2021 filed on 3/11/2021. It was brought under Sections 1A, 1B, 28, 29, 34, 63 and 75 (h) of the Civil Procedure Act, Chapter 21 of the Laws of Kenya; Order 51 Rule 1 of the Civil Procedure Rules and “all enabling provision (sic) of the Law.”

2. The Applicant sought the following specific orders:

(1) ...spent

(2) ...spent

(3) **THAT** the County Surveyor West Pokot County do furnish the Honourable Court with a certified copy of the Registry Index Map signed by the Director of Surveys, amended after 29th September 2021 and containing the land parcels nos. West Pokot/Chepkono/169, 170 and 171 within 7 days.

(4) **THAT** summons requiring the attendance of the said County Surveyor West Pokot as well as the Land Adjudication Officer West Pokot do issue, for them to attend court after furnishing the said Registry Index Map for cross examination on implementation of the judgment of this honourable court.

(5) **THAT** where need be, the Honourable Court to send the Deputy Registrar of this Honourable Court to verify the implementation of the judgment herein and file a report soon thereafter.

(6) **THAT** the costs of the Application be provided for.

3. The Application was based on numerous grounds numbered (a) to (k) on the face of the Application. It was supported by an Affidavit sworn by the Applicant, one Mr. Petro Kalungokor, on an unspecified date. The contents of the affidavit filed on 3/11/2021 together with the Application expound the grounds of the Application.

The Applicant's Case

4. The Applicant's case was that this Court delivered judgment on 27/2/2020 in a suit brought by way of a Complaint filed by the

Plaintiffs/Respondents on **23/10/2013**. Among the prayers sought in the Plaint were an order does issue requiring the **District Land Registrar, West Pokot to rectify the boundaries between parcel nos. West Pokot/Chepkono/169 and 179 and his land being No. 170 (lands in dispute)**. The Applicant maintained that by the judgment the Court ordered and directed the County Land Registrar, West Pokot to perform various tasks in execution of the judgment. **First**, it directed the Land Registrar to visit the disputed parcels of land, establish and fix boundaries thereon on the basis of the boundaries established and maintained after the land adjudication process was completed. **Second**, he was to effect rectification of the registers of the disputed parcels of land on the condition that it was necessary on the boundaries that he would have ascertained. The Court also ordered the parties to bear their own costs of the suit.

5. To the Affidavit in support of the Application, he annexed a true copy of the judgment and marked it as **PK-1**. The deponent claimed that the Court found that there was variance in the area in regard to the area of the suit parcels and that their physical locations on the ground did not correspond with the Registry Index Map (**RIM**) hence there was need for rectification of the registers and amendment of the RIM. He pointed out that **PW2** - the Land Adjudication Assistant in West Pokot - confirmed that there was a discrepancy and problem on the ground. He stated further that both the Land Registrar and County Surveyor visited the suit parcels of land and filed their respective reports, one dated **8/12/2020** and another one dated **27/11/2020**. He annexed copies of the reports and marked them as **PK 2(a)** and **(b)** respectively.

6. He then reproduced the contents of a section of the report dated **27/11/2020** which he considered relevant to the instant Application. He deponed that on basis that the judgment was partially implemented hence the necessity it to be reviewed and implementation completed, the Respondents filed an Application on **8/12/2020** wherein they sought a review of the judgment and for an order that the County Surveyor, West Pokot does curve out **5.90 ha** from **L.R. No. West Pokot/Chepkono/170**. He too had filed an Application on **5/5/2021** by which he sought an order for establishment and fixing of boundaries of the suit lands by a private surveyor or the director of surveyors on the ground that the County Surveyor was biased and failed to implement the judgment. He stated a fact that both applications were dismissed on **06/08/2021** and the court ordered the County Surveyor and County Land Registrar to implement the report dated **27/11/2020** on the ground and therefore fix the boundaries. He annexed a copy of the ruling and marked it as **PK-3** in evidence. He deponed that he was aggrieved by that ruling and filed a Notice of Appeal on **16/8/2021** as well as an Application for stay of execution dated **1/9/2021** which he has annexed and marked as **PK-4** and **PK-5** respectively.

7. He stated that it was alleged in the survey report dated **30/9/2021** that the amendment of the R.I.M was done barely **24** hours after the survey, to reflect the situation on the ground as per an attached sketch map which revealed the *status quo* before this suit was filed. By that status the boundaries **1, 2** and **3** were the ones between the land parcels Nos. **169, 170** and **171**. He stated further that he was surprised by what was implemented on the ground on the **29/9/2021** where boundary 5 was fixed as being the boundary between land parcel Nos. **169** and **170**. He expressed further surprise by the allegations of the 1st Respondent that remaining only was the rectification of the boundaries for the 3rd Plaintiff/Respondent to curve out **5.90 ha** from his land, **West Pokot/Chepkono.170**. He urged the court to allow his Application in terms of **Section 34** of the Civil Procedure Act.

The Response

8. The Application was opposed through the Replying Affidavit sworn by Charles Merisia on **15/11/2021** and filed on **18/11/2021**. He denied that allegations that the County surveyor acted contrary to the orders of the court. To him, the only issue remaining was the implementation concerning the curving out of **5.09 ha** due to land parcel **no. 171** and that the County Surveyor was required to rectify the boundaries between parcels Nos. **170** and **171** to include **5.09 ha** into parcel **No. 171**.

9. He responded further that the Applicant had already filed a Notice of Appeal against the orders of this Court. Thus, to him, the instant application was an abuse of the court's process. He prayed for its dismissal.

Submissions

10. The Application was heard by way of written submissions. The Applicant filed his dated **8/1/2021** on **9/11/2021**. They reiterate the contents of the grounds of the application and the supporting affidavit. The Respondents did not file any. That notwithstanding, this Court shall proceed to determine the Application on the basis of the documents filed thereto.

Issues, Analysis and Determination

11. This court carefully considered the Application, the affidavit in support, the submissions filed as well as the provisions of the law under which the application was brought. It found three issues for determination. These were:

(a) Whether the application is merited

(b) Who bears the costs?

12. I will analyze the issues one by one.

(a) Whether the application is merited?

13. The Applicant herein as I understood him, faulted the County Surveyor and the Land Registrar on how they implemented this court's judgment dated **27/2/2020**. He was dissatisfied with how the boundaries were fixed on the ground. It is a fact that the boundaries were fixed pursuant to the Surveyor's Report dated **27/11/2020** and by which in its ruling of **06/08/2021** the Court directed that the boundaries be fixed on the ground. By the said Application the Applicant herein lost the one dated **05/05/2021** through which he challenged the findings of the Surveyor on curving out of his land **No. 170** a portion measuring **5.09 ha** to form part of land parcel **No. 171**.

14. To begin with, this court passed judgment on the 27/2/2020. Following the judgment, a decree dated 25/2/2020 was extracted and issued to the relevant offices for execution. Armed with the decree, the Land Registrar and the County Surveyor visited the ground and implemented it. Worthy of note is that the decree was implemented in the presence of all parties to this suit, including their family members. The litigants herein helped the Surveyor and the Registrar to point out the boundaries on the ground.

15. From the record, it is clear that so far the decree of the court has been executed accordingly by the Surveyor and the Land Registrar. The court made its final decision on that matter. It became functus officio in relation to that issue. Moreover, by its ruling of 6/8/2021, this Court gave directions that the report dated 27/11/2021 be implemented as it was because it was in line with the decree of the court. However, the Defendant, now Applicant, was dissatisfied with the ruling of the Court. He filed a Notice of Appeal on 13/8/2021. He then filed the instant Application after filing the Notice of Appeal. The question that begs for an answer is, what is the import of filing a Notice of Appeal?

16. The starting point is to understand that once a party is dissatisfied from the decision of this Court his recourse lies in an appeal filed in the Court of Appeal to challenge that decision if the law permits it. Under **Order 42 Rule 6 (4)** of the **Civil Procedure Rules**, it is provided that *“For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.”*

17. The import of the provision is that once the Applicant filed a Notice of Appeal against the Ruling dated and delivered on 06/08/2021, he moved the substratum of this matter from this Court to the Court of Appeal. Thus, to move this Court in any manner inconsistent with the intended outcome of the Court of Appeal would amount to two things: one, the Applicant is challenging the decision of this Court on two fronts, namely, by way of an appeal and the Application; two, the Applicant wants to destroy the substratum of the Appeal preferred.

18. Whilst the may be permitted to destroy the substratum of the Appeal, he has to clearly elect on what he wants: either he withdraws the Appeal before moving this Court for orders such as sought in the instant Application or he proceeds with the Appeal. To the extent that he has not moved the appropriate forum for the withdrawal of the (Notice of) Appeal, the Appeal is alive. He cannot therefore be permitted to pursue the two avenues. Again, once he filed the Notice of Appeal, this Court was divested of and lacks jurisdiction in regard to the instant Application. It is my considered opinion that this application is a waste court’s precious judicial time: litigation has to come to an end. Even **Section 34** of the **Civil Procedure Act** as well as **Article 159 (2)** of the **Constitution** cannot cure the incompetency of the Application. There is no question that is to be determined by the Court which would call for invoking **Section 34** of the **Act**. In particular, there is none in regard to the instant Application which was not covered in the Applications dated 08/12/2020 and 05/05/2021 and by the ruling of 06/08/2021.

(b) What orders to should issue and who to bear costs

19. In the conclusion, this court finds that the Application is unmerited and it is hereby dismissed in its entirety with costs to the Respondents.

It is so ordered.

Dated, signed and delivered at Kitale via electronic mail on this 31st day of January, 2022.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE