



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 485 OF 1994

SAMWEL MAGETO MOMANYI PLAINTIFF

VERSUS

SAMWEL ONDIEKI DEFENDANT

RULING

1. The plaintiff brought this suit against the defendant in the year 1994 seeking the following reliefs:

- a. **A permanent injunction restraining the defendant and or his agents from interfering and encroaching into the plaintiff's land.**
- b. **That the destroyed boundary be restored into its original position.**
- c. **Costs and any other relief the court may deem fit.**

The defendant filed his statement of defence on 3rd October, 1994 in which he denied the plaintiff's claim in totality. The defendant contended that the boundary between the plaintiff's parcel of land known as **LR. No. Central Kitutu/Mwabandusi/702** (hereinafter referred to as "**Plot No.702**") and his parcel of land known as **LR. No. Central Kitutu/Mwabandusi/507**(hereinafter referred to as "**Plot No. 507**") had been determined by Kisii District Land Registrar and Surveyor in the year 1991 and as such could not be determined again by the court.

2. After the close of pleadings numerous attempts were made to settle the matter out of court which did not bear any fruit. The suit was ultimately set down for hearing on 21st February, 2002 when it was heard by Commissioner of Assize (CA), P.K.K.A. Birech. Birech CA. delivered judgment in the matter on 12th June, 2002 in favour of the plaintiff. He found that the plaintiff had proved on a balance of probabilities that the defendant had encroached on Plot No. 702 by two (2) metres at the lower end and one (1) metre at the upper end. He ordered that the boundaries between Plot No. 702 owned by the plaintiff and Plot No. 507 owned by the defendant be remarked by the District Surveyor so that the plaintiff may recover from the defendant the portion of Plot No. 702 on which the defendant has encroached as aforesaid. He also granted an injunction to the plaintiff restraining the defendant either by himself or through his agents from interfering with Plot No. 702. A decree was extracted from the said judgment and issued by the court on 22nd January, 2003.

3. The defendant was aggrieved by the said judgment. He did not however file and serve a notice of appeal within the prescribed time. The defendant made an application in the Court of Appeal for extension of time within which to file and serve a notice of appeal and record of appeal. This was in Court of Appeal at Kisumu, Civil Application No. NAI. 266 of 2005(KSM34/05). The defendant's application for extension of time to file and serve a notice of appeal and record of appeal was dismissed by the Court of Appeal (Waki JA.) on 31st March, 2006. The effect of the dismissal of the defendant's said application

was that the judgment that was made against the defendant herein on 12th June, 2002 remained unchallenged and the plaintiff was at liberty to execute the decree that was extracted therefrom.

4. The plaintiff for reasons which are not clear from the record did not take any steps for a period of over 5 years to execute the decree that was issued herein in his favour. The first step that was taken by the plaintiff after the judgment of 12th June, 2002 towards the execution of the said judgment was through an application that was filed on 15th June, 2011 in which the plaintiff sought an order to be provided with security to enable him execute the said judgment. That application was allowed by Makhandia J. (as he then was) on 18th July, 2011. After obtaining an order to be provided with security, the plaintiff seems not to have received any co-operation from Kisii District Land Registrar and District Surveyor who were supposed to assist in the execution of the decree that was issued herein. This forced the plaintiff to file yet another application on 7th November, 2012 seeking an order to compel Kisii District Land Registrar and District Surveyor to visit and determine the disputed boundaries of Plot Nos. Central Kitutu/Mwabundusi/702, 507,714 and 715. It is not clear why Plot Nos. 714 and 715 were included as they are not in issue in this suit and were not covered by the decree that the plaintiff sought to execute. The plaintiff's application dated 7th November, 2012 came up for hearing before me on 21st November, 2012 when I gave the following orders;

- i. **THAT the district land registrar, and the district surveyor, Kisii District should go back to the suit property and carry out the necessary fixing of the boundaries of the plaintiff's and the defendant's plots in accordance with the court decree given on 23rd January, 2002.**
- ii. **THAT this exercise should be carried out within the next 21 days from the date hereof.**
- iii. **THAT the OCS Kisii Central Police Station is hereby ordered to provide security.**
- iv. **THAT the plaintiff will liaise with them in this regard and should meet whatever expenses that may be required.**
- v. **THAT this matter will be mentioned on 20th December, 2012 to confirm compliance with this order.**

Following the granting of these orders, Kisii District Land Registrar and Surveyor visited the disputed boundary of Plot No. 702 and Plot No. 507 on 21st December, 2012 and purportedly fixed the same as had been as ordered by the court. Kisii District Land Registrar and Surveyor thereafter filed their reports in court on 27th March, 2014. According to the said reports and sketch drawing that was presented to court by the said officers, the boundary that was fixed by them runs through a building that the plaintiff has constructed on Plot No. 702. A portion of the said building now falls on Plot No. 507 owned by the defendant meaning that it is the plaintiff who has encroached on the defendant's parcel of land.

5. The plaintiff was dissatisfied with the said reports that were submitted to court by the District Land Registrar and District Surveyor and filed an application by way of Notice of Motion dated 29th April, 2014 under Order 46 rule 16 of the Civil Procedure Rules seeking the following orders:

- i. **That the land registrar's award/decision filed herein on 27th March 2014 be set aside.**
- ii. **That the court do supersede the arbitral award and do make further orders and/or directions for the ends of justice to be met.**
- iii. **That costs of this application be provide for.**

6. This is the application which is the subject of this ruling. The application was supported by the affidavit sworn by the plaintiff on 29th April, 2014. It was also brought on the grounds that were set out on the face thereof. In summary, the plaintiff contended that the reports by the District Land Registrar and District Surveyor were filed in court after the expiry of the time that was fixed by the court without leave and as such the said officers who prepared and filed the same in court were guilty of misconduct. The plaintiff contended further that the two officers did not comply with the terms of the court order of 21st November, 2012 in that they purported to determine the boundaries of Plot No.702 and Plot No. 507 afresh which was not within the scope of their authority.

7. In his affidavit, the plaintiff stated among other things that the District Land Registrar and District Surveyor took 31 days to implement the court order without seeking extension of the 21 days time limit that had been fixed by the court. The plaintiff stated further that instead of fixing the boundary between Plot No. 702 and Plot No. 507 as had been directed by the court, the two officers disregarded and/or ignored the court order, went into a frolic of their own and ended up establishing a new boundary that cuts through Plot No. 702 contrary to the decree issued herein which they were supposed to be executing.

8. The plaintiff's application was opposed by the defendant through a replying affidavit sworn on 29th May 2014. In his response to the application, the defendant contended that the District Land Registrar and District Surveyor established the original boundary of Plot No. 702 and Plot No. 507 when they visited the site of the two parcels of land pursuant to the court order of 21st November, 2012 and as such there could be no other boundary that can be established even if the court had to make an order for the two officers to re-visit the site for the same purpose. The defendant contended that the purpose and effect of the decree that was issued by this court was to establish or restore the original boundary of Plot No. 702 and Plot No. 507 an exercise that according to the defendant was meticulously undertaken by the District Land Registrar and the District Surveyor in the presence of the parties and their advocates. The defendant contended that there is nothing wrong with the reports that were filed herein by the said officers and termed the plaintiff's application as having been brought in bad in faith.

9. When the application came before me on 7th July 2014 it was agreed that the same be argued by way of written submissions. Both parties filed their respective written submissions and the same are on record. I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the replying affidavit that was filed by the defendant in opposition to the application. Finally, I have considered the written submissions by the parties' advocates.

10. There is no doubt from what I have set out above that the reports that were filed herein by the District Land Registrar and District Surveyor (hereinafter referred to only as "**officers**" where the context so admits) on 27th March, 2014 are inconsistent with the terms of the decree that was issued herein on 22nd January, 2003. They are also contrary to the order that was made herein on 21st November, 2012 pursuant to which they were prepared and filed in court. As I have stated above, in the judgment that was delivered herein on 12th June, 2002, the court found that the defendant had trespassed on Plot No. 702 to the extent of 2 metres on the lower side and 1 metre on the upper side. What the District Land Surveyor was required to do under the terms of the said judgment was to adjust the boundaries of Plot No. 702 and 507 as they existed prior to the said judgement so that on the lower part of the common boundary, the plaintiff would recover land measuring 2 metres on which the defendant was found to have encroached and on the upper part, he would recover 1 metre.

11. The order that I made herein on 21st November, 2012 expressly directed the District Land Registrar and District Surveyor (the officers) to fix the boundaries of Plot No. 702 owned by the plaintiff and Plot No. 507 owned by the defendant in accordance with the said court decree. The said officers were required only to adjust the boundaries of the two parcels of land so as to accord with the judgment and decree of the court. They had no business establishing what the defendant has referred to as "the original boundary". Theirs put plainly was to ensure that the boundary of the two parcels as they existed was pushed towards Plot No. 507 by 2 metres on the lower side and by 1 metre on the upper side; nothing more nothing less. That was the effect and purport of the judgment that was delivered herein on 12th June, 2002. That judgment has not been varied or set aside. It is binding upon the parties. The much this court can do at this stage is to enforce it however bitter the consequences may be. The said officers have in their reports in dispute re-written the judgment of the court. To them, it is the plaintiff who has encroached on the defendant's parcel of land namely, Plot No. 507. This is contrary to this court's finding in the judgment that was delivered on 12th June, 2002 in which it was held that it is the defendant who had encroached on Plot No. 702.

12. Having found that the reports filed herein on 27th March, 2014 are contrary to the decree of this court and the order made herein on 21st November, 2012 pursuant to which they were made, the said reports are

invalid and as such cannot be allowed to stand. The plaintiff has sought an order to have the said reports set aside under Order 46 rule 16 of the Civil Procedure Rules. I am of the view that the orders sought by the plaintiff cannot be granted under Order 46 rule 16 of the Civil Procedure Rules. The order that I made herein on 21st November, 2012 was not a reference to arbitration. This suit had been heard and determined and as such the same could not be referred to arbitration. Since the order was not a reference to arbitration, the reports that were made pursuant to the said order were not an award capable of being set aside or adopted as a judgment of the court under Order 46 of the Civil Procedure Rules. The plaintiff's application has been brought under the wrong provisions of the law. This however cannot defeat the application which is otherwise having merit. This court has power and control over its proceedings. It therefore has an inherent power to expunge any pleading or document that has been placed on its record contrary to its order or directions. The reports filed herein by the District Land Registrar and District Surveyor on 27th March, 2014 are for the reasons that I have given above liable to be expunged by the court from the record pursuant to the court's inherent power under section 3A of the Civil Procedure Act.

13. In addition to the order for the setting aside of the said reports, the plaintiff has also asked the court to give other orders and/or directions as may be necessary for the ends of justice to be met. I believe that such orders or directions are necessary. The earlier this 21 year old case is put to rest the better. Due to the foregoing, I hereby set aside the purported fixing and/or marking of the boundaries of Plot No. 702 and Plot No. 507 that was carried out by the Kisii District Land Registrar and District Surveyor on 21st December, 2012 and expunge from the court record the reports that were submitted to this court by the said officers on 27th March, 2014. I have noted that there seems to be some practical difficulty in executing the decree that was issued herein in favour of the plaintiff. This may have partly contributed to mistakes that were made by the District Land Registrar and District Surveyor while trying to comply with the orders that were made herein on 21st November, 2012.

14. I would not want the parties to find themselves in the same situation that led to the present application. Due to the foregoing, I hereby direct that the plaintiff do file an application under section 34 of the Civil Procedure Act, Cap. 21 Laws of Kenya for the court to consider and determine how the decree issued herein on 22nd January, 2003 can be enforced, in particular, how the boundaries of Plot No. 702 and Plot No. 507 can be fixed in such a way that the plaintiff recovers from the defendant the portion of Plot No. 702 which the defendant was found by the court to have encroached on. The determination of these issues is beyond the scope of the present application. The court would wish to have the views of the District Land Registrar and the District surveyor who would be charged with the responsibility of executing the said decree which views it is not seized of as of now. In conclusion, the plaintiff's application is allowed on the foregoing terms. The cost of the application shall be in the cause.

Delivered, Signed and Dated at Kisii this 17th day of April 2015.

S.OKONG'O

JUDGE

In the presence of:

Mr. Migiro for the plaintiff

Mr. Omwega h/b for Okenye for the defendant

Mr. Mobisa Court clerk

S.OKONG'O

JUDGE