



No. 296

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 147 OF 2012

FARAH AWAD PLAINTIFF

VERSUS

MOSINGO OLE NASITI

KISHOIAN NADALA

LETIMITO OLE KURARO

DAVID KANASA

KOISKIR OLE LEWOJO

NGASHAR OLE BARATA

MUSEINE OLE NKOIDILAH DEFENDANTS

RULING

1. By an amended plaint dated 3rd June 2013 the plaintiff sought the following reliefs against the defendants jointly and severally:-
 - i. **A declaration that the plaintiff is the registered and/or lawful owner of LR No. Trans-Mara/Oloirien/9 (hereinafter referred to only as “the suit property”).**
 - ii. **A permanent injunction to restrain the defendants from entering, trespassing onto, cutting down trees, cultivating, grazing, interfering with and/or in any other manner whatsoever dealing with the suit property or any portion thereof.**
 - iii. **General damages for trespass**
 - iv. **Special damages in the sum of kshs. 565,138.00 only.**
 - v. **Costs and interests.**
 - vi. **Such further and/or other reliefs as the honourable court may deem fit and expedient to grant.**

The plaintiff averred that he is the registered proprietor of the suit property and that on or about 20th January, 2012 the defendants without his permission or authority trespassed onto and/or

encroached upon a substantial portion of the suit property and commenced cattle grazing and cultivation thereon. The plaintiff averred further that as a result of the defendants said acts of trespass the plaintiff had suffered loss and damage for which the plaintiff held the defendants liable. It is on account of the foregoing that the plaintiff sought the reliefs set out herein above. By amended joint statement of defence dated 26th July 2013, the defendants denied the plaintiff's claim in its entirety. The defendants denied that they have trespassed on the suit property and contended that they are in occupation of their own respective parcels of land. The defendants contended that their parcels of land are in Kerrinkai Adjudication section and Oloirien Adjudication Section No. 1 and that they are strangers and have no interest in the suit property. The defendants contended that the plaintiff does not own and has never occupied the disputed parcel of land and as such the plaintiff has not suffered and is not entitled to any damages special or otherwise.

2. On 26th June 2013, the plaintiff brought an application by way of Notice of Motion dated 26th June 2013 seeking the following prayers:
 - i. **The instant application be certified urgent and same be heard on priority basis.**
 - ii. **The honourable court be pleased to order and/or direct the district land registrar and the district surveyor, Trans-Mara District, respectively, to visit LR No. Trans-Mara/Oloirien/9, belonging to and registered in the name of the plaintiff/applicant herein and thereby ascertain, determine and plant the exact boundary position thereof as against Plot Number 1, Oloirien Adjudication section.**
 - iii. **Upon visiting the subject parcel of land herein, the District Land Registrar and the District Surveyor, Trans-Mara District, respectively, do file a report, confirming whether the defendants/respondents herein, have trespassed onto LR No. Trans-Mara/Oloirien/9 and thereby determine the extent of such trespass.**
 - iv. **Costs and/or expenses to be incurred by the District Land Registrar and District Surveyor, Trans-Mara District, respectively, be borne by the plaintiff/applicant herein.**
 - v. **Costs of this application be provided for.**
 - vi. **Such further and/or other orders be made as the court may deem fit and expedient.**

The plaintiff's application was not opposed by the defendants and the same was allowed by the court as prayed on 24th July 2013. Following the order that was made by the court on the said application, the District Land Registrar and District Surveyor, Trans-Mara District visited the suit property, conducted a hearing, took measurements and prepared two (2) reports that were filed in court on 29th November 2013. In his report, the District Land Registrar, Mr. S. W Githinji made among others the following observations and recommendations:-

- i. **The area occupied by the plaintiff on the ground is less than the actual measurement of the suit property on record in that, on the ground the plaintiff occupies only 205 ha. while the measurement of the suit property on record is 926.60 ha.**
- ii. **There is an element on encroachment by the defendants and/or their relatives on the suit property.**
- iii. **The persons who have encroached on the suit property could not be identified because of the tension that was on the ground.**
- iv. **The beacons could not be fixed because of the hostilities on the ground.**
- v. **The title deed for the suit property should be amended to correspond with the actual acreage of the suit property on the ground.**
- vi. **The registry index map for the area should be amended so that it corresponds to the position on the ground.**

In his report the District Surveyor, Trans-Mara district made among others the following observations:-

- i. **The suit property according to the boundary that was pointed out to them by the plaintiff measures 208.42ha. on the ground and not 926.60ha. as indicated in the title deed for the suit**

- property.**
- ii. **There was encroachment on the suit property but the extent of the encroachment could not be established.**
3. Upon the filing of the two reports in court on 29th November, 2013 as aforesaid, the plaintiff filed another application by way of Notice of Motion dated 30th April 2014 this time seeking the following prayers:-
- i. **The instant application be certified urgent and same be heard on priority basis.**
 - ii. **The honourable court be pleased to adopt the report and/or findings of the District Land Registrar and Surveyor, Trans-Mara East/West Districts and thereby enter judgment in terms of the said reports, respectively.**
 - iii. **Consequent to prayer (2) herein being granted, the honourable court be pleased to order and/or direct that the defendants/respondents be and are restrained vide an order of permanent injunction from encroaching onto, grazing on, cultivating, trespassing onto and/or in any other manner interfering with the plaintiff's/applicant's rights and/or interests over the disputed portion of LR No. Trans-Mara/Oloirien/9.**
 - iv. **Costs of this application together with the main suit be borne by the defendants/respondents.**
 - v. **Such further and/or other orders be made as the court may deem fit and expedient.**

This is the application which is the subject of this ruling. The application which was supported by the affidavit of the plaintiff sworn on 30th April 2014 was brought on the grounds that the District Land Registrar and District Surveyor have established in their reports highlighted hereinabove that the defendants have encroached on the suit property and since the said encroachment is the basis of this suit, the substratum of this suit has been determined and as such, the court should proceed and enter judgment in accordance with the findings in the said reports. The defendants did not file any grounds of opposition or replying affidavit in opposition to the plaintiff's application. The application came up for hearing on 23rd June 2014 when Mr. Oguttu advocate proceeded to make oral submissions after the defendant's advocates application for adjournment was rejected.

4. I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the oral submissions that were made before me by the plaintiff's advocate. The plaintiff has sought the adoption of the reports dated 25th November, 2013 filed herein on 29th November 2013 by the District Land Registrar and District Surveyor, Trans-Mara District as a judgment of the court in this suit. The plaintiff's application was brought under Order 51 rules 1, 3 and 4 and Order 46 rule 18 of the Civil Procedure Rules 2010, section 1A, B, 3, 3A and 63 (e) of the Civil Procedure Act Cap 21 Laws of Kenya and section 19 of the Environment and Land Court Act, No. 19 of 2011.
5. I am of the opinion that the plaintiff's application herein has no merit. This court has no power under the provisions of the law cited by the plaintiff as the basis of the present application to adopt the reports dated 25th November 2013 by the District Land Registrar and District Surveyor, Trans-Mara District ("hereinafter referred to only as "the reports") as a judgment of this court. Order 46 rule 18 which has been invoked by the plaintiff empowers this court to enter judgment in accordance with an arbitration award. The said reports cannot by any imagination be termed as an arbitration award. The order issued herein on 24th July 2013 at the instance of the plaintiff was not a reference by this court of the issues in dispute in this suit to the District Land Registrar and District Surveyor, Trans-Mara District for determination. An issue in dispute in a suit can only be referred to arbitration under Order 46 of the Civil Procedure Rules by agreement of both parties in a suit and only on application made for that purpose. It is very clear on the face of the plaintiff's application dated 26th June 2013 in which the order of 24th July 2013 was issued that the application was not made under Order 46 of the Civil Procedure Rules, 2010.
6. The order that was issued pursuant to that application cannot therefore amount to a reference to arbitration which can give rise to an award adoptable as a judgment of the court under Order 46 rule 18 of the Civil Procedure Rules. The order that was issued by the court on 24th July 2013 was very clear in its terms. What the District Land Registrar and the District Surveyor, Trans-Mara

District were asked to submit to court was a report and not an arbitration award. I would wish to add that, the dispute between the parties herein is not a boundary dispute which is determinable by the Land Registrar. It cannot be said therefore that the reports filed herein by the District Land Registrar and District Surveyor, Trans-Mara District, on the boundaries of the suit property have determined this suit. If this suit was concerned only with the issue as to the exact boundaries of the parcels of land owned and occupied by the parties herein then this court would have no jurisdiction to entertain the same pursuant to section 18 of the Land Registration Act, 2012. In the absence of jurisdiction to entertain the suit, the court would have similarly lacked the jurisdiction to refer the matter to the District Land Registrar and the District Surveyor to determine the same. See, **Wamutu –vs- Kiarie [1982] KLR 480**. The plaintiff’s claim against the defendants as I have highlighted at the beginning of this ruling is based on trespass and the plaintiff has claimed reliefs ranging from a declaration of his title to the suit property to special and general damages for trespass. These are not issues which can be said to have been resolved by the reports filed herein the contents of which are limited only to the issue of the boundaries of the suit property.

7. It follows from the foregoing that even if I was to consider the plaintiff’s application herein outside the provisions of Order 46 of the Civil Procedure Rules, I would still not have been in a position to enter judgment in favour of the plaintiff on the basis of the said reports. The said reports have not only failed to address all the issues in dispute in this suit but the same are also inconclusive even on the issue the subject thereof. The District Land Registrar and District Surveyor, Trans-Mara District were supposed to “**ascertain, determine and plant the exact boundaries**” of the suit property and Plot No. 1 Oloirien Adjudication Section and to confirm whether the defendants have trespassed on the suit property. The District Land Registrar and the District Land Surveyor did not make any reference in their reports to Plot No. 1 Oloirien Adjudication Section. The District Land Registrar also observed in his report that although there was an element of encroachment on the suit property they were unable to establish the trespassers who were either the defendants or their relatives or both because of the tension on the ground. For the same reason, they could not also fix the beacons. The District Surveyor also observed in his report that they could not establish the extent of the encroachment on the suit property. A court of law cannot be called upon adopt these inconclusive findings as its judgment.
8. I am of the opinion that the two reports should remain part of the court record. Either party would be at liberty to tender the same in evidence at the trial for whatever they may be worth. The reports cannot however be adopted as a judgment of the court for the reasons that I have given above. The upshot of the foregoing is that the plaintiff’s application dated 30th April 2014 is not for granting. The same is dismissed accordingly. The costs of the application shall be in the cause.

Delivered, signed and dated at KISII this 31st day of July, 2014.

S. OKONG’O

JUDGE

In the presence of:-

Mr. Ogari h/b for Oguttu for the plaintiff

N/A for the defendants

Mr. Mobisa Court Clerk.

S. OKONG’O

JUDGE