



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO.168 OF 2011

NYAMEINOMAGETO PLAINTIFF

VERSUS

SIMION MAGETO NYAMEINO DEFENDANT

RULING

1. The plaintiff brought this suit against the defendant on 26th August 2011 seeking the following reliefs:
 - i. **A declaration that the land parcel in dispute (sic) does not form part of parcel number Central Kitutu/Mwogeto/383.**
 - ii. **That this honourable court be pleased to set aside the ruling and/or quash the same (sic) as decided by the Nyanza Land Dispute Tribunal.**
 - iii. **To (sic) grant prohibition on the suit property (sic) and order that the defendant desists from interfering with the peaceful enjoyment of the suit property (sic) by the plaintiff.**
 - iv. **That the court be pleased to grant costs of the suit as prayed (sic).**
 - v. **Any other costs (sic) that the court may deem fit to grant.**

The plaintiff's case as pleaded in the plaint dated 26th August 2011 is very difficult to understand or follow just as the reliefs that I have set out above. From what I have managed with a lot of patience to gather from the plaint and other material before me, the defendant had lodged a claim against the plaintiff with Manga-Division Land Disputes Tribunal (hereinafter referred to only as "the tribunal"). The defendant who at all material times was the registered proprietor of LR No. Central Kitutu/Mwogeto/383 ("Plot No. 383") claimed that the plaintiff had trespassed on Plot NO. 383 and sold a portion thereof to a third party on the pretext that the said portion was part and parcel of the plaintiff's former parcel of land known as LR No. Central Kitutu/Mwogeto/384 ("Plot No. 384") which has since been sub-divided into Central Kitutu/Mwogeto/1942, 2170, 2171, 2172, 2173 and 2174). The tribunal heard the plaintiff and the defendant with their witnesses and ruled on 6th October 2009 that the portion of land on which the plaintiff was alleged to have trespassed was part of Plot No. 383 that was owned by the defendant. The plaintiff was dissatisfied with the decision of the tribunal and preferred an appeal against the same to the Nyanza Land Disputes Appeals Committee (hereinafter referred to only as "the appeals committee"). The appeals committee found no merit in the plaintiff's appeal and dismissed the same on 10th July 2011. It is after the said decision of the appeals committee that the plaintiff brought this suit to challenge the tribunal's finding that the plaintiff had trespassed on Plot No. 383.

2. When this suit came up for mention on 17th April 2014 for pre-trial case conference, the advocates

for the parties agreed by consent to have the District Land Registrar and District Surveyor, Nyamira District visit the parcels of land namely LR Nos. Central Kitutu/Mwogeto/383, 384, 1941, 1942, 2170, 2171, 2172, 2173 and 2174 to establish and fix their boundaries on the ground. It was agreed further that the said officers do submit their report in court within 60 days from the date of the order. The District Land Registrar and District Surveyor, Nyamira District submitted their reports dated 18th July 2013 and 10th July 2013 respectively to court on 23rd July 2013 pursuant to the said consent order of 17th April 2013. The two (2) reports were unanimous that the boundaries of land parcel numbers 383 and 384 (1942, 2170, 2171, 2172, 2173 and 2174) were intact and that it was not necessary to fix the same as ordered by the court.

3. Following the filing of these reports in court, the plaintiff filed an application dated 18th February 2014 under Order 46 rule 20 of the Civil Procedure Rules and section 3A, 1A and 1B of the Civil Procedure Act Cap 21 Laws of Kenya seeking an order that judgment be entered for the plaintiff against the defendant in accordance with the findings in the said reports. The plaintiff's application that was supported by the affidavit of the plaintiff sworn on 18th February 2014 was brought on the grounds that the parties herein had agreed to the determination of the dispute between them by the District Land Registrar and District Land Surveyor, Nyamira District and that the two (2) officers have filed their reports in court which reports have not been contested through an appeal. The plaintiff contended that in the circumstances, it would be in the interest of justice if the said reports are adopted as a judgment of the court. The plaintiff's application was opposed by the defendant through grounds of opposition dated 31st May 2014. In the defendant's grounds of opposition, the defendant contended among others that the reports submitted herein by the District Land Registrar and District Land Surveyor, Nyamira District (hereinafter referred to only as "the reports") are not an award capable of adoption as a judgment of the court under order 46 rule 18 of the Civil Procedure Rules.
4. The defendant contended further that the reports have not addressed all the issues raised in this suit and as such cannot be adopted as a judgment of the court. When the plaintiff's application came up for hearing on 2nd April 2014, Miss Nekesa appeared for the plaintiff while Mr. Momanyi appeared for the defendant. The two advocates made oral submissions in support of and in opposition to the application. No cases were however cited by either side in support of their rival contentions. I have considered the plaintiff's application and the grounds of opposition filed by the defendant in opposition thereto. I have also considered the submissions that were made before me by the respective advocates for the parties. In my view the issues that I need to determine in the present application are:
 - i. Whether the reports filed herein by the District Land Registrar and District Surveyor, Nyamira District ("the reports") are capable of being adopted as a judgment of the court under order 46 rule 18 of the Civil Procedure Rules.
 - ii. Whether the said reports can be adopted as a judgment of the court under order 46 rule 20 of the Civil Procedure Rules and sections 3A, 1A and 1B of the Civil Procedure Act, Cap 21 Laws of Kenya.
5. Under order 46 rule 1 of the civil Procedure Rules the court has power to refer any matter in dispute between the parties to arbitration on application by the parties made for that purpose and the court shall fix the time within which the arbitrator shall submit his/her award in court. Subject to the provisions of order 46 rule 14, 15 and 16 of the Civil Procedure Rules, an award made pursuant to a reference under order 46 rule 1 of the Civil Procedure Rules can be adopted as a judgment of the court under order 48 rule 18 of the Civil Procedure Rules. I am in agreement with the submission by the defendant's advocate that the order that was made by the court by consent of the parties on 17th April 2013 was not a reference to arbitration within the meaning of the provisions of order 46 rule 1 of the Civil Procedure Rules. As rightly submitted by Mr. Momanyi, the parties herein did not agree that the issue of the boundaries of the various parcels of land in dispute herein shall be fully and finally determined by the District Land Registrar and District surveyor, Nyamira District as arbitrators. The parties must agree to refer a matter in dispute to arbitration before a reference to arbitration in strict sense of the word can be made by the court.
6. Whereas the parties herein had agreed to have the District Land Registrar and District Surveyor,

- Nyamira District determine the issue as to the boundaries of the said parcels of land, they did not agree that the said officers shall act as arbitrators and that their findings shall conclusively determine the said issue. Having reached a finding that the order made herein on 17th April 2013 was not a reference to arbitration under order 46 rule 1 of the Civil Procedure Rules, it follows that the reports that were submitted herein on 23rd July 2013 cannot be adopted as a judgment of the court under order 46 rule 18 of the Civil Procedure Rules 2010.
7. The plaintiff's application was not brought under order 46 rule 18 of the Civil Procedure Rules 2010. This is a concession that the order made on 17th April 2014 was not a reference to arbitration under order 46 rule 1 of the Civil Procedure Rules and as such the application herein could not be competently lodged under order 46 rule 18 of the Civil Procedure Rules. The application was brought under order 46 rule 20 of the Civil Procedure Rules, 2010 and under the inherent powers of the court. Order 46 rule 20 of the Civil Procedure Rules, 2010 empowers the court to adopt and implement any other appropriate means of dispute resolution of its own motion or at the request of the parties for the attainment of overriding objectives under sections 1A and 1B of the Civil Procedure Act, Cap 21 Laws of Kenya.
 8. Order 46 rule 20 of the Civil Procedure Rules, provides for other modes of dispute resolution apart from arbitration provided for under Order 46 rule 1. These would include mediation, reconciliation and expert determination. The parties herein did not request the court to refer any issue in dispute between them herein to any of the above modes of alternative dispute resolution. The court did not also of its own initiative make such reference. Where an application for such reference is made by the parties, the intention must be clear that the parties want an issue in dispute between them determined through alternative dispute resolution and that intention must be captured by the court in the order making the reference. The same applies to situations where the reference is made of the courts own motion. The plaintiff has not come out clearly in the application before me as to the mode of dispute resolution under which the reference made by the court pursuant to the order made herein on 17th April 2014 would fall. For the foregoing reasons, it is my finding that the reports filed herein on 23rd July 2013 cannot be adopted as a judgment of the court under Order 46 rule 20 of the Civil Procedure Rules.
 9. The plaintiff had invoked in addition to order 46 rule 20 of the Civil Procedure Rules the provisions of sections 3A, 1A and 1B of the Civil Procedure Act, Cap 21 Laws of Kenya. My view is that the provisions of Order 46 of the Civil Procedure Rules that deals with arbitration and other forms of alternative dispute resolution expressly provides for the issues at hand. There is no need therefore to invoke the inherent powers of the court. I am of the view however that even if I was to consider the reports filed herein outside the provisions of order 46 of the Civil Procedure Rules, I would still not be able to adopt the same as a judgment of the court under sections 3A, 1A and 1B of the Civil Procedure Act, Cap 21 Laws of Kenya. As I have stated at the beginning of this ruling, the plaintiff has sought several reliefs in this suit among them the setting aside of the decision of the appeals committee. The reports filed herein dealt only with one issue namely whether the boundaries of the parcels of land in dispute in this suit are in their correct positions on the ground.
 10. The other issues such as whether or not the plaintiff has trespassed on Plot No. 383 and whether the decision of the appeals committee should be set aside remains outstanding. This suit will still have to be heard to determine these issues. This court cannot therefore make a conclusive judgment in this matter as prayed for by the plaintiff on the basis of the said reports. I am in agreement with the defendant's advocate that the reports should remain part of the court record and either party shall be at liberty to rely on the same in support of its case.
 11. The upshot of the foregoing is that the plaintiff's application dated 18th February 2014 has no merit and must fail. The same is dismissed with costs to the defendant.

Delivered, signed and dated at KISII this 15th day of August, 2014.

S. OKONG'O

JUDGE

In the presence of:-

Miss Nekesa h/b for Moerwa for the plaintiff

Mr. Mokuwa h/b for Momanyi for the defendant

Mr. Mobisa Court Clerk.

S. OKONG'O

JUDGE