



REPUBLIC OF KENYA

High Court at Meru

Civil Case 103 of 1998

LAWRENCE KINYUA MWAI.....APPLICANT/PLAINTIFF

VERSUS

NYARIGINU FARMERS CO. LTD....1ST RESPONDENT/DEFENDANT

FLORENCE WAIRIMU.....2ND RESPONDENT/DEFENDANT

R U L I N G

The applicant LAWRENCE KINYUA MWAI through an application dated 10th October, 2012 sought to have an award by the District Surveyor, LAIKIPIA, dated 1st August, 2012 and read to parties on 2nd October, 2012 set aside and an order be made to the Laikipia District Land Surveyor to revisit the scene of the disputed plots and point out the concerned plots Nos. 437-127, 438-126 and 439-125 and confirm the numbers on the grounds.

The grounds on which the application is based on have not been stated on the face of the application nor has the provisions under which the application is based have been stated. The application is nevertheless supported by an affidavit of the applicant. The application is opposed and the respondent has filed a replying affidavit dated 12th October, 2012.

When the application came up for hearing this court heard oral submissions by the applicant and Mr. Kiogora learned Advocate for the respondent. The court has carefully considered the said submissions. It has also considered the pleadings and parties opposing positions.

The applicant contends that this honourable court made an order on 5/6/2012 for the matter in issue to be arbitrated by the Laikipia District Land Surveyor, who was to visit the scene of the disputed plots and point out the old and new plot numbers on the ground. The applicant contends the new plot numbers to be confirmed were Nos. 437/127, 438/126 439/125. He further contends that there were no boundary disputes between the applicant and 2nd defendant/respondent FLORENCE WAIRIMU. He contends the Surveyor's report indicating that the dispute is concerning the boundaries and the ownership on the ground is completely wrong and that the report should be set aside. The applicant in his summing up prayed that the award be set aside and matter be referred to the same Surveyor to revisit the scene of the plots and point out the old and new plot numbers of the disputed land.

The respondent on the other hand filed a replying affidavit opposing the applicant's application on the grounds that the applicant is a vexatious litigant and that the Surveyor had carried out his duties properly. The respondent contended that the Surveyor ought to have been served with the application.

The court's order referring the matter to arbitration states briefly as follows:-

“In the interest of justice, I direct that the Nanyuki District Surveyor do proceed to Nyariginu Farmers Co. Ltd and point out to the parties concerned the boundaries of plot Nos. 122, 123, 124, 125, 126, and 127 and indicate the owners of the respective plots and who is in actual occupation of each respective plot. The Surveyor should point out and indicate the road of access. OCS Nanyuki Police Station to provide security. The applicant Mr. Lawrence Kinyua Mwai to meet all necessary charges/expenses. The District surveyor to file his report within 60 days from today. Matter be mentioned on 2/10/2012 to receive the report.”

The applicant in his application did not state grounds for seeking to set aside the award. The grounds for seeking to set aside award are provided for under Order 46 Rule 1(1), (2) and (3) Civil procedure Rules which provides:-

- 1. Where in any suit all the parties interested who are not under disability agree that any matter in difference between them in such suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for an order of reference.***
- 2. The arbitrator shall be appointed in such manner as may be agreed upon between the parties.***
- 3. (1) The court shall, by order, refer to the arbitrator the matter in difference which he is required to determine, and shall fix such time as it thinks reasonable for the making of the award, and shall specify such time in the order.”***

In view of the facts that none of the grounds set out under Order 46 Rule 16 of the Civil Procedure Rules have not been cited the applicant was not obliged to serve the arbitrator.

Having carefully gone through the award and having considered the order dated 5th June, 2012 it is clear that the Surveyor did not fully comply with the court's order which required him amongst other things to point to the parties the boundaries of the respective plots. In his report there is no indication as to whether or not the boundaries were pointed to the parties. The Surveyor did not attach any sketch map indicating the road of access which he pointed out to the parties. Indeed there is no indication of him having pointed to the parties road of access as required of him.

Under Order 46 rule 15(1) and (2) of the Civil procedure Rules it is provided:

“15. (1) The court may remit an award, or any other matter referred to arbitration, for reconsideration by the same arbitrator or umpire upon such terms as it thinks fit—

(a) where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration, unless such matter can be separated without affecting the determination of the matters referred;

(b) where the award is so indefinite as to be incapable of taking effect; or

(c) where an objection to the legality of the award is apparent on the face of it.

(2) The order remitting the award shall state the time within which it shall be reconsidered, and rule 8 shall apply to such reconsideration as it applies to an award.”

Having pointed out that the arbitrator left undetermined the above-mentioned matters referred to him, I find that this is a suitable matter for remittance of the award to same arbitrator for reconsideration of the issues which were not determined.

I have noted that the applicant did not fully comply with the court's order in that he failed to meet all necessary charges/expenses as per the award by the Laikipia District Surveyor.

In the circumstances the application succeeds on the ground that the Surveyor left undetermined matters as pointed out in this ruling and as per court's order. The matter is accordingly referred to Laikipia District Surveyor to fully comply with court's order by pointing out to the parties concerned the boundaries of plots Nos. 122, 123, 124, 125, 126 and 127. The Surveyor should further point out to the parties and indicate the road of access and if need be attach to his report a sketch plan of the respective plots.

The application has not succeeded on applicant's grounds but on failure of the Surveyor to determine all matters as per court's order. The upshot is that the application is allowed in terms of this court's order. The award to be reconsidered within 30 days but before the arbitrator reconsiders the matter the applicant has to meet his obligation by paying charges/expenses which he has declined to pay to the Surveyors. The reconsideration charges to be shared by both parties.

No order as to costs in respective of this application as the failure to determine all matters were due to fault of the Surveyor.

DATED, SIGNED AND DELIVERED, IN MERU THIS 19TH DAY OF FEBRUARY, 2013.

J. A. MAKAU
JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

1. Applicants – present in person
2. Mr.M. Kariuki h/b for Ndorongo for the 3rd respondent.

J. A. MAKAU
JUDGE