



REPUBLIC OF KENYA

High Court at Eldoret

Environmental & Land Case 563 of 2012

DAVID K. RONO & ANOTHER.....PLAINTIFF

VS

ANDREW KEMEI KIMELI.....DEFENDANT

(Application seeking to have report of surveyor set aside; application made on grounds that the report was filed out of time and that it does not address the issues; alternative prayer to have a new surveyor directed to the site; whether report on record is a report capable of being set aside; whether under the circumstances a new surveyor ought to be appointed by court; report not an arbitration award; no provision for setting the same aside; under the circumstances not necessary to have new report; application dismissed)

RULING

The application before me is the application dated 22 May 2012 filed by the defendant. It is an application seeking the following orders :-

1. *That the Nandi (County) District Lands Registrar's report filed in Court and signed by P.K. Sibuchi be set-aside and the matter be fixed for hearing on merits.*
2. *That in the alternative and without prejudice to prayer (a) above, The District Lands Registrar be ordered to re-establish the boundary dispute to file a fresh report by another independent surveyor (sic).*

The application is founded on the grounds inter alia that the report was filed out of time, that the report lacks the statement of both parties to this suit, that the report is incompetent and does not address the issues in this suit.

The application is supported by the affidavit of the defendant and is opposed by the plaintiffs.

The genesis of this application has its roots in the cause of action to this suit. In his suit the plaintiffs have pleaded that they, alongside the defendant were members of Senetwo Farmers Cooperative Society Ltd. As members of the Society they came to own land that devolved from the Society. The plaintiffs were granted the land registered as Songhor/ Kabutei Block 1/444 (Senetwo) measuring 1.123 Ha whereas the defendant was granted the land parcel Songhor/Kabutei Block 1/ 393 (Senetwo) measuring 4.209 Ha. It is the plaintiffs' case that the defendant's title refers to the plaintiffs' land and they have sought that the defendant's title be called forth and be cancelled. They have also asked for a permanent injunction to restrain the defendant from their suit land.

There is another suit which had been filed earlier that the plaintiffs have acknowledged in their plaint. This is Kapsabet PMCC No. 120 of 2009. In the said case the defendant herein sued the plaintiffs and

claimed that the plaintiffs on 18 February 2007 moved into 2 acres of his land parcel Songhor/Kabutei Block 1 (Senetwo) 393. In the said suit the plaintiff (herein defendant) sought orders of permanent injunction against the defendants (plaintiffs herein).

The defendant upon being served entered appearance and filed a Defence and Counterclaim. In the defence the defendant has denied the claims of the plaintiffs and has inter alia averred that there exists a boundary dispute between the two parcels of land which has never been resolved. In his counterclaim, he has pleaded that the plaintiffs have encroached onto his land parcel Songhor/ Kabutei Block 1/444 (Senetwo). He has pleaded that the matter be referred for an arbitration for determination of the boundary separating the parcels of land belonging to the parties.

The plaintiffs alongside the Plaintiff also filed an application seeking an interlocutory injunction to restrain the defendant from dealing with the land parcel Songhor/Kabutei Block 1/ 444 (Senetwo) pending the hearing and determination of this suit. Interim orders were granted on 4 November 2009 by Mwilu J (as she then was). The application was never canvassed inter partes and instead the parties on 5 May 2010 recorded the following consent which I think I need to set out in full.

“By consent

- 1. The District Surveyor Nandi District and the District Land Registrar Nandi District do make a visit to the disputed parcels herein namely Songhor/Kabutei Block I (Senetwo) 393 and Songhor/ Kabutei Block I (Senetwo) 444 so as to determine the location and ownership of the two parcels.*
- 2. Their Land reports be filed within the next 60 days from the filing and service of this order.*
- 3. Both the District surveyor and the district Land officer Nandi shall if need be enlist the services of the nearest police station so as to facilitate the exercise.*
- 4. The parties shall meet the costs of the above exercise.*
- 5. Each party be at liberty to apply.*
- 6. Mention on 5.5.10.”*

The consent is signed by M/s Chemitei & Co advocates for the plaintiff and Kitur & Co Advocates for the defendant.

The consent is dated 5.5.10 and was recorded in the court file on the same day. There was no mention on 5.5.10 and the matter went quiet until 1.2.2010 when counsels sought a further mention date which was given for 26.1.11. There were a couple of other mentions, some before the Deputy Registrar who was following up on the report of the surveyor. On the 16 August 2011, counsel for the plaintiff in the absence of counsel for the defendant, appeared before the Deputy Registrar who confirmed that the surveyor's report had been filed. The matter then came up before the Judges a couple more times for mention (probably to have the report adopted) but without anything significant being addressed on the surveyor's report, until this application was filed.

The same was canvassed before me on 17 April 2013. Mr. Arap Mitei counsel holding brief for Mr. Kitur for the applicant urged me to allow the application and relied entirely on the grounds on the face of the application and the replying affidavit. He urged me to set aside the surveyor's report and have the matter proceed for hearing. In the alternative he asked that the lands registrar re-establish the boundaries through another surveyor as the report was filed 2 years after its due date.

Mr. A.T. Kiboi on the other hand urged me to dismiss the application. He stated that the only challenge to the report of the surveyor was that it was filed out of time but that there was no challenge on the substance of the report. He pointed me to the provisions of Order 50 Rule 2 of the Civil Procedure Act and argued that the court has liberty to extend time. He also relied upon Article 159 (2) of the Constitution of Kenya 2010 and stated that procedural technicalities ought not to be overemphasized. On the application for the alternative prayer, Mr. Kiboi was of the view that this was unnecessary as it would simply be a duplication of the same exercise that had been conducted. He prayed that the surveyor's report be adopted out of time.

I have considered the application and the submissions of the parties. It is apparent from the outset that the parties herein considered their dispute to be a boundary dispute and that is why they sought the involvement of the surveyor. That is certainly the reason why in the consent of 5.5.10, the parties asked that the District Surveyor Nandi District and the District Land Registrar Nandi District do visit the two parcels of land and determine their location and boundaries. The consent provided for the report to be filed within 60 days from "the filing and service of this order" with each party being "at liberty to apply."

I have seen the surveyor's report which is on record. The same was filed in court on 23 January 2012. I must say that the report is difficult to comprehend although I can see that in his conclusion, the surveyor's opinion is that the location of the land parcel No. 444 is not where it is presented, or thought to be, by the defendant. It would appear that it is not a report which is in favour of the defendant/applicant. The defendant now wants the report "Set aside and the matter fixed for hearing on merits" or in the alternative "the District lands registrar to be ordered to re-establish the boundary dispute and have a fresh report filed by another surveyor."

I think the parties have miscomprehended their own consent of 5.5.2010. The parties only wanted the Surveyor to determine the location of the boundaries and ownership of the two parcels. The reference to the surveyor was not a reference in the manner of an arbitration as provided for under Order 46 of the Civil Procedure Rules, 2010 (formerly under Order XLV of the immediate former Civil Procedure Rules.) If the parties meant that the same should be an arbitration, then they ought to have made that clear, which was not. If the same was being referred to the surveyor/Land Registrar as an arbitration, then the decision of the Land Registrar and District Surveyor would have been an award capable of being entered as a judgement of the court and the same by dint of the provisions of Order 46 rule 8 would have had to be filed within the stipulated time or else it would be susceptible to being set aside for the reason that it was filed out of time but with the discretion of court retained to extend time. This is probably the reason for the "setting aside" prayer in the current application as the report was filed out of the 60 days contemplated by the parties. However, given that the reference was not an arbitration then it matters little that it was filed out of time.

The reference to the District Surveyor and District land Registrar of this dispute was at best a mediation or a report that would assist the court when deliberating on the matter between the two parties. It was never meant to be binding unless the parties later agreed to adopt it as a judgment of the court. The fact that it was filed late or that it is fairly difficult to interpret therefore means for nothing. Since it was not an arbitration and there was no consent of the parties to have the report adopted as an order or judgment of the court, this court was never going to adopt it as its judgment and this court cannot therefore "set it aside" as prayed in the present application. Neither is there any substance in the request by counsel for the respondent to have time enlarged so that the report may be deemed to have been filed within time. Order 50 rule 6 quoted by counsel for the respondent allows court the discretion to enlarge time, but as I have stated above, the same is not relevant.

This court can of course on its own motion, even without prompting, order a re-survey of the boundaries and for a new report to be filed. However, unless the parties agree to have the same matter re-referred and the report be adopted as the judgment of court, it would in my view be an unnecessary exercise as we may end up in a situation in which we now find ourselves.

I think the best option, given the history of this matter, is to have each party present its witnesses and have the matter heard on merits. The parties will be free to call witnesses including the freedom to call the person who prepared the report in question. My direction therefore is to have this matter listed for hearing.

As to the application, I have stated that I cannot grant the first prayer as the report is not one which is capable of being set-aside. On the alternative prayer, I have stated that it would be unnecessary, unless the parties agree, for me to re-direct the surveyor back to the ground for a fresh report. I am unable to grant any of the prayers sought and therefore dismiss the application. The costs thereof shall be costs in the cause.

It is so ordered.

DATED and DELIVERED THIS 30TH DAY OF APRIL 2013

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT & LAND COURT AT ELDORET

Delivered in the presence of :-

Miss S.W. Karuga advocate holding brief for Mr. A.T. Kiboi of M/s Chemitei & Company Advocates for the plaintiffs/respondents.

No appearance on the part of M/s S.K. Kitur & Co. Advocates for the defendant/applicant.