REPUBLIC OF KENYA

High Court at Nakuru

Miscellaneous Civil Application 274 of 2012

FRANCIS WANGONGO TITUS GITUIKU.....1ST APPLICANT

DANIEL KINUTHIA WAINAINA.....2ND APPLICANT

VERSUS

FRANCIS MACHARIA.....1ST RESPONDENT

DISTRICT LAND REGISTRAR.....2ND RESPONDENT

RULING

The applicants brought the notice of motion dated 3.8.2012 praying that this court be pleased to order the 2nd respondent to forthwith cause to be defined by survey, the precise position of the boundary between land parcels No. NYANDARUA/SILANGA/79, 80, and 86**.**

The application is premised on the grounds that the applicants are the administrators of the estate of Titus Wainaina (deceased) which is due for dissolution; that it has become impossible to distribute one of the estates of the deceased, namely L.R NO. NYANDARUA/SILANGA/79 because the boundaries thereto are not precisely defined; that their efforts to get the boundaries defined and fixed by way of survey has been strenuously opposed by the 1st respondent who owing to distortion of the boundaries enjoys a larger parcel of land; and that the order sought is meant to enable the precise and accurate distribution of L.R NO. NYANDARUA/SILANGA/79.

The application is supported by the affidavit of the applicants sworn on 3.8.2012. In that affidavit the applicants have averred that the boundary dispute herein dates back to 1965; that the various attempts to resolve the dispute, both by the administrators and the deceased) have all been in vain; that the 1st respondent has been an impediment in resolving the boundary (as he continues to enjoy a larger parcel of land owing to distortion of the boundary); that the 1st respondent's behaviour is illegal and detrimental to the laws of the land; that the order sought is fair and equitable; and that the order sought is meant to assist the applicants deliver the estate to its rightful heirs in measurements that are precisely defined.

The application is opposed by the 1st respondent who through the affidavit sworn on 27. 8.2012 has deposed that the application is bad in law, incompetent, fatally defective and an abuse of the process of the court; that the application is lacking in merit and based on speculation that his boundary is not properly positioned or he is enjoying a bigger parcel of land than he was allocated. The respondent has also deposed that the application is an after thought, and that coming more than 30 years after the dispute was raised and resolved, the claim is statute barred.

Counsels for the respective parties filed submissions which I have read and considered. From the pleadings and the submissions the questions for determination are:-

1. Whether the application is fatally defective for want of a suit on which it can hinge?

2. Whether a dispute for fixing of a boundary under the Registered Land Act, Chapter 300 laws of Kenya is subject of limitation of time under the Limitation of Actions Act, Chapter 22 laws of Kenya?

3. Whether issuance of the order sought will affect persons who are not parties to the application; and if so whether the court should decline to grant the order for the said none joinder of essential party to the application.

4. Whether report from surveyor is necessary, at this stage, to show encroachment?

5.What is the order as to costs.

With regard to the 1st question, Section 19 of the Civil Procedure Act provides:-

"Every suit shall be instituted in such a manner as may be prescribed by rules.".

Pursuant to this legal edit, Order 3 of the Civil Procedure Rules provides:-

"Every suit shall be instituted by presenting a plaint to the court or in such other manner as may be prescribed."

Other than a plaint the other recognized manner of instituting a suit, under the Civil Procedure Rules, is by Originating Summons, under Order 37.

It is submitted, on behalf of the 1st respondent, that the application herein is bad in law because it was instituted by notice of motion, yet a notice of motion is not one of the recognized means of instituting a suit; that the only recognized means of instituting civil actions is by plaint, originating summons or petition. Counsel for respondent cited a number of authorities to support his contention, including **Theuri** Vs. **Law Society of Kenya** (1988) KLR 334 where the Court of Appeal held:-

"The grant of an interlocutory relief is an interim remedy and is normally sought during the pendancy of substantive suit. The law of this country is not deficient in providing for the mode of which a civil suit may be commenced... Order 6 rule 1 provides in mandatory terms how such action may be brought....Another method of presented a civil action provided by rules, is by originating summons under order 36 in certain specified cases. The ambit of this order is not as wide as that required for a plaint.....it is clear to me that the method laid down by law for commencing such action is by plaint. If he did not bring a plaint, he could not have set on foot a competent action which he could base the claim for grant of an interim relief.... I find that the petitioner having failed to commence the suit as provided by Civil Procedure Rules the suit is incompetent and has no case with probability of success." (emphassis mine).

Although the applicants' have not controverted the contention that the application is fatally defective for none compliance with mandatory provisions of the law, they maintain that the none compliance with the law herein has not occasioned any prejudice to the respondent.

Indeed, as submitted by counsel for 1st respondent, a notice of motion is not one of the methods recognized in law for commencement of a suit. However, having so observed, I hasten to observe that Article 159(2) (d) of the Constitution as read with Section 1A and 3A of the Civil Procedure Act enjoins this court to administer justice to all without undue regard to procedural technicalities.

Without wilting down the need for compliance with rules of procedure, and contrary to the view expressed in the authorities cited by counsel for the respondent, in the peculiar circumstances of this application, in which the prayer sought is a stand alone prayer, I find that the court can, in appropriate circumstances, grant the orders sought without any prejudice to the parties.

Turning to the second and third question, it is contended, on behalf of the respondent, that the dispute regarding the boundary herein having arisen in 1965 (more than 30 years) it is statute barred; a contention which counsel for applicant submits does not lie as the trespass by the respondent onto the deceased's estate was a continous act of trespass.

Section 21(2) of the Registered Land Act (now repealed) provides:-

"Where any uncertainty or dispute arises as to the position of any boundary, the Registrar, on the application of any interested party, shall, upon such evidence as the Registrar considers relevant, determine and indicate the position of the uncertainty or disputed boundary."

Subsection 4 thereof provides:-

"**No court shall entertain any action or proceedings relating to a dispute as to boundaries of registered land unless the boundaries have been determined as provided in this section".**

The foregoing provisions of the law are replicated in Section 18 and 19 of the Land Registration Act, 2012, on which this application is predicated.

Section 7 of the Limitation of Actions Act, on which the 1st respondent's contention is based provides:-

"An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."

From the foregoing provisions of the law, it is clear that whereas section 7 of the Limitation of Actions Act prohibits institution of a suit to recover land 12 years after the cause of action accrued to the claimant or to some other person through whom he claims; Section 21 of the Registered Land Act or Section 18 and 19 of the Land Registration Act, 2012 do not prescribe the time within which a dispute in respect to boundaries of registered land ought to be brought to the attention of the Registrar. Nevertheless, the application herein being based on equity, the deceased or the applicants ought to have moved the Registrar for resolution of the dispute herein immediately after the dispute arose-delay defeats equity!

Even though the applicants have averred that the 1st respondent has been an impediment to their attempts to get the boundary dispute resolved by way of survey, the evidence tendered shows that they only began asserting their right a few years ago. The dispute over the boundary herein, admittedly, began in 1965. The applicants have not provided any reasonable explanation why no steps were taken to resolve the the dispute since 1965. This failure to give any reasonable explanation for the inordinate delay in seeking solution to the boundary dispute coupled with the failure by the applicants to provide any evidence to prove that the 1st respondent has distorted the boundary make their claim incredible.

As regards the third question, there is no doubt that if the the order sought is granted it is going to affect the proprietor of parcel No. NYANDARUA/SILANGA/80 who is not a party to this application. Issuing such an order, in my view, would be in contravention of the rules nutural justice. See **Pashito Holdings & another** v **Ndugu & 2 others** KLR (E & L) 1 where the Court of Appeal held:-

"The gravemen of the respondent's suit was that the Commissioner had no right to alienate public land to any person for any user other than that for which it had been reserved. The respondents could not have established a *prima facie* case with probability of success which is an essential legal requirement in order to be entitled to an interlocutory injunction unless the Commissioner was a party to the proceedings."

Clearly the order herein sought, if issued will affect the legal rights of the proprietor of parcel No. NYANDARUA/SILANGA/80 without being afforded an opportunity to be heard. Such a course would be unlawful and in breach of the rules of natural justice.

The foregoing findings, on issues of law and fact, suffice, to determine this application but before I conclude this ruling I wish to point out that the applicants have failed to present evidence capable of proving, on balance of probabilities, that the 1st respondent has encroached on the estate of the deceased or that the acrage of the deceased's estate has reduced owing to the alleged distortion of the boundary.

For the foregoing reason the application has no merit and is dismissed with costs.

Dated, signed and delivered on this 24TH day of May 2013.

L N WAITHAKA
JUDGE.

PRESENT
Mr Maina for applicant
N/A for Respondents
Stephen Mwangi : Court Clerk

L N WAITHAKA
JUDGE