



Mapi v Land Registrar Kajiado North & another (Environment and Land Miscellaneous Application 87 of 2019) [2022] KEELC 3475 (KLR) (17 May 2022) (Judgment)

Neutral citation: [2022] KEELC 3475 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 87 OF 2019
CA OCHIENG, J
MAY 17, 2022**

BETWEEN

TONKEI OLE MAPI APPLICANT

AND

LAND REGISTRAR KAJIADO NORTH 1ST RESPONDENT

EDWARD NDICHU WANGONGU 2ND RESPONDENT

JUDGMENT

Introduction

1. Vide an Originating Summons dated September 23, 2019, the Applicant moved the court for the following orders;
 - a) That the restriction placed on the parcel of land known as Ngong/Ngong/14384 be removed.
 - b) That the boundary report dated May 27, 2019 be adopted as the boundary between Ngong/Ngong/14384 and Ngong/Ngong/5257.
 - c) That costs of the Application be borne by the Respondent.
2. The Application was based on grounds on the face of it and supported by the affidavit of one TOnkei Ole Mapi, the Applicant herein. The 2nd Respondent raised a Preliminary Objection dated 12th November 2019 in which they sought to have the Application struck out for being res judicata as it related to the Nairobi HCCC No.4469 of 1992 whose judgment was delivered on March 11, 2005. They further filed a Replying Affidavit dated September 14, 2020. The 1st Respondent filed Grounds of Opposition dated 8th November 2019 in which they opposed the Application on various grounds.



The Applicant's case

3. The Applicant passed on in the year 2020 and his brother currently represents his estate. In his supporting affidavit, he claimed to be the registered proprietor of the land known as Ngong/Ngong/14384 measuring about 3.05Ha (*hereinafter known as the 'suit property'*). He confirmed the existence of a long-standing dispute, with the 1st Respondent placing a restriction on the parcel since 1995. He averred that the 2nd Respondent had started fencing off his land and his fence encroached on the suit property. He claimed to have reported the same to the area Chief and the Police, which culminated in the Land Registrar, Kajiado North undertaking a visit to the disputed site and determining the boundary between Ngong/Ngong/14384 and Ngong/Ngong/5257. He further prepared a report dated the May 27, 2019 to that effect. His contention was that the 1st Respondent failed to lift the restriction even after the aforementioned report yet he was clothed with jurisdiction to do so. He claimed to be justified in seeking the lifting of the restriction by dint of Section 78(2) of the [Land Registration Act](#), being the registered proprietor of the suit property. He averred that there was no relationship between the 2nd Respondent and himself at whose behest the restriction was lodged.
4. In his submissions, the Applicant reiterated that the restriction ought to be removed since there is no dispute over the subject property. He relied on a similar case of Joyce Waithera Mwangi v Thika Land Registrar where the court held that there was no need for a restriction to subsist forever. He further argued that the boundary report dated May 27, 2019 ought to be adopted to enable the Land Registrar take necessary steps to lift the restriction and grant him quiet possession of his property. As to the matter being *res judicata* to HCCC No.4469 of 1992, he argued that the former suit dealt with the issue of ownership to which he conceded to have lost to the 2nd Respondent but the instant Application focuses on lifting of a restriction and boundaries.

The Respondents' case

5. The 1st Respondent only filed grounds of opposition in which he claimed to have already exercised its mandate in accordance with Section 18 of the [Land Registration Act](#) as per the report dated 29th May, 2019. It was his contention that the report cannot be implemented while the Decree emanating from Nairobi HCCC No.4469 of 1992 has not been set aside or appealed against. He argued that the Applicant ought to have filed an Appeal against the decision in HCCC No. 4469 of 1992. He stated that his actions were in compliance with a court order issued by a competent court.
6. The 2nd Respondent on his part filed a Notice of Preliminary Objection to the Application dated September 23, 2019 and a Replying Affidavit sworn by Edward Wangongu Ndichu in response to the Application dated 4th September 2020. His position remained that the Applicant's claim was already determined by a court of competent jurisdiction and that the subdivision that was made only touched on property number Ngong/Ngong/5257 and not Ngong/Ngong/14384 as alleged by the Applicant.
7. In his submissions which was in support of the Preliminary Objection, the 2nd Respondent reiterated that the Application was *res judicata* and cited provisions of Section 7 of the Civil Procedures Act. He argued that the permanent injunction against the Appellant still applied as per the court orders. He proceeded to rely on various authorities which I deem relevant.

Analysis and Determination

8. Upon consideration of the instant Originating Summons, respective affidavits, annexures and rivalling submissions, the following are the issues for the determination: Whether this Application is *res judicata*



to Nairobi HCCC No.4469 of 1992? Whether the restriction on the suit property ought to be lifted? Whether the Originating Summons is merited? Who should bear the costs of this suit?

Whether this Application is res judicata to Nairobi HCCC No. 4469 of 1992?

9. The Respondents insists this Originating Summons is res judicata to Nairobi HCCC No. 4469 of 1992 that had already determined the issues in dispute herein, which fact is disputed by the Applicant.

10. The doctrine of res judicata is set out in the *Civil Procedure Act* at Section 7 which provides as follows:

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

11. The *Civil Procedure Act* provides explanations with respect to the application of the *res judicata* rule. Explanations 1-6 states thus:

"Explanation. —(1) The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."

12. In the case of *Uburu Highway Development Ltd V Central Bank & Others*, CA No. 36 of 1996 the Court of Appeal stated that: -

"In order to rely on the defence of res judicata, there must be a previous suit in which the matter was in issue; the parties must have been the same or litigating under the same title; a competent court must have heard the matter in issue and the issue is raised once again in the fresh suit."

13. See also the decision in *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, [2017] eKLR).

From the legal provisions cited above, it is pertinent that for a party to rely on the doctrine of *res judicata*, the decisions must emanate from the same court with competent jurisdiction, parties must have litigated under the same title with issues therein heard and determined. I note the court that heard and determined Nairobi HCCC No. 4469 of 1992 was a court of competent jurisdiction. On perusal of the impugned Judgment which was delivered on 11th March 2005, I note the parties in the



former suit were Tonkei Ole Mapi Vs Simon Waweru Kariuki and Charles Wambui Kimani. The 2nd Respondent herein was not a party to the said suit. Further, the Plaintiff therein, now the Applicant, was not present during the hearing of the former suit to present his evidence. The court only relied on the evidence of the Defendants and proceeded to give its Judgment. As for the matter in issue, the instant suit seeks to lift the restriction on the suit property and adopt the 1st Respondent's report on a boundary dispute while in the former suit, there was a determination of ownership of land as well as granting of a permanent injunction against the Applicant herein. Based on the facts as presented while relying on the legal provisions cited above as well as associating myself with the quoted decisions, I find that this suit does not satisfy the all the tenets for *res judicata* and will proceed to determine it on its merits.

As to whether the restriction on the suit property ought to be lifted?

14. On perusal of the Certificate of official Search in respect to the suit property, at the encumbrance section, it indicates as follows: 'No dealing to be Registered until Parcel No.1395 Encroached on by the parcels 1590 & 1591 (original Parcel 1107) Has Been Re-established on the ground.*'
15. On registration and removal of restrictions, Section 76 of the [Land Registration Act](#) provides that:
 - (1) For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, and after directing such inquiries to be made and notices to be served and hearing such persons as the Registrar considers fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge. (2) A restriction may be expressed to endure - (a) for a particular period; (b) until the occurrence of a particular event; or (c) until a further order is made, (2) and may prohibit or restrict all dealings or only or the dealings that do not comply with specified conditions, and the restriction shall be registered in the appropriate register."
16. While Section 78(1) of the [Land Registration Act](#) provides that:

"The Registrar may, at any time and on application by any person interested or at the Registrar's own motion, and after giving the parties affected by the restriction an opportunity of being heard, order that the removal or variation of a restriction. (2) Upon the application of a proprietor affected by a restriction, and upon notice to the Registrar, the court may order a restriction to be removed, varied, or other orders as it deems fit, and may make an order as to costs."
17. I note the restriction on the suit land was registered on 2nd March 1995 and is still subsisting todate. The Applicant herein has sought for the Land Registrar Kajiado North to remove the said restriction but he has declined to do so. It is my considered view that the 1st Respondent is statute bound to remove the restriction and should give reasons for his failure to do so. I find that the 1st Respondent's actions of declining to remove the restriction over the suit property is prejudicial to the Applicant and is contrary to the provisions of the [Fair Administrative Action Act](#). Further, except for filing Grounds of Opposition, the 1st Respondent did not provide any plausible reasons why the restriction should subsist. From the record, no reason has been given by any party as to why the restriction remains in place or why the boundaries have not been established to date.



18. In the case of *David Macharia Kinyuru Vs District Land Registrar, Naivasha & Another, Nakuru* ELC Misc. Appl.No.331 of 2016, the Court held that:-

"...the purpose of a restriction is aimed essentially at stemming fraud or improper dealings over land. The Land Registrar may also place a restriction where there is other sufficient cause. Restrictions are to endure for a particular time or until the occurrence of an event, or the making of a further order. It is not the purpose of this section of the law to have restrictions remain indefinitely. The reasoning is that a restriction should only hold a property in abeyance as the underlying issue leading to the restriction is being resolved; since restriction by itself does not solve a dispute...."

19. In relying on the facts as presented and the legal provisions I have cited as well as associating myself with the quoted decision, there being no evidence of any attempted fraud by any of the parties, this court holds the view that the restriction has been overtaken by events and directs that the same be lifted forthwith.

As to whether the Originating Summons is merited?

20. The Applicant sought for various orders in the instant Originating Summons. This Court has already dealt with the issue of removal of the restriction. As for the adoption of the boundary report dated May 27, 2019 as between Ngong/Ngong/14384 and Ngong/Ngong/5257. The Respondents have vehemently opposed this prayer and insist the issue of boundaries was dealt with in the Nairobi HCCC No.4469 of 1992. For the avoidance of doubt, I wish to reproduce the final orders in the said judgement:

- a) Suit No. HCCC No. 4469 of 1992 is hereby dismissed with costs to the Defendants.
- b) Suit No. HCCC No. 5484 of 1992 is hereby allowed with costs to the Plaintiff and Simon Waweru Kariuki hereby declared the exclusive owner of land parcel Title No. Ngong/Ngong/5257.
- c) Suit No. HCCC No. 5485 of 1992 is hereby allowed with costs to the Plaintiff and Charles Wambu Kimani declared the exclusive owner of land parcel Title No. Ngong/Ngong/9510 a subdivision from the original parcel of land Title No. Ngong/Ngong/5258.
- d) A permanent injunction do issue against Tonkei Ole Mapi restraining the said Tonkei Ole Mapi, by himself, his servants, or agents or anyone claiming under or in his name from trespassing, entering or in any other way interfering with the said parcels of land Nos Ngong/Ngong/5257 and Ngong/Ngong/9510.
- e) Interest on costs shall be at Court rates.

21. I note in the proceedings in respect to the boundary dispute between land parcel numbers Ngong/Ngong/5257 and Ngong/Ngong/14384 dated the 14th May, 2019, the Applicant including the 1st and 2nd Respondents participated therein. I note the 2nd Respondent is captured in the report as stating that the determination of the boundary was done in 2016 but they are yet to receive the report. In absence of the report, I find that there was no determination of the boundary between the two parcels of land. Further, since the 2nd Respondent participated in the boundary dispute proceedings after the impugned Judgment of the High Court which report he seeks to block its adoption, I am of the view that he is not being candid. I note that even in the restriction that was registered on the suit property, it indicated that there was need for the boundaries to be reestablished. Be that as it may, on cursory glance at the High Court judgement, I note it did not deal with the boundary dispute as claimed



by the Respondents. The fulcrum of the dispute therein revolved around trespass and ownership of the respective parcels of land which the court proceeded to uphold. It is trite that it is only the Land Registrar that is mandated to determine a boundary dispute and the court is estopped from doing so, until the Land Registrar has undertaken his mandate.

22. Section 18 and 19 of the [Land Registration Act](#) provides that:

(1) "Except where, in accordance with Section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel. (2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section. (3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary: Provided that where all the boundaries are defined under section 19(3), the determination of the position of any uncertain boundary shall be done as stipulated in the [Survey Act](#), (Cap. 299).

19. If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.

(1) (2) The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.

(3) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section."

23. In this instance, the Land Registrar exercised his mandate and proceeded to determine a boundary between Ngong/Ngong/14384 and Ngong/ Ngong/5257 and prepared a report dated the 27th May, 2019 to that effect. However, he intimated his inability to adopt the said report based on the orders granted in Nairobi HCCC No. 4469 of 1992 consolidated with HCCC No. 5484 of 1992 and HCCC No. 5485 of 1992. Having had a chance to peruse the judgement therefrom and noting in the final orders there was no determination of the boundary between the aforementioned parcels of land noting that the 2nd Respondent never sought to quash the said proceedings including the findings of the Land Registrar, while associating myself with the decision I have cited above, I am of the view that the said Decree in the High Court matter cannot block the adoption of the report dated the 27th May 2019. In the circumstance, I have no recourse but to direct that the boundary report dated 27th May 2019 be adopted as the boundary between Ngong/Ngong/14384 and Ngong/Ngong/5257.

24. It is against the foregoing that I find the instant Originating Summons merited and will allow it. I proceed to make the following final orders:



- a) That the restriction placed on the parcel of land known as Ngong/Ngong/14384 be removed forthwith.
- b) That the boundary report dated 27th May 2019 be and is hereby adopted as the boundary between Ngong/Ngong/14384 and Ngong/Ngong/5257.
- c) The costs of the application is awarded to the Applicant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 17TH DAY OF MAY, 2022

CHRISTINE OCHIENG

JUDGE

