



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

Civil Case 28 of 2011

STEPHEN MBITHI MANTHI.....PLAINTIFF

VERSUS

1. MARY MBILI ISIKA

2. MUINDI ISIKA

3. KIOKO ISIKA..... DEFENDANTS

RULING

1. The Application before the court is one dated **10.5.2011**. It is an unusual one. It seeks two main prayers.

a. First that the District Surveyor, Machakos do visit parcel **Nos. Mbiuni/Ulaani/147** and **Mbiuni/Ulaani/148** and restore the common boundary thereof.

b. Second, that the main suit be determined in terms of the Surveyor's decision.

2. The Application is expressed to be brought under Order 51, Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The Applicant might as well have added Sections 1A and IB of the Civil Procedure Act.

3. According to the pleadings filed in this case, this is a straightforward boundary dispute. The Plaintiff claims that the defendants have encroached on his land which borders theirs. The Defendants deny the claim and insist that they have always been on their side of the boundary. It follows that the evidence of a credible third party witness to establish the proper boundary between the two parcels of land to wit land parcel Nos. Mbiuni/Ulaani/147 and Mbiuni/Ulaani/148 will be crucial to resolving the dispute between the parties.

4. However, it appears that the relationships between the parties, who are all related, is so sour that they cannot even agree to summon a surveyor by consent; hence the present Application.

5. When the Application came up for hearing on **23.11.2011**, the Defendants all but conceded that a surveyor's visit and report would be helpful to resolve the issues. Their only peeve was that the application had been made in the first place. Their position is that they have no problem with the survey being done and had so agreed through the local chief. Indeed, they represented in court that they had given the Plaintiff a letter to take to the surveyor to facilitate the process. They are only dismayed that the Plaintiff chose to file the present Application instead.

6. In the circumstances, it would appear that the just and expedient course of action is for the court to facilitate the survey so that a report can be generated which will be used to resolve the dispute between the parties. The role of the court under both the overriding principles of the Civil Procedure Act and our new Constitution (*see section 159*) is to expeditiously and fairly resolve disputes between parties that appear before it. I will therefore use the inherent powers of the court to order the Machakos District Surveyor to visit the site of the alleged common boundary between Land Parcels Nos. Mbiuni/Ulaani/147 and Mbiuni/Ulaani/148 and to generate a report which will assist the court in resolving the dispute between the parties. The report should then be filed in court.

7. Since this application is made by the Plaintiff and it appears necessary for the prosecution of his case (*where in he bears the initial burden of proof*), I will further order that the Plaintiff pays for the costs of the survey and filing. However, the costs of the present application will be in the cause.

8. Finally, at this point, I decline to grant prayer 3 in the Application. Unless both parties agree to canvass and resolve their dispute solely by way of the report to be generated by the surveyor, I think it is prejudicial and premature to delimit the evidence the parties can use to litigate their case even before pre-trial procedures have been complied with. If the Plaintiff is of the opinion that the surveyor's report will be dispositive of the case, then he will be free to move the court accordingly at the appropriate time.

9. The upshot is that prayer 2 of the Application dated 10.5.2011 is granted with the modification that the District Surveyor does generate a report from the visit and the same be filed in court. The matter will be mentioned in court on a date to be agreed by consent by the parties to confirm progress.

DATED, SIGNED and DELIVERED at MACHAKOS this day 23RD day of JANUARY 2012.

J.M. NGUGI
JUDGE