



**Kori v District Land Registrar Nyandarua & another (Environment and Land
Miscellaneous Application 14 of 2017) [2022] KEELC 3815 (KLR) (23 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3815 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 14 OF 2017**

YM ANGIMA, J

JUNE 23, 2022

BETWEEN

DAVID MURAI KORI APPLICANT

AND

DISTRICT LAND REGISTRAR NYANDARUA 1ST RESPONDENT

JOSEPH KARIUKI KIBORO 2ND RESPONDENT

RULING

A. Introduction

1. By a notice of motion dated May 12, 2016 the applicant sought an order compelling the respondent to define and fix the boundaries between his parcel of land Title No Nyandarua/Mawingo/2872 (parcel 2872) and the Interested Party's Title No Nyandarua/Mawingo/2522 (parcel 2522) and file a report to that effect in court. The Applicant contended that the respondent had failed to resolve a boundary dispute between the parties despite the same having been reported to his office in 2014.
2. By an order made on February 26, 2019 the court (Hon Justice MC Oundo) allowed the said application and consequently made an order in the following terms:

“The Land Registrar Nyandarua and Samburu Counties to within 90 days from the date of being served with the order/ruling herein, cause to be defined by survey, the precise position of the boundaries in respect of land parcels known as Nyandarua/Mawingo/1872 and No Nyandarua/Mawingo/2522 in terms of sections 18 and 19 of the [Land Registration Act, 2012](#).”
3. The material on record shows that the respondent duly complied with the court order and filed a report dated September 3, 2021 in court. The report indicated that there was a 6m wide access road between the Applicant's aforesaid parcel and the interested party's parcel of land which was captured in the



Registry Index Map (RIM). The report further indicated that the respondent pointed out the width of the access road to the parties present and noted that it was the Interested Party who had encroached on the access road.

B. The Interested Party's Application

4. Aggrieved by the said order and respondent's report, the interested party filed a notice of motion dated October 21, 2021 under article 40 of the *Constitution of Kenya 2010*, Order 5, Order 10 rule 11, order 50 of the *Civil Procedure Rules 2010*, sections 87 and 101 of the *Land Registration Act, 2012*, section 3 of the *Environment and Land Court Act*, sections 1A, 1B, 3A, and 63 (e) of the *Civil Procedure Act* (Cap 21) and all other enabling provisions of the law seeking two main orders. The first was an order for setting aside the orders made on February 26, 2019. The second was an order for him to be granted unconditional leave to defend the "suit".
5. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the interested party on October 21, 2021. It was contended that the orders made on February 26, 2019 were made without his knowledge or participation since he was never served personally served with the notice of motion dated May 12, 2016. It was further contended that M/S Njoroge Mwangi & Co Advocates who were served by the applicant were acting for him in a different suit between the parties hence they had no instructions to act for him in the instant matter. The interested party further contended that the Applicant was in the process of executing the order of February 26, 2019 to his prejudice.

C. The Applicant's Response

6. The applicant filed a replying affidavit in opposition to the application. It was contended that the orders of February 26, 2019 had already been executed by the respondent and a report to that effect filed in court. It was contended that the interested party was aware of the proceedings on the boundary dispute since he was represented by a firm of advocates and that he had deliberately failed to attend court for hearing and before the respondent for determination of the boundary dispute.
7. It was contended that the boundary dispute was the subject of Nakuru Judicial Review Application No 16 of 2014 which culminated in a settlement agreement dated September 25, 2015 which was drawn by the interested party's advocates M/S Njoroge Mwaura & Co Advocates. It was further contended that it was the interested party who failed to participate in the resolution of the boundary dispute by failing to show up on the appointed date.
8. The applicant contended that the instant application was an abuse of the court process since all previous reports by the Land Registrar had confirmed the existence of a 6m wide access road between parcel 2872 and 2522. The applicant further stated that prior to implementation of the order made on February 26, 2019 the interested party was duly served via whatsapp messaging and through his employee on site and an affidavit of service filed hence there was no need of re-opening the matter or reviewing the orders of February 26, 2019.

D. The Interested Party's Rejoinder

9. The interested party filed a further affidavit in which he essentially reiterated the contents of his supporting affidavit and disputed the contents of the replying affidavit. The interested party contended that the instant proceedings constituted a new suit hence he was entitled to personal service of court process. The interested party contended that the access road affected several other related parcels of land hence parcel Nos 2872 and 2522 should not be treated in isolation.



10. It was the interested party's contention that the applicant had refused to contribute 3m of land towards the access road hence he was not entitled to assert the existence of an access road which he did not contribute to. The interested party further stated that, in any event, the access road did not extend all the way to the river as claimed by the respondent.

E. Directions on Submissions

11. When the said application was listed for inter partes hearing it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their submissions. The record shows that the interested party filed his submissions on March 25, 2022 whereas the applicant filed his on April 4, 2022. The respondent did not file any response or submissions to the application.

F. The Issues for Determination

12. The court has perused the interested party's notice of motion dated October 21, 2021, the applicant's replying affidavit in response thereto as well as the Interested party's further affidavit. The court is of the opinion that the following issues arise for determination herein:
 - (a) Whether the interested party has made out a case for setting aside the orders made on February 26, 2019.
 - (b) Who shall bear costs of the application.

G. Analysis and Determination

(a) Whether the Interested Party has made out a case for setting aside the orders made on February 26, 2019.

13. The court has considered the material and submissions on record on this issue. The interested party contended that the proceedings leading to the order of February 26, 2019 were conducted without his knowledge and in his absence. He further contended that the site visit by the respondent was undertaken in his absence and without his knowledge. The interested party denied that the firm of Njoroge Mwaura & Co Advocates had any instructions to accept service of the notice of motion dated May 12, 2016 or to represent him in the matter. He also disputed notice of the site visit by the respondent.
14. It is evident from the material on record that the parties herein have been engaged in the boundary dispute over an access road for a long period of time. At some point the interested party filed a judicial review application over the dispute which application was ultimately withdrawn. The material on record shows that on September 25, 2015 the parties signed an agreement for resolution of the dispute once and for all. The said agreement was notably drawn by the firm of Njoroge Mwaura & Co Advocates. That is the same firm which was served with the notice of motion dated May 12, 2016 which resulted in the impugned orders. The Interested Party would like the court to treat the current dispute in isolation from the previous judicial review proceedings and the agreement dated September 25, 2015. The court has noted that there is an affidavit of service on record showing that the firm of Njoroge Mwaura & Co Advocates accepted service of the said application on behalf of the interested party without protest.
15. There is no letter or affidavit from the said law firm indicating that they did not inform the interested party of service of the application or that they did not pass it over to him. The court is unable to accept the interested party's contention that service must be personal in all circumstances regardless



of whether or not a party had a recognized agent acting for him in a given dispute. The court is thus satisfied in the circumstances of this matter that the interested party's advocates were duly served as his recognized agent with respect to the dispute between the parties over the access road.

16. The court has also considered the material on record on the question of service of notice prior to the site visit by the respondent. There is an affidavit of service on record showing that the interested party was notified in two ways. First, notice was served upon his employee, one Joseph Mwaura Njogu on August 14, 2021. Second, the interested party was said to have been served via whatsapp messaging which indicated delivery of the message on August 16, 2021 at 6.19 p.m. and perusal at 6.30 p.m. The court has noted that the interested party did not in his sworn affidavits dispute having such an employee and neither did he dispute that the cell phone number used was his or that the message was duly delivered on August 16, 2021 at 6.19 p.m. and read at 6.20 p.m. The interested party did not even seek to cross examine the process server on the contents of his affidavit of service.
17. The court is thus satisfied on the basis of the material on record that the interested party was aware of the notice of motion dated May 12, 2016 and that he was also aware of the site visit by the respondent. The court has noted from the material on record that the interested party decided to close the access road in issue allegedly because the applicant had refused to contribute 3m of his land towards the same. The court has noted that all previous findings by different land registrars indicate the existence of a 6m wide access road which the interested party has always disputed.
18. The Registrar's report dated April 3, 2014 found the existence of the access road which the interested party had encroached upon. Similarly, the Registrar's report dated September 3, 2021 made pursuant to the impugned order concluded as follows:

“The ground measurement clearly indicates that there ought be a 6m wide access road all the way to the river. The RIM indicates that there is an access road all the way to the river. The respondent is therefore in error by encroaching on the access road. The Land Registrar therefore pointed out the width of the access road which ought to be maintained.”

19. The court is thus of the opinion that the interested party is merely out to unlawfully block an access road which exists in official government records. The instant application appears to have been filed to aid the interested party in his bid to grab an access road which at least two different Land registrars and surveyors have found to exist. Accordingly, the court finds no merit in the notice of motion dated October 21, 2021.

(b) Who shall bear costs of the application.

20. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. *See Hussein Janmohamed & Sons v Twentsche Overseas Trading Co Ltd [1967] EA 287*. The court finds no good reason why the successful party should not be awarded costs of the application. Accordingly, the applicant shall be awarded costs of the application.

H. Conclusion and Disposal

21. The upshot of the foregoing is that the court finds no merit in the interested party's application for setting aside the orders made on February 26, 2019. Accordingly, the interested party's notice of motion dated October 21, 2021 is hereby dismissed with costs to the applicant.

It is so ordered.



**RULING DATED AND SIGNED AT NYAHURURU AND DELIVERED VIA MICROSOFT
TEAMS PLATFORM THIS 23RD DAY OF JUNE, 2022.**

In the presence of:

N/A for the Applicant

Mr. Gachaga for the Interested Party

N/A for the Attorney General for the Respondent

C/A - Carol

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Y. M. ANGIMA

JUDGE

