



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI

JR MISC. APPL. NO.5 OF 2010 formerly NAIROBI MISC. NO. 154/2007

REPUBLIC.....APPLICANT

VERSUS

DISTRICT LAND REGISTRAR KILIFI.....RESPONDENT

AND

HASHIM MOHAMED AHMED.....EX PARTE APPLICANT

ELEONORA COZZI.....INTERESTED PARTY

RULING

The Notice of Motion dated 3rd December 2008 is made under section 3A of the Civil Procedure Act seeking that the award made by the District Land Registrar Kilifi/Kaloleni (Malindi District) dated 17th October 2007 be adopted as an order of this court. Further that any temporary structure which may way interfere with the erecting of the boundary as per the award, be demolished. The grounds are that:

- (a) The Kilifi District Land Registrar made an award ascertaining the current boundary as per section 21 (4) of the RLA (CAP 300).
- (b) To enforce the said award and ensure the current boundary is respected an order of this court is required to be extracted as per the award given.
- (c) This court has no jurisdiction to entertain proceedings under the RLA except by adapting an award of the District Land Registrar.

In the affidavit sworn by the applicant in support of the prayer he depones to be the registered owner of parcel LR No. Kilifi/Jimba/43 which shares a common border with the property LR. NO. Kilifi/Jimba/570

owned by Eleonora Cozzi (the interested party herein). A dispute arose between the applicant and interested party regarding the position of the boundary between the plots and proceedings were filed in the **High Court Mombasa HCCC NO. 537 of 2000** seeking the intervention of the court to issue orders setting the boundary dispute.

On 9th September 2004, Hon. Justice Mwera issued an order directing that the boundary dispute be determined pursuant to section 21 (2) of the RLA – a copy of that order is annexed as HMAX.

The orders were served on the District Land Registrar Kilifi On 24/9/04 but despite numerous efforts to him to comply with the orders, he did not determine or identify the boundary between the two plots.

Consequently the row has been simmering and became volatile.

On 1st August 2007, the District Land Registrar Kilifi/Kaloleni and Malindi District, visited the disputed area and made inquiries. He came up with findings which are annexed as HMA 4 and the same have been served on the Commissioner of Lands. No appeal has been made against the findings.

I have seen the order signed by Justice Mwera which directed the said Registrar to determine the boundary between the parties.

The background to the matter is that the applicant had filed a suit against the defendant (now interested party) alleging that she had encroached into his land and had erected a wall she contested this in her statement of defence, saying applicant was mistaken as to the exact and proper location of the boundary. He proposed that adjustments be done and specified what these were. He also advised the parties to mark their boundaries with permanent features to avoid any further encroachments.

Section 21 (2) of the RLA provides as follows;

“Where any uncertainty or dispute arises as to the position of any boundary, the Registrar on the application of any interested party shall on such evidence as the Registrar consider relevant, determine and indicate the position of the uncertain or disputed boundary.”

This was an application for Judicial Review for orders of mandamus. The application was opposed on grounds that;

- (1) The issues raised were dealt with in Miscellaneous HCCC No. 537 of 2000.
- (2) That the application is incompetent in the Notice of Motion dated 15/3/07 and this court has never referred the matter to the Respondents, so the application is an abuse of the court process.

As a matter of fact there is the order made by Hon. Justice Mwera to the Land Registrar for determining the boundary. The interested party's advocate did not attend court for hearing of the motion, so I do not know what orders had been made in HCCC No. 537 of 2000.

This application is not a contradiction to the application dated 15/3/07 in fact it is a confirmation in every aspect in the sense that now that the District Land Registrar has complied with the orders, applicant wishes to give it full effect- this is the only way in which he can complete his pursuit.

I have read all through the proceedings by the District Land Register – it shows that the interest party was not present during the hearing. Was the interested party served with a hearing notice to attend the proceedings? I also note that the list of those present during the hearing of the suit on 1/8/07 are shown as inter-alia Sunpalm Ltd referred to as the defendant. That is a limited liability company is an artificial person who for practical purposes would have to be represented by a human person. – yet no names of a representative appears further in the body of the proceedings, the defendant (now interested party) is

shown as absent without apologies. I have gone through every leaf of paper in this file- there is nothing to confirm to me that the interested party was served with a hearing notice to appear before the District Land Registrar. There is however evidence that they were served with the findings of the District Land Registrar- if not earlier, then at least when this application was served since the ruling was annexed to the application.

All the other processes were followed i.e hearing witnesses, taking and analyzing the evidence and reached a conclusion. Section 22 (1) RLA requires the Registrar to give notice to the owners and occupiers of the land adjoining the boundary the intention to ascertain the boundary and it is that notice which has not been demonstrated as having been served. It is on account of this alone that I decline to grant the orders sought.

Delivered and dated this 15th day of December 2010 at Malindi

H. A. OMONDI

JUDGE

Mr. Mwadilo holding brief for Mr. Khaminwa present