REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE 5 OF 2009

SAMWEL KIMANI MACHARIA……....1ST PLAINTIFF

SIMON KIMANI MWANIKI……2ND PLAINTIFF

JANE WANJIRU KIMANI……..…3RD PLAINTIFF

VERSUS

JOSEPH GITHIGA MACHAU……..…
DEFENDANT

RULING

The applicants in this application are asking the court to enter judgment in accordance with the award filed by the Chief Land Registrar on 21st May, 2008 and further that the respondent be restrained from closing, using or interfering in any way with the road of access to South Kinangop plots Nos.1142, 1143, 1085 and 1086 and Karati Scheme plot Nos.184 and 185 pending the final determination of the dispute.

It is the applicant's case that the dispute herein was referred to a surveyor appointed by the Chief Land Registrar. That the surveyor's report was filed in court.

That subsequent to this the respondent's agents, using a tractor, ploughed the road of access, which is the subject matter in this dispute.

The respondent than planted potatoes on the said road of access, thereby cutting off access to the plots identified earlier.

The respondent filed grounds of opposition to the application arguing that the application is fatally defective, misconceived and a gross abuse of the court process. That the court has no jurisdiction to entertain this application as Order XLV was not invoked by the parties by consent. That the application for injunction is *res judicata* as the same had been heard on merit and dismissed.

The dispute is about a road of access which the applicants are claiming they have used since 1964 and 1977 respectively. Trouble started on 14th March, 2001 when the respondent closed the road in question

completely cutting off the applicants from access to or from their parcels of land.

From the pleadings filed by the respondent, it is his case that the suit parcels of land are in the neighbouring scheme to his land; that the two are separated by two parallel access roads; and that the two access roads were created for each scheme namely, Karati and South Kinangop Schemes. It is further deposed that some of the applicants closed the access road leading to their parcels of land by erecting fences on the road.

Arguing the application, counsel for the applicants submitted that the terms of the consent recorded were clear that all the pending litigation regarding the road of access would be determined by a surveyor appointed by the Chief Land Registrar. The survey was conducted in the terms referred to above and an award filed in court. However, before the ***H.C.C.C.NO.5/2009*** same could be adopted as judgment, this file was transferred to Nakuru from Nairobi. Counsel submitted further that the award as filed has not been challenged. He has denied that this application is *res judicata.*

For the respondent, his counsel contended that the court has no jurisdiction to deal with the application as there was no judgment capable of being entered as the dispute was never referred to arbitration; that the surveyor was only to mark boundaries and not arbitrate. Counsel maintained that a similar application was made in 2001 and dismissed by Aganyanya, J. (as he then was). An application for review was also dismissed.

I have considered these submissions and I am of the views that they raise only two broad issues for determination, namely whether the consent order and the subsequent report by the surveyor amounted to an award from arbitration and secondly whether the relief of injunction is available to the applicant.

It is important that the order whose interpretation is in question be set out at this. It reads:

"***IT IS HEREBY ORDERED BY CONSENT:***

1. that the application marked '2' dated 24th September, 2007 be and is hereby withdrawn with no orders as to costs.

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2. that the application marked '3" and dated 12th November, 2007 be and is hereby allowed with no orders as to costs.

3. that the Provincial Appeal No.6 of 2002 at Nyeri be withdrawn by the plaintiffs within fourteen (14) days of the date of this order.

4. that the Chief Land Registrar at Nairobi to appoint a surveyor <u>to mark the boundary of the road of access</u> to South Kinangop Plot Nos.1142, 1143, 1085 and 1086 and Karati Scheme plot Nos. 184 and 185.

5. that <u>any party aggrieved</u> with the decision of the Chief Land Registrar to <u>exhaust the appeal process set out under the Registered Land Act, Cap 300 Laws of Kenya. Only then shall any party have a right to come to the High Court.</u>

6. that this matter be mentioned on 5th October, 2008.

…….. ……

Issued at Nairobi this 1st day of February, 2007.

DEPUTY REGISTRAR

……***..”*** (Emphasis added).

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It is important to note that although the survey was to be conducted by the surveyor, he was to be appointed by the Chief Land Registrar. Infact it was the latter who was directed to file the report of the survey. It is that report, referred to as an award by the applicants that is sought to be entered as a judgment. What was the intention of the parties when they recorded the above consent?

According to the applicants, the Registrar was to determine the dispute and file his award, which he did. The respondent on the other hand believes that the Registrar was only required to conduct a survey and file a report which would then form a basis of trial in this dispute. That is how I understand the issues from the prism of each party.

It is, however, not in dispute that they recorded the said consent before Ang'awa, J. on 5th December, 2007. Counsel representing the parties in this dispute signified their commitment to the terms of the consent by signing the consent recorded in the Judge's handwriting. Fraud, mistake or misrepresentation have not been raised. Indeed the consent order is not being challenged. It is, as I have noted, its interpretation.

In trying to understand the intentions of the parties, it must be borne in mind that the parties have disagreed over a road of access leading to their respective properties. In the consent recorded herein, they set out to resolve the actual position of the road of access. To this end they agreed that the right authority to do so was the Registrar through ***H.C.C.C.NO.5/2009*** the surveyor. The Registrar instructed the surveyor who visited and conducted a survey in the presence of the parties, the area Chief, District Registrar, Settlement Officer and O.C.S. on 14th May, 2008 and subsequently on 19th May, 2008 filed his report. In that report, the District Surveyor, Nyandarua was categorical in his finding that the respondent (being the proprietor of parcel No.184) and the owner of parcel No.183 blocked the road. He observed that the said road was in existence at the time plot No.South Kinangop/797 was subdivided to create Nos.1143, 1142, 1085 and 1086 (the suit property). The second finding he made was that the road meant to serve plot Nos.1085 and 1086 was also blocked by the owner of plot No.182.

To address the twin problems described above, it is clear from the Registrar's report that the original road of access serving plot Nos.183, 194 and 185 on the one hand and the original plot No.797 (now the subdivided and forming the suit property) on the other hand, should remain intact. In other words, the alleged interference by the respondent and the owner of plot No.183 must cease.

On the second problem, the Registrar created a 6m road out of plot No.1143. I am convinced that by so acting as aforesaid, the Registrar was complying with the consent order (see the first sentence of his report) marking the boundary of the road of access to Kinangop South plot Nos.1142, 1143, 1085 and 1086 and Karati plot Nos.184 and 185. These parcels of land are no doubt registered under the Registered ***H.C.C.C.NO.5/2009***

Land Act – Cap 300 Laws of Kenya. Under Division 3 of Part ll of that Act, the Registrar has absolute power, subject only to giving a hearing to the parties concerned, to cause a survey of land and to determine a boundary in case of an uncertainty or dispute. The role of the court in respect of the exercise of those powers by the Registrar is limited. Section 21(4) of the Registered Land Act provides that:

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

The court's intervention in matters where the Registrar has made a decision under the Act may be only by way of case stated by the Registrar himself.

Section 149 of the Act provides as follows:

"***49. Whenever any question arises with regard to the exercise of any power on the performance of any duty conferred or imposed on him by this Act, the Registrar may state a case for the opinion of the High Court; and thereupon the High Court shall give its opinion thereon, which shall be binding upon the Registrar"***

Section 150 (2) to (6) and Section 151 provide an elaborate procedure for lodging and prosecution of an appeal from the decision, order or award of the Registrar.

Applying the foregoing to the facts in dispute in this matter, I am satisfied from the clear language of the consent order and the conduct of the parties that they intended that the dispute be settled once and for all by the Registrar. I find no other explanation for their consent to withdraw the Notice of Motion of 24th September, 2007 which sought the dismissal of the applicants' suit for want of prosecution.

There is similarly no explanation for the parties to agree to revive the 2nd applicant's suit as sought in Chamber Summons dated 12th November, 2007.

The parties further agreed to withdraw Provincial Appeal No.6 of 2002 at Nyeri. They themselves agreed that any of them aggrieved by the marking by the Registrar must exhaust the appeal process set out in the Act and only approach the court through that process. All these go to buttress my conviction that they were determined to have their differences resolved by the Registrar.

It is clear from the language used in the consent order that the Registrar was to "*mark"* the boundary. To "*mark*" in my view is equivalent to the word "*determine"* in section 21 (5) of the Act. Having so marked or determined the boundary, that marking or determination can only be set aside by the court on the Registrar stating the case for ***H.C.C.C.NO.5/2009*** the opinion of the court or by way of appeal under Section 150(2) of the Act. In the absence of any appeal or a case stated for the opinion of the court, the Registrar's decision is final.

As a matter of interest, by his letter to the Registrar of the High Court dated 21st May, 2008, forwarding the report to the court, the Chief Land Registrar invited an aggrieved party to lodge any appeal in accordance with the Registered Land Act. Learned counsel for the respondent argued that there was no arbitration as understood in Order 45 of the Civil Procedure Rules. That argument lacks merit as the Chief Land Registrar was asked to survey the road of access by the parties. After all, under Section 21 (2) of the Act, any interested party may apply to the Registrar to determine and indicate the position of any uncertain or disputed boundary.

The matter having been referred to the Registrar by the court, judgment shall and is hereby entered in terms of the report. I turn to consider briefly the question of injunction. I am once again persuaded from the applicants' averments and from the Registrar's report that the respondent has persistently interfered with the road of access in question. The road is a public road and the Registrar has made a definite finding.

That being the case and the court having entered judgment in terms of the Registrar's report, an order of mandatory or permanent injunction will be superfluous.

I reiterate that judgment is entered against the respondent with costs.

DATED and DELIVERED at Nakuru this 21st day of July, 2009.

W. OUKO

JUDGE