REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

Civil Suit 43 of 2003

JOHN WEPUKHULU ===================1ST PLAINTIFF/APPLICANT

JOHN TANUI ==========================2ND PLAINTIFF/APPLICANT

SUSAN TANUI ========================3RD PLAINTIFF/APPLICANT

V E R S U S

PETER MWEGA ==================1ST DEFENDANT/RESPONDENT

MWIRERI GICHERU ================2ND DEFENDANT/RESPONDENT

R U L I N G

The application before me has been brought by the defendants, who seek the setting aside of the District Surveyor's report which was adopted in court on 16/6/2006.

It is common ground that on 28/3/2006, the parties consented to an order through which the District Surveyor Trans-Nzoia was mandated to identify the boundaries of the parcels of land occupied by each of the parties. The said report was supposed to be filed in court within 30 days.

From the court records it is evident that the District Surveyor had not yet filed his report by 9/5/2006. The court then directed that the case be mentioned on 19/6/06. According to the applicants herein, the mention was for the purposes of ascertaining the position.

However, the plaintiffs view is that the mention was intended for confirming the filing and reading of the report of the District Surveyor, Trans-Nzoia.

Whilst the applicants' insist that the report was read and adopted by the court, without prior notice to them, the respondents' position is that the applicants did have prior notice.

The question that then arises is as regards the nature of the notice which was issued to the applicants. I say so because if it is clear that the applicants were duly notified, then that basis of their complaint would fall by the wayside. So, how were the applicants notified that the report would be read and adopted by the court on 19/6/2006?

According to the respondents, the applicants became aware of that date when they attended court on 9/5/2006, when the case was put-off for mention on 19/6/2006.

On course, it is true that on 9/5/2006 the applicants were represented by their advocate, in court. It is also true that on that date, the case was adjourned to 19/6/2006, for mention. However, the parties are not in agreement as to why there was need to mention the case on 19/6/2006. The applicants say that the mention was for purposes of confirming the position, whilst the respondents say that the mention was for purposes of confirming that the report of the District Surveyor had been filed, and if so, the said report was to be adopted.

From the record of the proceedings on 9/5/2006, no reasons were spelt out for the mention. Therefore, I am unable to determine, with any degree of certainty, as to what the reason was intended for. I also have no basis for determining which of the parties is now stating the correct position, as regards the intended purpose for the mention.

In the circumstances, I find that although the parties did agree to have the case mentioned on 19/6/2006, the said parties did not have a consensus as to the reasons for the mention. Therefore, I am unable to accept the respondents' contention that the applicants had notice that on 19/6/2006 the District Surveyor's report would be read and thereafter be adopted by the court.

I also take note of the letter dated 26/5/2006, from the defendants' advocates. By that letter, the defendants (who are the applicants herein) complained to the District Surveyor, that he had notified the parties about his proposed date for visiting the properties in issue. As a result, the defendants expressed the view that the report to be prepared by the District Surveyor would not be fair, as it would have been compiled without any input on the defendants part.

By the same said letter, the defendants asked the surveyor to re-visit the properties, after giving due notice to the parties. If the surveyor did not re-visit the properties, after giving notice to the parties, the defendants said that they would strongly object to the adoption of the surveyor's report.

In the light of that letter from the defendants' advocates, I am persuaded that the defendants would have objected to the filing of the District Surveyor's report dated 8/5/2006, if the defendants had had due notice of the filing and the adoption of the said report.

The plaintiffs say that as the defendants were represented by counsel, there was no requirement that they be served with a notice.

It is the plaintiffs' understanding that pursuant to Order 45 rule 10 of the Civil Procedure Rules, parties should only be served with a notice of the date when the report is filed, if the parties are in person. The said rule reads as follows;

" ***Where an award in a suit has been made, the persons who made it shall sign it and cause it to be filed in court, together with any depositions and documents which have been taken and proved before them; and notice of the filing shall be given to the parties."***

Nowhere in that rule is it stated that notice would only be given to parties who were acting in person. Therefore, even when a party was represented by an advocate, notice should be given to the said advocate. The reason for so holding is that by virtue of Order 3 rule 1 of the Civil Procedure Rules, any application to, or appearance or act in any court required or authorized by law, to be made or done by a party in such court may be made or done by the party in person, or his recognized agent, or by his duly appointed advocate.

Meanwhile, as is provided for in Order 45 rule 10 of the Civil Procedure Rules, the notice to the parties is supposed to be issued by the persons who made, signed and filed the award. That is only logical because it I they who would know when they had filed the award.

The importance of the notice to the parties cannot be gainsaid as it determines the date by when any party to the action may apply to court for;

(i) ***costs; or***

(ii) ***modification or correction of the award; or***

(iii) ***the remittance of the award or of any matter, for reconsideration by the arbitrator; or***

(iv) ***the setting aside of the award.***

Pursuant to rule 16, any party shall have a period of 30 days, from the date he received notice of the filing of the award, or where the date had been fixed by the court for the reading of the award, to make his application.

In this case, there is no evidence at all that the District Surveyor served the applicants with a notice of the filing of his report. And the could did not fix a specific date for the reading of the award. Therefore, the report was read without notice to the applicants, and that is wrongful.

Another issue of concern to the court, but which was not raised by the parties herein, relates to the failure by the parties to obtain from the court an extension of the time for filing the report of the District Surveyor.

The consent order dated 28/3/2006 required the District Surveyor to file his report within 30 days. As the report in contention was filed on 9/5/2006, but without there having been an extension of the time for making the award, the said report was filed without the requisite authority.

In the result, the report dated 8/5/2006 is set aside. The costs of the application dated 8/8/2007 are awarded to the defendants.

Dated and Delivered at Kitale, this 21st day of January, 2008.

FRED A. OCHIENG

JUDGE