

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
Civil Case 124 of 2001

EMMA MAGURUSHA MAHINDRA PLAINTIFF

AND

DICK ALBERT OSELE GARI1st DEFENDANT

CHRISTINE ADONGO OSELE 2nd DEFENDANT

RULING

The Plaintiff is the registered owner of a parcel of land known as **KISUMU /PANDPIERI/1259** while the defendants are the registered owners respectively of land parcels **KISUMU/PANDPIERI/1732** and **KISUMU/PANDPIERI/2238**.

The above mentioned parcels of lands have a common boundary at Nyalenda Estate within Kisumu Municipality and it is the plaintiff's contention that the defendants through an agent of theirs called Juma Samson Otieno have interfered with the common boundary amongst themselves by uprooting the beacons and shifting the common fence inward, towards the plaintiff's property thereby encroaching into the plaintiff's land parcel **KISUMU/PANDPIERI/1259**. As a result the plaintiff has filed this suit against the defendants praying for a permanent injunction to restrain the defendants and/or their agents/servants and or employees from trespassing, invading and/or encroaching against the common boundaries of the aforementioned parcels of land. A temporary injunction was in the meantime issued against the defendants on the 19th September 2007 after the plaintiff moved the court for the same. The said injunction was to lapse on 3rd October 2007 but was extended to 17th October 2007 pending inter partes hearing of the main application for a temporary injunction.

On 17th October 2007 and after the defendants had filed their statement of defence on the 16th October 2007 the matter was mentioned in court in the presence of the parties respective advocates. The advocates informed the court that they had reached a consent as follows:-

(i) The Kisumu District Land surveyor do visit the parcel numbers KISUMU/PANDPIERI/1259, 1732 and 2238 and conduct a survey and establish the correct boundaries thereof, place beacons and file a report thereon within three weeks from today.

The matter was then fixed for mention on 21st November 2007 and interim orders were extended accordingly. On 21st November 2007 a further mention was fixed (i.e. on 28th November 2007) after the court was informed that the report of the surveyor was undergoing typing. On 28th November 2007 the surveyor's report had been filed in the court record and at the request of the plaintiff's counsel a date for adoption of the report was taken i.e. 5th December 2007. On 5th December 2007 matter was fixed for further mention on 17th December 2007 to allow the defendant's advocate to see the report. On 17th December 2007 the defendant's advocate requested for a further mentioned date in order to take further instructions from his clients one of whom was said to be unwell and hospitalised after a road accident. Matter was then fixed for further mention on 28th January 2008 on which date the parties did not attend. It was then stood over generally and resurfaced on 30th January 2008 when it was fixed for mention on 6th February 2008 on which date it was fixed for further mentioned on 13th February 2008 on which date

the court ordered that the parties study the surveyor's report and return to court on 20th February 2008 for orders. All along, the interim orders granted to the plaintiff were extended.

On 20th February 2008 the parties appeared in court and learned counsel for the plaintiff applied to have the District surveyor's report adopted. Learned counsel for the defendants did not favour adoption of the report on ground that it was contradictory to a report compiled by a private surveyor hired by the defendants who were not present at the scene when the District surveyor carried out his inspection and compiled his report. The absence of the defendant at the scene during the survey conducted by the District surveyor was attributed to the fact that the first defendant was hospitalised after being involved in a road accident and that the second defendant who is his wife was away with him in Nairobi. Counsel for the defendants now proposes that the District surveyor do again visit the parcel to re-survey the site in the presence of private surveyors representing both sides. Counsel for the plaintiff did not seem to share the same proposal and accused the defendants of delaying this matter. He considered that in any event, the report by the private surveyor was not sanctioned by the court.

In the opinion of this court, the survey carried out by the District surveyor was initiated by both parties under their consent of the 17th October 2007, which was sanctioned by the court. The defendants cannot now be heard to renege on that consent and require that there be private surveyors for a revisit and a resurvey of the site. However, it was imperative that all the sides be present at the scene during survey. It is apparent that the defendants were not present at the scenes when the District surveyor carried out his survey and compiled the report sought to be adopted. Therefore it is necessary that a resurvey be carried out by the District surveyor in the presence of all the parties and a further report be filed in court accordingly. The defendants' absence during the initial survey is well explained and acceptable. It must however be emphasized that none of the parties should absent himself at the site on the appointed date unless with good credible reason.

The subsequent report by the District surveyor will suffice and as long as all the parties are present at the scene there would be no need for private surveyors representing each side. Involving so many people in a simple boundary disputed shall merely complicate matters, increase costs and delay the expeditious disposal of this case. Consequently, a further order does hereby issue to the District surveyor to revisit the material parcels of land in the presence of all the parties and carry out a fresh resurvey. He shall then file his report in court within one month from this date hereof. In the meanwhile the interim orders granted to the plaintiff are hereby extended accordingly.

Dated, signed and delivered at Kisumu this 21st day of February 2008.

J. R. KARANJA

JUDGE