



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Suit 552 of 2001

JASWINDER SINGH JABBALPLAINTIFF

VERSUS

R. J. TILBURYDEFENDANT

R U L I N G

On 18th April, 2007 when the suit herein came up for hearing, the following consent order was entered-

“ ORDER: By consent:-

(1) The following issue shall be determined as a preliminary issue, that is –

WHETHER OR NOT THE TREES COMPLAINED OF BY THE PLAINTIFF ARE SUBSTANTIALLY ON THE BOUNDARY BETWEEN THE TWO PROPERTIES OR SUBSTANTIALLY ON THE DEFENDANT’S PROPERTY.

(2) That issue is hereby referred to the Provincial Surveyor, Nairobi for determination.

(3) The Provincial Surveyor shall file his report within 14 days of service of the order.

(4) The parties shall share equally the surveyor’s fees.

(5) It is hereby agreed that if the trees are found to be substantially on the boundary between the two properties they shall be deemed to be on the boundary and hence the responsibility of both parties.

(6) If the trees are found to be substantially on the Defendant’s property, then, unless the parties settle the suit otherwise, the same shall proceed to hearing.

(7) The matter to be mentioned on 9th May, 2007.

(8) Costs in the cause”.

The Provincial Surveyor’s report was eventually filed on 12th June, 2007. There was appropriate and consensual extension of time, such that the report was duly filed. The report says in the material part –

“ FIELD DATA ANALYSIS

1. All the positions of the trees picked were found to fall on plot L.R. No. 7741/41 but a number of their branches were precariously hanging onto part of L.R. No. 7741/306, hence being a great risk to the occupants.
2. There seemed to be no frequent trimming of the fence on L.R. No. 7741/41.
3. The proprietor of the plot has constructed some of his buildings near his fence with L.R. No. 7741/41, and parts of their walls have cracked and the roofs have been adversely affected by the debris falling from the branches.
4. The stone wall position was found to be falling on the actual common boundary of the two plots in dispute. See the plan over-leaf showing the actual position of each tree picked relative to the stone wall on boundary line for L.R. No. 7741/41 and L.R. No. 7741/306”.

When the matter was mentioned on 12th June, 2007, the day on which the surveyor’s report was filed, the Defendant’s learned counsel informed the court that the Defendant was not happy with the report and intended to move the court appropriately. The Defendant has so moved the court by notice of motion dated 29th June, 2007 stated to be brought under sections 3 and 3A of the Civil Procedure Act, Order 50 of the Civil Procedure Rules and ” all other enabling provisions of the Laws of Kenya”. He seeks orders to set aside the Provincial Surveyor’s report and to appoint another surveyor to prepare another report. The grounds for the application given on the face thereof are:-

1. That the report is biased.
2. That it does not “respond” to the order of the court.
3. That the surveyor’s analysis dwelt on matters not required in the court order.
4. That the report is inadequate and will be of no assistance in determination of the issues before the court.
5. That the Plaintiff will not suffer any prejudice if the orders sought are granted.

There is a supporting affidavit sworn by MARK JOHN TILBURY, one of the substituted defendants, the Defendant having died. The affidavit elaborates the grounds of the application.

The Plaintiff has opposed the application as set out in his replying affidavit filed on 7th November, 2007. The grounds of opposition appearing on the face thereof are:-

1. That the surveyor’s report is in accordance with the consent order of referral and the surveyor duly discharged his duty under the order..
2. That no bias is disclosed.
3. That the additional information provided by the surveyor is relevant and will assist the court in the proceedings.

4. That no professional negligence, incompetence or other inadequacy on the part of the Provincial Surveyor is disclosed.

5. That the application is frivolous, vexatious and only meant to delay conclusion of the suit to the Plaintiff's detriment.

I have given due consideration to the submissions of the learned counsels appearing. No cases were cited. The order of referral to the Provincial Surveyor contained in the consent order of 18th April, 2007 was essentially an order of arbitration under **Oder 45 of the Civil Procedure Rules (the Rules)**. Any application to set aside the surveyor's report must therefore be governed by the provisions of that Order. Under rule 15 of the Oder, the court may set aside the report only on the following grounds:-

- (a) Corruption or misconduct of the Provincial Surveyor.
- (b) Fraudulent concealment by either party of any mater which he ought to have disclosed.
- (c) Willful misleading or deception of the Provincial Surveyor by either party.

The complaints of the Defendant disclosed in the supporting affidavit are that the surveyor's report does not "respond" to the order of the court and leaves issues for determination unanswered; that the plan attached to the report does not support the data analysis made; that the analysis dwelt on matters not required in the order and arrived at conclusions that are biased against the Defendant and not required by the order; that the plan attached to the report does not show the position of the respective properties of the parties; that the surveyor did not inspect the boundary wall or the walls of the Plaintiff's house nor study any overhanging branches, notwithstanding his observations thereon; and that the report is inadequate and will be of no assistance in determination of the issue in dispute.

As can be seen, no corruption is alleged against the Provincial Surveyor. There is also no fraudulent concealment or willful misleading or deception alleged against the Plaintiff. What has been alleged against the Provincial Surveyor is misconduct in that:-

- (i) he did not do what was required of him by the order of referral;
- (ii) he did what was not required of him by the order;
- (iii) by dwelling on matters not required by the order he arrived at conclusions that are biased against the Defendant; and
- (iv) his analysis includes references to the wall, the Plaintiff's house and overhanging branches when in fact he did not inspect them at all.

I have studied the surveyor's report. The order of reference required him to determine

"whether or not the trees complained of by the Plaintiff are substantially on the boundary between the two properties or substantially on the Defendant's property".

In this connection, what the Provincial Surveyor said was this –

"All the position (sic) of the trees picked were found to fall on plot L.R. No. 7741/41"

What does he mean by **"all the position of the trees picked"**? Are these the trees complained of by the Plaintiff? If so, why did the Provincial Surveyor not state, **"All the trees pointed out by the Plaintiff?"**

It was essential, in order for the surveyor to fulfill his mandate, for the Plaintiff to point out to him **all** the trees that he has complained about in the suit, and for the surveyor to record this fact in his report. The order of referral required the surveyor to determine whether or not those trees complained of by the

Plaintiff are substantially on the boundary between the two properties or substantially on the Defendant's property. He should have done that, and that only, without ambiguity. As it is, the report does **not** indicate clearly and without ambiguity that the surveyor did this. This is a sufficient ground to set aside the report.

It is also clear that the report contains observations and comments that went beyond the Provincial Surveyor's mandate under the referral order. This has led, not unjustifiably, to an accusation of bias against the Defendant. Misconduct is disclosed where an arbitrator, by his observation and comments, has far exceeded his mandate with the apparent intension of assisting one or the other of the parties to the dispute. That is the case here.

For the above reasons the Provincial Surveyor's report dated 20th May and filed on 12th June, 2007 is hereby set aside. The parties are at liberty to agree to referral to another surveyor. In the absence of such agreement the consent order of 18th April, 2007 shall stand vacated, and the suit may proceed to hearing in the normal way.

Regarding costs, the Plaintiff has not been at fault; it was all the Provincial Surveyor's fault. Notwithstanding that the Plaintiff opposed the application, it would be unjust to burden him with costs at this stage. I will therefore order that costs of the application be in the cause. It is so ordered.

DATED AND SIGNED AT NAIROBI THISDAY OF JUNE 2008.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 6TH DAY OF JUNE 2008