REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Case 111 of 2004

GEORGE GITARI KAMWERE.....1ST PLAINTIFF/APPLICANT

DUNSTAN MACHARIA KAMWENE.....2ND PLAINTIFF/APPLICANT

Versus

ZAKAYO NGARI KIIGE.....1ST DEFENDANT

WILSON MWANGI NGARI.....2ND DEFENDANT

GIKUYO KAARA.....3RD DEFENDANT

KAHOME MUITA.....4TH DEFENDANT

MUTURI KANYUIRA.....5TH DEFENDANT

JENIFER MWANGI.....6TH DEFENDANT

ROBERT KAIRU MURIUKI.....7TH DEFENDANT

RULING

The Defendants have come to court by way of a Chamber Summons dated 10th April 2006. That Chamber Summons is brought under ***Order VI Rules 13(1)(a)(b)*** of the Civil Procedure Rules. The Defendants seek the striking out of the Plaintiffs' suit. The Defendants based their prayer on their contention that the Plaintiffs' suit is incompetent because it is a suit which is based on a boundary dispute which dispute has not yet been determined by the Registrar as provided by ***Section 21(4)*** Registered Land Act. ***Section 21*** provides as follows:

"***1. Except where, under section 22, it is noted in the register that the boundaries of a parcel have been fixed, the registry map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.***

2. 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 considers relevant, determine and indicate the position of the uncertain or disputed boundary.

3. Where the Registrar exercises the power conferred by subsection (2), he shall make a note to that effect on the registry map and in the register and shall file such plan or description as may be necessary to record his decision.

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.

5. Except where, as aforesaid, it is noted in the register that the boundaries of a parcel have been fixed, the court or the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as it or he thinks fit."

The Plaintiffs' claim relates to parcel No. **KONYU/GACHUKU/80**. In their plaint the Plaintiffs state that since the property was demarcated in 1957 they had not been a right of way or a footpath on that property. On or about the 23rd of March 2003 the residents of Kahara village together with the Defendants invaded the Plaintiffs' aforesaid property and proceeded to curve out a footpath thereof. It is further stated that no such footpath exists and the Defendants' claim to such a footpath was misconceived. The plaint further provides that such a footpath is not provided in the registry map by the director of survey. In that invasion the Plaintiffs pleaded that the Defendants' destroyed crops and other crop materials. In their final prayer the Plaintiffs seek for an injunction against the Defendants from entering the property. They also seek a declaration from the Court that there is no right of way across their property. Finally they also seek a declaration that the curving out of that footpath was illegal and accordingly that the same be closed.

The Defendants in their Defence deny the Plaintiffs claim in total. Further they aver that the Plaintiffs' claim does not disclose a reasonable cause of action. That is the substance of the Defendants' defence.

The grounds upon which the Defendants application is based on are as follows:

· That the suit is prematurely before the court since no determination has been made under *Section 21(1)* of the Registered Lands Act.

· That the suit does not therefore disclose a cause of action

· That the suit is an abuse of the process of the court.

The defence counsel in support of the application submitted that *Section 21(4)* prohibits any proceedings unless a determination has been made by the Land Registrar. Defence relied on a ruling that was delivered in this matter on 10th June 2005 by the Hon. Justice Khamoni. That ruling was in respect of the Plaintiffs' application for interlocutory injunction. The Court in that ruling stated as follows:

"……***meaning S. 21 of the registered land Act. The operative word is 'entertain' meaning that the Land Registrar must act or make his decision before the action or other proceedings referred to in S. 21(4) are filed in the Court or Tribunal.***

Hence the defence counsel argued that this suit is premature before Court and therefore sought its striking out.

The Plaintiffs opposed the application. Plaintiffs' counsel in his submission began by saying that the rules which the Defendants relied on in their application i.e. *rule 13(1)(a)* does not allow a party to rely on evidence but rather such rule can only rely on the pleadings. He relied on the provisions of *rule 13(2)*. That rule is in the following terms:

"No evidence shall be admissible on an application under sub rule (1) (a) but the application shall state concisely the grounds on which it is made."

Plaintiffs' advocate argued that in the Defendant placing reliance on affidavit evidence it made their

application to be incompetent. To support his point of view the advocate relied on the case of **EMMANUEL K. NJAU V JACKSON ABUGA HCC NO. 3788 OF 1989** and laid emphasis on the following passage:

"***In an application under Order VI r.13(1) (a) Civil Procedure Rules no evidence is admissible. The first prayer in the instant application is in effect an application under that order and rule. Evidence was improperly included regard being had to the provisions of Order VI rule 13 (2) Civil Procedure Rules. Considering the wording of this latter sub-rule the admission of evidence was in breach of that provision and rendered the application incompetent."***

The Defendants' affidavit made the Defendants' application to be incompetent, according to the Plaintiffs' counsel. The Plaintiff also attacked the application for its failure to abide by the provisions of ***Order L Rule 15 (2)*** of the Civil Procedure Rules. He argued that that rule is in mandatory terms and failure to abide by it was fatal to an application. That rule provides as follows:

"***Every motion and summons shall bear at the foot the words:-***

If any party served does not appear at the time and place above-mentioned such order will be made and proceedings taken as the court may think just and expedient."

The Plaintiff also argued that the power of striking out pleadings should be used cautiously by the Court. He relied on the book of **Bull & Leake PRECEDENTS OF PLEADINGS 12TH Edition.** He emphasized the following portion:

"***Because the powers under RSC, Ord. 18, r.19, are coercive in operation and are exercised by summary process and because a party may thereby be deprived o his right to plenary trial, the court exercises these powers only with the greatest care and circumspection and only in the clearest cases. As Fletcher-Moulton L.J. said in Dyson v Att-Gen.***

"***To my mind it is evident that our judicial system would never permit a plaintiff to be 'driven from the judgment seat' in this way without any court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad."***

In the Plaintiffs' view the suit raises serious issues which need to go to trial. Plaintiffs' counsel referring to the ruling of the Hon. Justice Khamoni stated that the judge recognized that evidence needed to be adduced for the issues in the matter to be resolved. He referred to a passage in that ruling which is in the following terms:

"***Otherwise having said all I have said above, I would conclude this ruling by saying that since the issue in this matter is whether or not there is a lawful public road of access and that issue is yet to be resolved on evidence,"***

To begin with the wishes to consider the opposition raised by the Plaintiff on the basis that the application ought not to have relied on the evidence by affidavit whilst it was brought under *Rule 13(1) (a)*. My response to that argument is that the application is also brought under *rule 13 (1) (b).* This rule does not prohibit reliance on evidence by affidavit. I therefore find that the Defendants' reliance on affidavit evidence does not make the present application to be incompetent. I therefore find that I am not persuaded by the Plaintiffs' argument. In that regard I also find that the finding in the case of **EMMANUEL K. NJAU V JACKSON ABUGA HCC NO. 3788 OF 1989** does not persuade me either. Failure to comply with the requirements of *Order L Rule 15 (a)* is also not fatal to an application. What that rule requires is that every motion or summons do have a warning or a caution to the respondent that if he fail to attend court the court would proceed to give orders as necessary. To fail to quote the words of that rule does not make an application incompetent. Such failure is more of an irregularity which does not go to the root of the application. Failure to quote those words would probably only lead to the setting aside of any orders that would be given in the absence of conformity to that rule. The mischief that this rule addressed was to ensure that the respondents who would be served with an

application would be made aware that if they fail to oppose the application by attending the hearing they would suffer the consequences of orders being granted in accordance with such an application. It therefore follows that failure to abide by the provisions of that rule does not make an application incompetent particularly as in our case where the Respondent did attend the hearing.

Now turning to the Defendants' application, I beg to differ with the statements made in the ruling in this matter of 10th June 2005 as far as the facts of this case relate to the provisions of *Section 21* are related. As can be seen the Plaintiffs' claim is that the Defendants invaded their land and curved out a footpath. The Defendants in their defence did not claim to have a right over that footpath. They did not plead that the footpath is either part and parcel of their land or that it was a public land. In their defence the defendants merely denied invading the land and curving out the footpath. Having the pleadings in consideration I am of the view that they do not show that what the Court will be deciding is a boundary dispute. What the court will decide is whether the Defendants alongside with other people invaded the Plaintiff's land. I therefore also disagree with the Plaintiffs' grounds of opposition No. 4 where they articulated the issue for the determination by the Court as being whether there is or there is no public road of access cutting through their property. That issue is not borne out by the pleadings. In order to understand whether indeed this is a boundary dispute, I draw the attention of the definition of the word 'boundary' found in the Blacks Law Dictionary which is as follows:

"***A natural or artificial separation that delineates the confines of real property".***

This definition must be seen in the light of the Defendants' denial to invading the Plaintiffs' land and curving out a footpath thereof. It is clear in their defence that the Defendants do not lay a claim to the Plaintiffs' land. They simply deny encroaching it. I am therefore of the view that this matter is not within the purview of *Section 21(4)* Registered Land Act. Accordingly the Defendants' application dated 10th April 2006 is hereby dismissed with costs to the Plaintiffs.

MARY KASANGO

JUDGE

Dated and delivered at Nyeri this 13th day of November 2007.

By: M. S. A. MAKHANDIA

JUDGE