



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 104 OF 1999

STEPHEN NJOROGE KIBOI.....PLAINTIFF

VERSUS

DANIEL NGULI KYALO.....1ST DEFENDANT

MASAI ITUMO.....2ND DEFENDANT

RULING

The Plaintiff filed this suit against the Defendants on 12th March, 1999. He averred that he was the registered owner of L.R. No. LAIKIPIA/NYAHURURU/237 situated within Laikipia District. He stated that on or about 13th August, 1998 the boundary between his parcel of land and that of the first Defendant was fixed by a surveyor and in the process it was established that the first Defendant was in occupation of a portion of the Plaintiff's parcel of land.

He further stated that it was established that the first Defendant had built upon the Plaintiff's land and cultivated thereon without the Plaintiff's authority despite oral and written notices to vacate therefrom. He also stated that the second Defendant and his family members had been trespassing on his piece of land while going to fetch water from a well located on his land.

The Plaintiff was aggrieved by those continuous acts of trespass to his property and therefore prayed for the first Defendant's eviction from the occupied portion of his land aforesaid and also prayed for a permanent injunction to restrain the Defendants jointly and severally from occupying, entering, cultivating, passing through, alienating or in any other way interfering with the Plaintiff's aforesaid parcel of land.

The Defendants filed a Defence and a counterclaim on 15th October, 1999 and denied that they were in occupation of the Plaintiff's land. They stated that they were in possession and occupation of parcel of land Numbers L.R. SUBUKIA/10474 and L.R. SUBUKIA/6718 which were the subject of Nakuru H.C.C.C. No. 159 of 1992. They therefore denied having trespassed on the Plaintiff's parcel of land. They contended that the Plaintiff's suit was frivolous and vexatious as the parcels of land which they were occupying and the Plaintiff's land were in two different Districts.

In their counterclaim, the Defendants averred that if they were on the Plaintiff's parcel of land, the Plaintiff's right of action was time barred. They further stated that if they were in occupation of the Plaintiff's parcel of land they had acquired title to the portion they occupy by operation of the law. They stated that the well on the parcel of land had been used by the parties for over 29 years and so they had

acquired prescriptive rights to the use of the said well.

They therefore prayed that the Plaintiff's suit be dismissed with costs and an order do issue to restrain the Plaintiff, his servants, and/or agents from interfering with the Defendants occupation and possession of the parcel of land in dispute. The Defendants also prayed for an order that they had acquired title to the portion of the land they occupy by operation of the law and for an order that the Plaintiff's title to the said portion of land be deemed as extinguished. The Defendants also prayed for an order that the Plaintiff holds the said parcel of land in trust for the Defendants and that the said trust be determined and the said piece of land be registered in the name of the Defendants.

On 17th May, 2000 the Plaintiff filed an amended plaint and averred that he was the registered proprietor of **L.R. NO. LAIKIPIA/NYAHURURU/1945 & 1950** which are subdivisions of original title **No. LAIKIPIA/NYAHURURU/237** situated within Laikipia District. He further averred that the boundary between his parcel of land and that of the first Defendant was fixed by a qualified surveyor and in the process it was established that the first Defendant was in occupation of a portion of the Plaintiff's parcel of land No. LAIKIPIA/NYAHURURU/1950 and that the first Defendant had built upon that property and cultivated thereon without his authority. He sought orders as in the original plaint but now relating to the new parcels of land, that is L.R. NO. LAIKIPIA/NYAHURURU/1945 and 1950.

On 15th August, 2001 the Plaintiff made an application under Section 3A of the Civil Procedure Act that the District Surveyors Laikipia and Nakuru Districts do visit L.R. NO. LAIKIPIA/NYAHURURU/1950 and L.R.NO. 10474 and 6718 SUBUKIA for purposes of fixing the boundaries.

When this application came up for hearing on 11th March, 2002 a consent order was recorded to the effect that the boundary be fixed as prayed.

Surveyors joint report dated 11/6/2002 was prepared and submitted to the court Deputy Registrar on 28th May, 2003. On 12th August, 2003 the plaintiff filed the present application praying that the surveyors joint report be adopted as judgment of the honourable court and that the first Defendant be ordered to demolish two (2) semi permanent residential houses, concrete water tank and the grass thatched huts constructed on L.R. No. LAIKIPIA/NYAHURURU/1950 and in default execution proceedings to issue. He supported the application with his own affidavit sworn on 11th August, 2003 where he deponed inter alia that the surveyors visited the land in dispute in the presence of himself and the Defendants and that the joint surveyors report had not been objected to by any of the parties. In the circumstances, he further deponed, the report ought to be adopted as judgment of the court.

The second Defendant filed a replying affidavit on his behalf and on behalf of the first Defendant. He stated that they had been in occupation of the land in dispute since 1971 and had therefore acquired prescriptive rights over the same. He further stated that their occupation of the land had been subject of High Court Civil Suit No. 159 of 1992 in this honourable court in which the court had ordered that they remain in occupation and that they be given title to the land. He annexed a copy of the Decree – the aforesaid suit. According to him, the Plaintiff's application was aimed at defeating their claim which they had acquired by operation of law.

When the application came up for hearing, the learned counsel for the Applicant Mr. Chege submitted that the first Defendant was bound by the findings of the said report. He further submitted that the dispute related to boundary only and that the issue of adverse possession could not avail the first Defendant any defence as he had clearly stated that he was not occupying the Plaintiff's land. He pointed out that the first Defendant had not filed any replying affidavit and that he could not rely on the affidavit that had been sworn by the second Defendant. It was also his submission that the Plaintiff was not a party to High Court Civil Case No. 159 of 1992 which the second Defendant had quoted in his replying as having given the Defendants rights over the disputed land.

On his part, learned counsel for the Defendants said that the Plaintiff's application had no merit because it was brought without regard to the consent order which had been recorded. He said that there was no provision that the surveyor's report be adopted as a judgment of the court because it was not an award. It

was merely intended to guide the court to arrive at a fair finding. Responding to the Plaintiff's Advocates submission that the first Defendant had not filed an affidavit, he stated that there was no law which required one Defendant not to swear an affidavit on his behalf and on behalf of another Defendant in the same suit. He said that the suit should go on to full hearing so that the surveyors can be cross-examined as there was a Defence and a counter-claim.

I have carefully considered all the pleadings and submissions made in this matter. I have in particular perused the consent order given on 11th March, 2002 and the joint surveyors report so as to determine the present application. The consent order which gave rise to surveyors joint report hence this application was worded as hereunder:-

“By consent of both co unsels and their respective clients: -

(a) The District Surveyors LAIKIPIA & NAKURU DISTRICTS do visit L.R. NO. LAIKIPIA/NYAHURURU/1950 AND L.R. NO. 10474 SUBUKIA for purposes of fixing boundaries in presence of both parties.

(b) The costs of the survey exercise be borne by the Plaintiff and the first Defendant in equal portions.

(c) The surveyors to file a joint report within SIXTY (60) days of this order.

(d) Costs of the application be in the suit.

(e) The Plaintiff's counsel shall serve a certified copy of the order upon the two surveyors.

A careful examination of the consent shows that the parties and their counsel intended to have the suit to go on even after the surveyors visited the aforesaid premises and fixed the boundaries and filed their report. There was no clause which stated that the surveyors report would be on award or the final document which would finalise the dispute between the parties. If that would have been the intention, nothing would have been easier than stating so in the consent order. Paragraph (d) of the consent is also a clear pointer that the parties and their advocates anticipated that they would go on with the suit and that is why they recorded that “costs of the application be in the suit”. The joint surveyor's report is outrightly in favour of the Plaintiff but that does not automatically mean that there is no need for a hearing. The report is like any other expert document which can be placed on second to help the court reach a just decision. All the parties are entitled to examine and cross examine the two surveyors. It would be unprocedural to order that the surveyors joint report be adopted as the judgment of this court.

The Plaintiff's second prayer that the first Defendant be ordered to demolish two semi permanent residential houses, a concrete water tank and grass thatched huts constructed on the land under dispute cannot be granted summarily. This is not an application for a mandatory injunction, it is one brought under Section 3A of the Civil Procedure Act.

One more reason why the report cannot be adopted as the judgment of the court is that there are two Defendants and the report relates to the first Defendant only. If the application was to be allowed, what would be the fate of the second Defendant? He would have been condemned unheard which is against the law and fair play. Further more, the Defendants have a counterclaim as against the Plaintiff. If the court allowed the Plaintiff's application it would amount to a summary dismissal of the counter claim which would be a legal absurdity. The counter claim raises very serious issues of law and cannot be wished away. All the parties must be given their day in court.

The Plaintiff raised the issue that the first Defendant did not personally swear a replying affidavit but instead the second Defendant swore an affidavit where he stated in paragraph 2 thereof that he had authority to swear the affidavit on behalf of the first Defendant. In paragraph one, he deponed that he was the second Defendant and that he was competent to swear the affidavit.

While it may have been desirable to have the first Defendant also swear an affidavit there is nothing wrong in having the second Defendant making an affidavit on his own behalf and on behalf of the first Defendant. In conclusion, it ought to be borne in mind that this is a land matter and Kenyans attach a lot of importance to land and while courts of law have a duty to dispose of matters expeditiously, they must do so procedurally and following the due process and anything short of that would be unacceptable and would most likely result to chaos.

For these reasons, I dismiss the application dated 11th August, 2003. The Plaintiff will bear the costs of the application. I urge the parties and their advocates to take urgent steps to finalise this matter as soon as possible because the dispute seems to be going back many years ago.

DANIEL K. MUSINGA

JUDGE

17/11/2003

Dated and delivered in open court this 17th day of November, 2003 in the presence of:-

Mr. Matiri holding brief for Mr. Oyugi for Defendant/Respondent.

Mr. Karanja holding brief for Mr. Chege for applicants.