



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC JUDICIAL REVIEW CASE NO. 6 OF 2019

IN THE MATTER OF L.R. MERU NORTH/ATHINGA/ATHANJA/4882 AND L.R. NO. MERU NORTH/ATHING'A/ATHANJA/3421 WHICH SHARE A COMMON BOUNDARY

REPUBLIC..... APPLICANT

VERSUS

THE LAND REGISTRAR, MAUA, SUBCOUNTY SURVEYOR.....1ST RESPONDENT

TIGANIA EAST SUB-COUNTY.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

AND

SUSAN KABUTHU MUTHEE (*Sued as the legal representative of the estate of*

ANDRIANO MBAABU M'LITHUMAI *alias*

ANDRIANO MBAABU KORONYA (DECEASED).....INTERESTED PARTY

JULIUS NG'OLUA.....1ST EXPARTE APPLICANT

MERCY KARWITHA.....2ND EXPARTE APPLICANT

JUDGMENT

A. INTRODUCTION AND BACKGROUND

1. The ex-parte Applicants (*the Applicants*) were the Plaintiffs in *Tigania ELC No. 2 of 2014 Julius Ng'olua and Another v Andriano Mbaabu Koronya* whereas the Interested Party was the Defendant in the suit. The Applicants had sued the Interested Party seeking his eviction from *Plot No. 3421 Athinga/Athanja* Adjudication Section (*parcel 3421*). They also sought general damages and a permanent injunction restraining him from entering, remaining upon, or interfering with the suit property.

2. The basis of the said suit was that the Interested Party had sometime in December, 2013 wrongfully trespassed into the Applicants' *parcel 3421* measuring approximately 0.12 acres without any lawful justification or excuse and commenced construction of permanent structures thereon.

3. It would appear that the Interested Party who was the owner of an adjacent *plot No. 4882* in the same adjudication section denied the Applicants' claim and maintained that his activities were contained within his own plot.

4. It would further appear that during the hearing of the Applicants' application for an interim injunction pending the hearing and determination of the suit, the parties entered into a consent whereby the Land Adjudication Officer, the Demarcation Officer and the District Land Surveyor were to visit the properties in dispute in the presence of the trial court and the parties or their representatives. It was also agreed by consent of the advocates for the litigants that the attendant costs shall be shared equally by the parties.

5. The material on record shows that a site visit was undertaken on 17th April, 2014 at which only the Land Demarcation Officer who doubled up as surveyor attended. The Land Adjudication Officer did not attend but the Demarcation Officer informed the court that he would be able to handle all technical issues. It would further appear that upon taking measurements it was found that plot 3421 measured 0.9 acres whereas plot 4882 measured 0.10 acres. The Land Demarcation Officer later on filed his report in court and indicated that none of the disputing parties had encroached on each other's plot.
6. The material on record further indicates that the Applicants were not satisfied with the findings and report of the site visit. They pressed on with the hearing of the main suit. At the trial of the suit, the 2nd Applicant testified that what she bought was 10 points and not 12 points as indicated in the title document. It was her case that the interested party had encroached on the Applicants land by 2 points hence they were left with 8 points only.
7. The trial court, relying upon the report filed in court by the Land Demarcation Officer, was not satisfied that the Applicants had proved the allegations of trespass against the Interested Party. The court consequently dismissed the Applicants' suit with costs by a judgment dated and delivered on 7th February, 2019.
8. There is no indication on record to show whether or not the applicants ever appealed against the dismissal of their suit. There is also no indication that they ever applied for review of the decree or indeed whether they challenged the decree in any other manner.

B. THE APPLICATION FOR JUDICIAL REVIEW

9. By a chamber summons dated 25th March, 2019 brought under **Sections 8 and 9 of the Law Reform Act (Cap. 26) and Order 53 of the Civil Procedure Rules, 2010** the Applicants moved the court under certificate of urgency seeking leave to apply for the judicial review order of mandamus to compel the 1st and 2nd Respondents to visit *parcel No. Meru North/Athinga/Athanja/3421* (parcel 3421) and *parcel No. Meru North/Athinga/Athanja/4882* (parcel 4882) in the presence of the parties for the purpose of preparing a report on whether or not the Interested Party's boundary had encroached on parcel 3421.
10. The said application was grounded upon the statutory statement dated 25th March, 2019 together with the verifying affidavit sworn by the Applicants on the same date as well as 4 annexures thereto. In their statutory statement, the Applicants claimed that it was the Interested Party who had brought in a demarcation officer to prepare a faulty report instead of the Land Registrar who had the mandate to resolve boundary disputes concerning registered land. The Applicants contended that their suit before Tigania Law Courts was wrongfully dismissed due to the "faulty" report by the Demarcation Officer.
11. The Applicants further contended that despite making efforts to have the 1st and 2nd Respondents to visit the two suit properties for the purpose of resolving the boundary dispute, they had failed and or neglected to perform their statutory duties under **Section 19 of the Land Registration Act, 2012** hence the application for leave to apply for judicial review.
12. The material on record shows that the Applicants were granted leave on 26th March, 2019 to apply for judicial review. The Applicants were granted 21 days within which to file the substantive notice of motion. The record shows that the Applicants filed a notice of motion dated 28th March, 2019 seeking the following orders:-

(a) That an order of mandamus be issued, directing the 1st and 2nd Respondents to visit L.R. No. Meru North/Athinga/ Athanja/3421 and No. Meru North/Athinga/Athanja/4882 which adjoin each other, in the presence of the ex-parte Applicants and Interested Party (if they or either of them so desire and/or their representatives/advocates, prepare a report on whether or not the interested party's stone building is partly built on and has encroached onto the ex-parte Applicants' L.R. No. Meru North/Athinga/ Athanja/3421 in Muriri market and if so, to what extent and supply the ex-parte applicants and interested party with a copy each, of that report.

(b) That costs of this application and the ex-parte chamber summons for leave be borne by the Respondents and interested party jointly and severally.

13. The said notice of motion was based upon the matters set out in the statutory statement and the verifying affidavit. However, the Applicants emphasized that the Interested Party had erected a permanent house partly on the Applicant's parcel No. 3421 and that only a report by the 1st and 2nd Respondents under **Section 19 of the Land Registration Act, 2012** would be able to resolve that dispute.

C. THE RESPONDENTS' RESPONSE

14. The Attorney General for the 1st and 2nd Respondents filed grounds of opposition dated 20th May, 2019 in opposition to the application for judicial review on two grounds. First, it was contended that the application was misconceived, premature and an abuse of the court process. Second, it was contended that the Applicants had not exhausted all available remedies before seeking judicial review.

D. THE INTERESTED PARTY'S RESPONSE

15. The Interested Party filed a replying affidavit sworn on 13th June, 2019 in opposition to the application. The Interested Party filed the affidavit in her capacity as the personal representative of her deceased brother Adriano Mbaabu Koronya (*the deceased*). She stated that the Applicants had filed *Tigania CMCC No. 2 of 2014 (the Tigania case)* alleging trespass against the deceased which suit was dismissed upon hearing on merit.

16. The Interested Party stated that prior to the hearing of the Applicants' application for interim orders in the Tigania case, the parties thereto recorded a consent for the court and the Land Adjudication Officer to visit the properties in dispute at which the disputing parties were shown their respective boundaries and that it was found that the deceased had not encroached into the Applicants' parcel No. 3421.

17. It was further stated that by the time the Tigania case was filed the properties in question had not been registered hence the reason for the involvement of the Land Adjudication Officer as opposed to the Land Registrar. The Interested party stated that vide an application dated 7th August, 2018 in the Tigania case the Applicants sought an order for the Land Adjudication Officer to visit the suit properties to identify the boundaries of the parcels in question but the application was dismissed as unnecessary.

18. The Interested Party, therefore, contended that the application for judicial review was frivolous, vexatious and otherwise an abuse of the court process. The Interested Party was of the view that the issues which were directly and substantially in issue in the Tigania case are the ones which are being canvassed in the instant application. It was contended that if the Applicants were aggrieved by the judgment and decree in the Tigania case they ought to have moved this court by way of appeal and not judicial review.

E. THE APPLICANTS' REJOINDER

19. The Applicants filed a supplementary affidavit sworn jointly on 11th September, 2019 in response to the Interested Party's replying affidavit. They contended that the Tigania case was dismissed on a technicality and on the basis of a faulty report hence there was no need to appeal against it.

20. It was further contended that the site visit by the court and the Demarcation Officer did not resolve the main issue in the dispute which was encroachment by the Interested Party. It was further contended that the Land Adjudication Officer did not attend personally during the visit and that the beacons marking out the boundaries of the two plots were not shown to the parties.

21. The Applicants disputed that measurements were taken during the earlier site visit. They also disputed that there was a specific finding in the report that each of the parties were occupying their respective plots. They further stated that the application dated 7th August, 2018 for a second visit by the Land Adjudication Officer was filed by their advocate without their instructions.

F. DIRECTIONS ON SUBMISSIONS

22. When the matter was listed for directions on 2nd September, 2020, it was directed that the application for judicial review shall be canvassed through written submissions. The Applicants and the 1st Respondent had already filed their written submissions. The Attorney General was granted 21 days to file and serve his submissions. However, the Attorney General's submissions were not on record by the time of preparation of the judgment.

G. ISSUES FOR DETERMINATION

23. The court has considered the Applicants' notice of motion dated 28th March, 2019, the statutory statement, verifying affidavit and their supplementary affidavit. The court has also considered the Attorney General's grounds of opposition and the Interested Party's replying affidavit and supplementary replying affidavit. The court is of the opinion that the following issues arise for determination in this matter:

- a) *Whether the application for judicial review is misconceived, frivolous and an abuse of the court process.*
- b) *Whether the Applicants have made out a case for the grant of the judicial review order sought.*
- c) *Who shall bear the costs of the application.*

H. ANALYSIS AND DETERMINATION

(a) Whether the application is misconceived, frivolous and otherwise an abuse of the court process

24. The court has considered the material and submissions on record. There is no doubt that all along the Applicants were aggrieved by the alleged trespass and encroachment by the deceased. The material on record is clear that the Applicants filed the Tigania case to vindicate their rights without much success.

25. The material on record indicates that upon filing the Tigania case the Applicants' requested for the Land Adjudication Officer and District Surveyor to visit the two properties in issue and to prepare a report on whether or not the deceased had encroached on parcel 3421. The deceased did not oppose the request and, in fact, the parties recorded a consent to that effect.

26. The trial court visited the suit properties on 17th April, 2014 in the company of the Land Demarcation Officer. The Land Adjudication Officer did not attend the site but the Demarcation Officer indicated that he could handle all technical work on his own and that he doubled up as a surveyor. It would appear that when measurements were taken on the ground, it was found that both plots measured less than 0.12 ha as indicated in the records. The Applicants' parcel No. 3421 measured about 0.9 points whereas the deceased's parcel No. 4882 measured 0.10 points

27. Later on, the Demarcation Officer filed a report of his findings dated 26th May, 2014 in court in which he concluded that none of the disputing parties had encroached into each other's properties hence the existing boundaries should be maintained. The Demarcation Officer

also stated that the discrepancy in acreage between the actual and recorded acreage was within the acceptable margin of error.

28. The Applicants were dissatisfied, nay aggrieved, by the said report. They disputed the contents and conclusions of the report. The record shows that when the suit came up for further hearing on 27th February, 2018 the applicants sought a second site visit by the Land Adjudication Officer. The Applicants were of the opinion that the report dated 26th May, 2014 did not conclusively resolve the issue of the size of the two parcels.

29. On 21st June, 2018 the trial court declined to allow a second site visit holding that it would be superfluous to do so in view of the earlier visit in respect of which a report had been filed in court. Undeterred, the Applicants filed a formal application dated 7th August, 2018 seeking an order for the Land Adjudication Officer to visit the two properties for the purpose of identifying and marking out their respective boundaries. It would appear, again, that the application did not bear fruit.

30. The record further shows that upon conclusion of the hearing the Applicants filed their written submissions dated 4th January, 2019 in which they sought, *inter alia*, the following reliefs:

“(a) That the Land Officer, Tigania East District, be directed to demarcate and ensure that the Plaintiffs’ plot number 3421 situated at Athinga Athanja Adjudication Section is measuring approximately 0.12 acres and identify and confirm/put beacons within seven (7) days of the order hereof.

(b) That an order for removal of structures placed by the defendant and or his representative, agent, employee, servant or any other person acting on his behalf or the plaintiffs’ plot number 3421 situated at Athinga Athanja Adjudication measuring approximately 0.12 within seven (7) days of the order...”

31. By a judgment dated and delivered on 7th February, 2019 the court held that the Applicants had failed to prove their claim of trespass against the deceased and dismissed the Applicants’ suit with costs. The trial court accepted and adopted the findings of the demarcation officer’s report dated 26th May, 2014 and held that both plots in question had lost some acreage and that the marginal errors were within acceptable limits.

32. The Applicants though aggrieved by the said judgment and decree, did not appeal against the same. The Applicants contended in their supplementary affidavit sworn on 11th September, 2019 that they did not appeal because they considered that the suit was dismissed on a technicality and that the judgment was based upon a faulty report by the Demarcation Officer.

33. It would appear that the Applicants are out to have a second bite at the cherry after losing their suit for trespass against the deceased. It is obvious from the material on record that they applied for a second site visit before the trial court but the request was rejected. The Applicants appear to strongly believe that their parcel number 3421 should measure 0.12 acres, no more no less. They strongly believe that there should be no deficit and that any deficit must have been stolen from them by the deceased. That is why in their written submissions they prayed for an order for the Land Adjudication Officer to conduct another visit of the scene and ensure that their plot measured 0.12 acres.

34. The court finds no evidence on record to suggest that the deficit in the Applicants’ acreage was due to encroachment by the deceased. The demarcation officer’s report indicated that both parcels in question had a deficit and that the deviation was within the acceptable error of margin. The Applicants did not tender any surveyor’s report to the contrary. The court is thus of the opinion that it would be futile to have a second or third site visit merely for the purpose of satisfying the Applicants’ fantasies.

35. The Applicants have attempted to create a distinction between the roles of the Land Adjudication Officer and the Land Registrar in the determination of boundaries. It would appear that the parcels in issue were still under the land adjudication regime at the time of filing the Tigania case but the same were eventually registered under the Land Registration Act 2012 during the pendency of the suit. Having been dissatisfied with a determination made by the officers in charge of the Land adjudication process, the Applicants would like to try their luck under the Land Registration Act, 2012.

36. It is not clear why the Applicants did not amend their pleadings during the pendency of the Tigania case to indicate the registration of the parcels in dispute under the Land Registration Act. Be that as it may, it cannot be denied that the two plots have remained the same and in the same position since their registration under the Land Registration Act. What the demarcation officer did during the site visit on 17th April, 2014 is essentially the same thing the Applicants are seeking in the instant application namely, a determination as to whether or not the deceased had trespassed or encroached into their parcel No. 3421.

37. The court is not satisfied that government officials who have limited resources at their disposal should be compelled to undertake repetitive tasks for frivolous reasons. The court agrees with the interested party that the instant application for judicial review is frivolous and misconceived. The court is further of the opinion that the application is an abuse of the court process. The application is thus a perfect candidate for dismissal.

(b) Whether the Applicants have made as a case for the grant of the judicial review order sought

38. The court has already found that the application for judicial review is frivolous and misconceived. The court has also found that the application is otherwise an abuse of the court process. In those circumstances, a frivolous application cannot entitle an applicant to any orders of judicial review. And neither can an application which is an abuse of the court process. It would, therefore, follow that the Applicants have not made out a case for the grant of any judicial review order.

(c) Who shall bear costs of the application

39. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful parties should not be awarded cost of the appeal. Accordingly, the Respondents and the Interested Party shall be awarded costs of the appeal.

I. CONCLUSION AND DISPOSAL

40. The upshot of the foregoing is that the court finds no merit in the application for judicial review. Accordingly, the court makes the following orders for disposal thereof:

(a) The Applicants' notice of motion dated 28th March, 2019 is hereby dismissed in its entirety for being frivolous and an abuse of the court process.

(b) The Respondents and the Interested Party are hereby awarded costs of the application to be borne by the Applicants.

It is so ordered.

Judgment dated and signed in chambers at Nyahururu this 20th day of May 2021.

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Y. M. ANGIMA

ELC JUDGE

Judgment delivered at MERU this 27th day of May 2021.

In the presence of:

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L. N. MBUGUA

ELC JUDGE