



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 275 OF 2017

JUDITH ACHIENG OMONDO.....PLAINTIFF

VERSUS

JUNE NYAINGO HOSSEL.....1ST DEFENDANT

DIRECTOR OF SURVEYS.....2ND DEFENDANT

FRANCIS MACHARIA.....THIRD PARTY

RULING

1.The plaintiff instituted the present suit vide a plaint dated 30th June 2017 filed in court on the same date. Inter alia the plaintiff sought orders that:-

(i) That the property Title Number Gilgil/Gilgil block1/7803 (Kekopey) measuring 0.43 Hectares belongs to the plaintiff.

(ii) That no part of the plaintiff's property or development encroached on the 1st Defendant's property.

(iii) An order that the Director of surveys forthwith produce the mutation report relating to land parcels Gilgil/Gilgil. Block 1/7802 (Kekopey) and Gilgil/Gilgil Block 1/7803 (Kekopey) for purposes of conducting a survey and ascertaining the boundaries thereof.

(iv) An order compelling the 2nd defendant to use the mutation report to conduct a survey in relation to the properties known as Gilgil/Gilgil Block 1/7802 (Kekopey) and Gilgil/Gilgil Block 1/7803 (Kekopey) and ascertain the boundaries.

2. The 1st defendant in his statement of defence dated 9th July 2018 filed in court on 17th July 2018 averred that the plaintiff had constructed a cabin that encroached onto his parcel of land. Under paragraph 20 of the statement of defence, the 1st defendant admitted the issue involved a boundary dispute which the court had no jurisdiction to handle.

3. On 5th March 2020 the matter was listed for mention for directions before me and upon intimation by Mr. Weche, State Counsel appearing on behalf of the 2nd defendant that the matter involved a boundary dispute, I invited the parties to consider whether the matter ought to be referred to the Land Registrar /Surveyor to ascertain and fix the boundary between the two adjoining parcels of land of the plaintiff and the 1st defendant. On 8th December 2020 the parties appeared before me and while the plaintiff, the 2nd defendant, and the interested party were agreeable to the matter being referred to the Land registrar and the Surveyor, the 1st defendant was of the view that the matter should be heard by the court. The court having heard the parties made a ruling /order in the following terms:-

1. The Land Registrar Nakuru and the County Surveyor Nakuru do visit the parcel of land LR No.Gilgil/Gilgil block 7802 and LR No.Gilgil/Gilgil Block 7803 and carry out an inspection with the view of establishing the physical boundaries of the two parcels.

2. The Surveyor to affirm if there has been any encroachment by either of the parties on the other's parcel of land and to provide a sketch plan to illustrate any such encroachment.

3. The Land Registrar and the Surveyor in carrying out the exercise to adhere to the provisions of Section 18 and 19 of the Land Registration Ac 2012.

4. The Land Registrar and the Surveyor to file a report in court within 90 days from today (8/12/2020).

5. On the date appointed for the exercise, any party will be at liberty to be represented by a private surveyor of his choice.

4. The court in making the reference to the Land Registrar and the surveyor appreciated that under section 18 (2) of the Land Registration Act 2012 it had no jurisdiction to entertain suits relating to boundary disputes respecting land registered under the Act. Section 18 (2) of the Act provides as follows:-

(2) *The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.*

5. Section 19 of the Land Registration Act, 2012 sets out the process the Land Registrar is required to adhere to in establishing a boundary that is disputed.

19. *Fixed boundaries.*

(1) *If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.*

(2) *The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.*

(3) *Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section.*

6. The Land Registrar and the surveyor pursuant to the court's order of reference visited the disputed land parcels on 4th March 2020 and made their respective reports. The Land Registrar's report affirmed that the plaintiff was present while the 1st defendant was represented by a private surveyor one Justin Mwangi. The original owner of land parcel No. Gilgil/Gilgil Block 1/2944 (Macharia) who subdivided and sold the resultant subdivisions 7802 and 7803 to the plaintiff and 1st defendant respectively was present. As per the Land Registrar, the findings of the inspection and survey were that :-

“ Parcel Gilgil /Gilgil Block1/7802 encroached on Gilgil /Gilgil Block 1/7803 rendering Gilgil Block 1/7803 to measure 0.399 Hectares, whereas Gilgil Gilgil block 1/7802 measuring 0.514 Hectares instead of 0.42 and 0.44 respectively”

7. The report by the surveyor confirmed that as per the actual ground measurements derived from the mutation form used to subdivide the original land parcel Gilgil/Gilgil block 1/2944 the fencing of land parcel 7802 had encroached onto land parcel 7803 by as much as 4.5 metres. The surveyor concluded that:-

“ ---through the fencing done the area of the two properties differ from those of the initial survey with Gilgil /Gilgil Block 1 (Kikopey Ranch)/7802 measuring 0.5147 while Gilgil /Gilgil Block 1 (Kikopey Ranch) 7803 is 0.399 Ha”.

8. As there was no consensus on the adoption of the report for implementation, the court directed the parties to make written observations respecting the reports. The plaintiff and the 1st defendant filed their written observations/ submission on 23rd July 2021 and 27th July 2021 respectively.

9. I have considered the pleadings, the reports by the Land Registrar and the surveyor and the filed observations/submissions by the plaintiff and the 1st defendant. There is no contestation that indeed this matter involved a boundary dispute between land parcels Gilgil/Gilgil Block 1/7802 and 7803 (Kikopey). That being the case and considering that this was land registered under the repealed Registered Land Act (Cap 300 Laws of Kenya) and now governed under the Land Registration Act, 2012, the court by dint of section 18 (2) of the Land Registration Act, 2012 lacked the mandate /jurisdiction to deal with the issues of boundary dispute. The Act gives such mandate to the Land Registrar acting in concert with the District Surveyor. The rationale to oust the court's jurisdiction in matters relating to boundary disputes is easy to appreciate. The court does not have the technical capacity to establish or ascertain and/or fix boundaries. To the contrary the Land Registrar and the Surveyor, who have been vested with the statutory mandate to establish, ascertain and fix boundaries have the technical capacity and are the custodians of the records relating to registered land. Before any parcel of land is registered and titled, there is ordinarily a survey undertaken and the dimensions of the land delineated and in respect of every registration section there is normally a survey map delineating all the parcels carried under the registration section.

10. Where a parcel of land is subdivided a mutation form (where the land is registered under the Land Registration Act) is prepared to evidence the subdivision and it is such mutation upon registration that is used to process the resultant titles. In the event of a boundary dispute as in the present case the Registry Index Map and mutation forms in the case of subdivision play critical roles in the ascertainment of physical boundaries.

11. The 1st defendant has in her submissions maintained that the parcels of land had no fixed beacons and the boundaries had not been fixed and the surveyor for that reason erred in using the RIM and mutation forms as the reference. The 1st defendant further submitted neither her nor the plaintiff took possession of their respective parcels on the basis of the RIM and /or the mutation form. She argued the boundary would be classified within the class of general boundaries which were not fixed and could therefore be ascertained having regard to other

general physical features such as the fencing that existed between the two parcels.

12. Indeed section 18(1) of the Land Registration Act acknowledges that unless the parcel boundaries have been fixed in accordance with section 20 of the Act (reference should have been to section 19) of the cadastral map and any filed plan are deemed to indicate approximate situation of the parcel.

13. It is evident that the original parcel Gilgil/Gilgil Block 1 (Kekopey Ranch) 2944 before subdivision measured 0.82 Hectares. As per the mutation Form it was subdivided to create land parcel Gilgil/Gilgil Block 1/7802 measuring 0.44 Hectares and Gilgil/Gilgil Blok1/7803 measuring 0.42 Hectares. The titles issued to the plaintiff and the 1st defendant indicated the approximate areas of their respective parcels in line with the mutation form. The RIM, the mutation Form and the resultant titles defined the parcel of land of each of the parties. Once the issue of boundary arose, these were the documents that were to be resulted to in establishing the actual physical position of the boundary on the ground.

14. Section 18 and 19 of the Land Registration Act, 2012 gives the Land Registrar the power and mandate to establish and fix the boundaries of land parcels. I am satisfied the Land Registrar and the District Surveyor acted properly and in accordance with the court's order of 8th December 2020. The Land Registrar and the Surveyor were in order in using the RIM and the mutation form to establish and fix the boundary. It is indeed incumbent on the 1st defendant before commencing the effecting of any development on her plot to have the boundaries of her parcel of land delineated by a surveyor. It is not clear how the mutation form was prepared since the surveyor who carried out the subdivision ought to have physically delineated the two parcels as per the dimensions shown in the mutation form.

15. The surveyor who represented the 1st defendant during the exercise does not appear to have raised any objection to the manner the exercise was carried out. The physical measurements taken on the ground show that parcel No. Gilgil/Gilgil Block 1/7802 as per the fenced area occupies a larger area (0.5147) ha instead of 0.44ha) while parcel Gilgil /Gilgil Block 1/7803 occupies a smaller area (0.399 ha instead of 0.42 ha). I do not agree that by the surveyor relying on the mutation form in establishing the boundaries, between the two parcels he was in effect altering the bargain of the 1st defendant with the third party. The bargain interia included that the 1st defendant's Parcel of land was to be 0.44 Ha as per the Mutation form and the placing of a fence that resulted in increasing the area to 0.5147 Ha was giving the 1st defendant more than she had bargained for.

16. I am persuaded the appropriate remedy was to have the boundary between the two parcels of land reestablished and if necessary readjusted to conform with the ground measurements. That was the intent of section 18 and 19 of the Land Registration Act, 2012; to have disputed boundaries established and fixed. The Land Registrar and the Surveyor having carried out their statutory mandate as envisaged under the said provisions, the court is bound to accept their findings as the technical experts entrusted with the statutory authority.

17. The net effect is that I find no basis upon which I could fault the technical officers in the execution of their statutory mandate. I find the report by the Land Registrar and the surveyor to be well founded and supported. The report is accordingly adopted by the court and the court directs that the Land Registrar implements the findings of the report and should in terms of section 19 (3) of the Land Registration Act 2012 make a note in the register that the parcel boundaries have been ascertained and fixed.

18. As the Registrar's report indicates certain structures erected by the 1st defendant have enclosed onto the plaintiff's parcel of land, the 1st defendant shall upon the alignment/adjustment of the boundary being effected by the Land Registrar, remove any structures that may have encroached onto the plaintiff's plot within 60 days of the adjustment and/or realignment of the boundary. The adoption of the Land Registrar's report for implementation more or less disposes of the issues that were raised in the pleadings. The plaintiff raised the issue of the 1st defendant's encroachment into her plot while the 1st defendant in her defence and counterclaim denied being in encroachment of the plaintiff's plot. The 1st defendant further averred the plaintiff's actions had led her to lose an investment of opportunity and loss of earnings from the anticipated business. The incidental prayers both by the plaintiff and the 1st defendant in her counterclaim flowed from the determination of the issue of encroachment.

19. The question of encroachment having been determined on the basis of the Land Registrar's report in favour of the plaintiff and against the 1st defendant, it follows the counterclaim by the 1st defendant was not sustainable and I order the same dismissed. Though the plaintiff was successful in establishing the 1st defendant had encroached onto her plot, I am not persuaded the plaintiff had established a basis for award of general damages. As I observed earlier in this ruling it was not clear whether any physical survey was done at the time the subdivision of the original plot was done. That could have accossioned the placing of the fence between the two plots at the wrong position. I find fault on both the plaintiff and the 1st defendant in not carrying out a physical survey at the time they purchased their respective plots. In those circumstances, in exercise of my discretion I order that each party would bear their own costs of the suit and the counterclaim.

20. The final result is that I adopt the report of the Land Registrar and the surveyor as judgment of the court and order its implementation forthwith. The plaintiff's suit succeeds to the extent the Land Registrar's Report has affirmed there was encroachment on her parcel of land by the 1st defendant. I make no award for general damages. The 1st defendant's counterclaim is without merit and is ordered dismissed.

20. Each party to bear their own costs.

Ruling dated signed and delivered virtually at Nakuru this 4th day of November 2021.

J M MUTUNGI

JUDGE