



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC MISC APL. NO. 4 OF 2020

WAMBUA MUTHAMA KAKUI.....APPLICANT

-VERSUS-

JONES MULWA NDONYE.....RESPONDENT

RULING

1. What is before this court for ruling is the Notice of Motion application dated 7th December, 2020 and filed in court on 8th December, 2020 by the counsel for the applicant under certificate of urgency for orders: -

I. Spent

II. That this Honourable court be pleased to issue enforcement order to the District Surveyor to implement the decision made by the Minister in land Appeal Case No. 495 of 1985 and ascertain and mark/put boundaries of the Land Parcel No. UKIA/UTAATI/1327.

III. That the Officer Commanding Station Makueni to ensure compliance of this order

IV. That the costs of this application be provided for.

2. The application is expressed to be brought under Order 51 of the Civil Procedure Rules, Section 1A,1B and 3A of the Civil Procedure Act and all other enabling provisions of the law. It is also predicated on the grounds on its face and is further supported by the affidavit of Wambua Muthama Kakui, the applicant herein, sworn on 7th December, 2020 at Makindu.

3. Jones Mulwa Ndongye who is the respondent herein has opposed the application vide his replying affidavit sworn at Machakos on 26th February, 2021 and filed in court on 8th March, 2021.

4. The application was canvassed by way of written submissions.

5. The applicant has deposed inter alia that he is the owner of plot No. Ukia/Utaati/1327 situated within Makueni County, that the land was subject to a Land Tribunal hearing under the Land Adjudication Act wherein the respondent was dissatisfied with the decision of the Tribunal and appealed to the Minister that the letter rendered his decision in the Minister's Land Appeal Case Number 495 of 1985, that the Ministry of Lands vide a letter dated 20th November, 2007 informed the applicant to be on the site for implementation of the decision and that the surveyors, the District Officer and the Chief have been unable to ascertain the boundaries due to hostility from the respondent.

6. On his part, the respondent has deposed inter alia that having read and where necessary the advocates on record having explained to him the application together with the supporting affidavit and the annexure thereto, the contents of the said application are mere falsities and imbued with vexatious and salacious undertones in an attempt to mislead the court, that he is the owner of Land Parcel No. Ukia/Utaati/638 measuring 1.307hectares, that he is privy to the facts and outcome of the two land tribunals, that he conceded to the decision rendered by the Minister on 12th November, 2007 in Land Appeal Case No. 495 of 1985 albeit against him, that the applicant's claim that he has opposed the re-alignment of the boundaries to be carried out is false since the District Surveyor implemented the decisions made on 18th December, 2007 and he has at all material times cooperated with the said Surveyor.

7. In his submissions dated 19th February, 2021 and filed in court on 22nd February, 2021 before the respondent could file his replying affidavit as directed by the court on 26th January, 2021, the counsel for the applicant reiterated the averments in the applicant's supporting affidavit and urged the court to allow the application.

8 On the other hand, the counsel for the respondent in his submissions dated 26th February, 2021 and filed in court on 8th March, 2021

framed two issues for determination as follows: -

(i) Whether the boundary realignment was conducted.

(ii) costs.

On the first issue, the counsel submitted that pursuant to the ruling in the Minister's Land Appeal No. 495 of 1985, the boundaries of the suit property were re-aligned as per the Registry Index Map (RIM) annexed as 'JMN1' to the respondent's replying affidavit thus the application must fail with costs to the respondent.

9. It is common ground that vide the Minister's ruling in Appeal Case No. 495 of 1985, it was directed that the boundary of Ukia/Utaati/1327 be re-aligned. The Director of Land Adjudication and Settlement instructed the District Surveyor of Machakos to implement the said decision vide the document marked as 'WMK1'.

10. On 20th November, 2007 the District Surveyor Makueni wrote a letter to both the applicant and the respondent and informed them that the re-alignment exercise was to be carried out on 18th December, 2007. It would appear that the exercise did not take place on 18th December, 2007 in view of another letter from the District Surveyor dated 30th October, 2014 ('WMK 3') which shows that the exercise was to be carried out on 6th November, 2014. Eventually the exercise was to be carried out on the 26th November, 2014 as per the District Surveyor's letter dated 19th November, 2014. A letter from the same office dated 7th October, 2014 ('WMK 4') shows that the Minister's ruling was implemented and the applicant has confirmed as much in his letter dated 27th November, 2014. He however goes ahead to state that the implementation was not done in the same letter that he wrote to the Ministry of Lands, Housing and Urban Development. Be that as it may, the applicant further relies on the letter dated 5th May, 2015 ('WMK 5') from the Ministry of Lands, Housing and Urban Development which confirms that the exercise could not be carried out because the objectors were hostile.

11. The above being the case, it is clear that the Minister's decision in Land Appeal No. 495 of 1985 is yet to be implemented. The respondent cannot therefore be heard to say that the same was implemented notwithstanding his hostility to the exercise. In the circumstances, therefore, my finding is that the application has merits and I hereby proceed to allow it as hereunder:-

1. That an enforcement order be and is hereby issued to the District Surveyor to implement the decision made by the Minister in Land Appeal Case No. 495 of 1985 and ascertain and mark/put boundaries of the Land Parcel No. UKIA/UTAATI/1327.

2. That the Officer Commanding Station Makueni to ensure compliance of this order.

3. That the costs of this application be provided for.

DATED, SIGNED AND DELIVERED AT NAROK VIA EMAIL ON THIS 30TH DAY OF NOVEMBER, 2021

Mbogo C.G.

Judge

30/11/2021

In the presence of:

CA:Chuma