



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 313 OF 2017

RWAMBA WAWERU KARANJA (Suing through his Attorneys Maurice

Ngugi Karanja and Stephen Karanja Waweru).....PLAINTIFF

VERSUS

OLE KOIKAI1ST DEFENDANT

DHL HOUSING COOPERATIVE SOCIETY.....2ND DEFENDANT

RULING

What is before court for determination is the Defendants' Notice of Motion application dated the 26th April, 2019 brought pursuant to Sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act; Sections 18(2) and 20 of the Land Registration Act and Order 40 Rule 10 of the Civil Procedure Rules. The Applicants seek the District Land Registrar to prepare and produce the report following the meeting convened on 2nd December 2015 by the said Registrar concerning the boundary dispute herein. In the alternative, the District Land Registrar and District Survey Office prepare a joint report in relation to the boundary dispute herein.

The application is premised on the summarized grounds that the issues in this suit relate to a boundary dispute arising out of various subdivisions made from the mother title referred to as Kajiado/ Kisaju/ 1747. The Defendants through their erstwhile Chairperson Henry Mahugu Wanjohi filed a dispute with the District Land Registrar whereupon the said Registrar issued summons in an attempt to resolve the dispute but is yet to avail the report to court. The Land Registrar's report dated the 26th June, 2018 which is before the court does not touch on the core of the dispute but only provides for the respective owners of the land as per the Green Card.

The application is supported by the affidavit of Peter Kuya the 2nd Defendant's current Chairperson who provides a history of the land parcel number Kajiado/ Kisaju/ 1747 which he explains was a resultant subdivision from Kajiado/ Kisaju/ 1695 together with Kajiado/ Kisaju/ 1746. He contends that the Plaintiff is claiming a part of the southern border of Kajiado/ Kisaju/ 1747 which is owned by the 2nd Defendant. He claims that during a meeting to resolve the boundary dispute, the District Land Registrar and the District Surveyor produced a mutation form which they obtained from the survey office. Further, the District Land Registrar confirmed that the said mutation form had been defaced, having been amended with white out and was also inconsistent with the record the erstwhile chairperson obtained during the preliminary stages of acquisition of the property. He insists the surveyor then proceeded to fix the boundaries as confirmed by the District Land Registrar and soon thereafter, the Plaintiff instituted this suit.

The Plaintiff opposed the application and filed a replying affidavit sworn by STEPHEN KARANJA WAWERU who is an Attorney of the Plaintiff where he deposes that the only summons issued by the Land Registrar were dated 7th August, 2015 which scheduled the hearing on 2nd September, 2015 for parcels 1890; 1991; 1746 and 1747. He contends that on the 2nd September 2015, he personally went and waited at the parcel of land together with his co Attorney until 5 p.m and no one showed up. He claims one London Ole Tunkas Kepiro informed him that the Defendants had visited the Plaintiff's parcels of land Kajiado/ Kisaju/ 6736; 6737; and 6738 (formerly Kajiado/ Kisaju/ 1991) with a large group of persons and were seen pegging using short wooden sticks. He confirms proceeding to the Kajiado Land Office where he met the in charge Mr. Nyandoro who informed him that summons were issued by another Registrar Njambi. Further, the said Njambi explained that although she issued the summons and visited the site on 2nd September, 2015, she left without doing anything as no party was on site. He avers that the 2nd Defendant has already subdivided her parcel number 1747 and now seeks to superimpose a fraudulent 1747 on the Plaintiff's parcel of land. He insists the Defendants parcel was L Shaped while the Plaintiff's parcel is trapezoidal in shape. He reiterates that the Land Registrar has completed and filed a report in compliance with the court directions. Further, since Kajiado/ Kisaju/ 1747 no longer exists, a survey thereof cannot be made. He states that the Defendants are intent on frustrating the suit and the application is mischievous, incompetent as well as an abuse of the court process.

The Defendants through Peter Kuya filed a further affidavit where they reiterated their claim above and deposes that the issues in this suit

arose as a result of the subdivision of Kajiado/ Kisaju/ 1695 and not 1747 as indicated in the grounds in the instant notice of motion. He confirms that the 2nd Defendant is the registered owner of Kajiado/ Kisaju/ 9251 upto Kajiado / Kisaju/ 9350 which were resultant subdivisions of Kajiado/ Kisaju/ 1747 while the Plaintiff is the proprietor of Kajiado/ Kisaju/ 6736; 6737; and 6738 respectively that were subdivided from Kajiado/ Kisaju/ 1746. Further, both the Plaintiff and the Defendants claim part of the southern border which was initially Kajiado/ Kisaju/ 1747. He insists the Land Registrar issued summons on 7th August, 2015 and contends that the 2nd Defendant was present during the site visit together with Ms Njambi and a Surveyor. Further, that Ms Njambi confirmed that the mutation produced by the 2nd Defendant was genuine.

Both the Applicant and the Respondents filed their submissions.

Analysis and Determination

Upon consideration of the Defendants' Notice of Motion application dated the 26th April, 2019 including the parties' affidavits and submissions, the only issue for determination is whether the District Land Registrar should prepare a joint report with the District Survey Office in relation to the boundary dispute herein.

The Applicants submitted that the issue in this suit is a boundary dispute brought about by the subdivision of Kajiado/ Kisaju/ 1695 into 1746 and 1747 respectively. Further, that both the Plaintiff and the 2nd Defendant claim ownership of part of the southern border which was initially Kajiado/ Kisaju/ 1747. They contend that it is only the Land Registrar mandated to fix boundaries to registered land. They relied on the cases of **Dr. William Gacani V Charles Kirimi (2018) eKLR; and George Kamau Macharia V Dexka Limited (2019) eKLR** to buttress their arguments. The Respondent/ Plaintiff in his submissions averred that the issue herein is not a boundary dispute since parcels 1747 and 1991 have been subdivided and no longer in existence. Further, that a survey cannot be done on a non-existent parcel of land and neither can a non-existent report be filed in court. He relied on the case of **Kivanga Estates Limited V National Bank of Kenya Limited (2017) eKLR** to support his argument.

From the averments from both parties, it is evident that both the Plaintiff and the Defendants' parcels of land were resultant subdivisions of Kajiado/ Kisaju/ 1695. At paragraph 11 of the Plaint, the Plaintiff contends that the Defendants intend to use a Land Registrar named Njambi to create a non-existent dispute so as to unlawfully dispossess him of his parcels of land. Further, at paragraph 12 of the Plaint, the Plaintiff claims the Defendants have engaged surveyors to demarcate and subdivide his land. The Plaintiff annexed a map as well as summons dated the 7th August, 2015 issued by the Land Registrar in respect to the boundary dispute over land parcel numbers Kajiado/ Kisaju/ 1890; 1746; 1747 and 1991. Based on the facts as stated above, I find that the dispute herein is indeed a boundary dispute which emanated from the subdivision of the above-mentioned parcels of land from one larger parcel. Since the Land Registrar never filed a report on the determination of the said dispute after issuance of the summons, it is difficult for the court to decipher whether the said issue was determined or not.

In the current case, I note both the Plaintiff and the 2nd Defendant are registered proprietors of their respective parcels of land which were all resultant subdivisions of Kajiado/ Kisaju/ 1695. Insofar as the Plaintiff opposes this application and insists the Land Registrar already filed her report in court as per the Court directions, I note the said report only provided a record of the respective parcels of land as per the Green Card and was not on determination of any boundary dispute.

Section 18 (2) of the Land Registration Act provides that: **“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”.**

Under section 19 of the Land Registration Act, it is the Land Registrar mandated to fix boundaries to registered land.

In the case of **Amos Mpeshe & 3 others v Salau Ole Sokon Modo [2015] eKLR** the Judge held that:

Under section 18 of the Land Registration Act, 2012 the court is precluded from entertaining any action or any proceedings any action relating to a boundary dispute unless the boundaries have been ascertained/determined in accordance with the Act.

Since the Land Registration Act mandates the Land Registrar to deal with boundary disputes before the matter is entertained in court, I do not foresee any prejudice the Plaintiff will suffer if the District Land Registrar and District Survey Office determined the boundary and prepared a joint report.

It is against the foregoing that I find the notice of motion application dated the 26th April, 2019 merited and will allow it. I direct the parties to adhere to the provisions of section 18 (2) of the Land Registration Act before proceeding with the suit herein.

Costs will be in the cause.

Dated signed and delivered in open court at Kajiado this 27th day of January, 2020

CHRISTINE OCHIENG

JUDGE