



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 78 OF 2007

ANTHONY KIPKOSKEI KIMETTO.....PLAINTIFF

VERSUS

DICKSON A. RONO & OTHERS.....DEFENDANTS

RULING.

1. Judgment in this case was delivered on the 16th May, 2019. Upon hearing the Land dispute on both ownership and boundary, the Court made a finding that **Land Parcel No. Narok/CIS-Mara/ILmotiok/468** rightfully and legally was the property of the plaintiff Anthony Kipkoske Kimetto who is also the registered owner, whereas **Land parcel NO. Narok CIS-Mara/Ilmotiok/2444** is the property of the defendants.

2. The court further made a finding (paragraph 25 and 26 judgment) that the dispute was essentially one on boundary between the two land parties, a position supported by the parties in their submissions.

3. Upon such finding, the court, at paragraph **28-30 made orders and directed settlement and fixation of the boundary between the two land parcels by the Narok County Land Registrar and file a report within 60 days, upon which the court would give the final judgment and orders on the boundary and encroachment dispute.**

4. On the 30th June, 2019, the Narok District Land Registrar filed a report dated the 21st May, 2019. It states:

“The referred parcel No. CIS-Mara/Ilmotiok/2444 has been subdivided to create parcel Nos. 3991 and 3992. Hence, the said order cannot be implemented”.

5. By an application dated the 18th October, 2019, the plaintiff moved the court under the **Provisions of Section 3A of the Civil Procedure Act, Order 22 and 51 of the Rules** for

ORDERS:

1) Spent.

2) That this court be pleased to give final orders in the matter in line with its earlier directions at paragraph 30 (4) of its judgment to give effect; on the grounds that the defendants land parcel has been sub divided and therefore a confusion has been created on the ground, as the defendants parcel has ceased to exist; and sought clarification by the court.

6. In opposing the application, the defendants filed submissions on points of law only. The plaintiff too filed its submissions on points of law only. The plaintiff too filed its submissions, which I have carefully considered.

7. **Defendant’s (Respondent) Submissions** are based on the principle of *“Functus Official”*, that once a court passes judgment on a matter, it cannot be called upon to revisit the judgment on merits, save as provided under the law, **Order 21 Rule 3(3) of the Civil Procedure Rules (3)** and that a judgment once signed shall not afterwards be altered or added to save as provided **under Section 99 of the Act** or on review.

8. To buttress its submissions, a Court of Appeal decision was cited, **Baya Tsuma Baya & 2 Others (2014) e KLR**, as well as **Peterson Ndungu Vs. Kenya Power & Lighting Co. Ltd (2015) e KLR, (High Court decision)**.

9. **For the plaintiff/applicant, it is submitted** that as the dispute between the parties was on boundary (as found by the court, and not ownership) the court ought to order for a survey of the suit parcels to ascertain the measurements on the ground as captured in the Title Deeds.

This Court Functus Officio?

10. It is evident that none of the parties hereto were aggrieved by the orders and directions of the court at Paragraph 30 of the judgment.

These Orders were made in furtherance, and to give flesh to the Court's judgment, which if left as were, would have served no purpose to the parties, nor would they have served any justice to them.

11. The Supreme Court of Kenya in **Raila Odinga & 2 Others Vs. IEBC & 3 others (2013) e KLR** held that a Court becomes *functus officio* only after a judgment or award has been perfected by a decree or formal order.

The court further rendered that

“the *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality”.

12. As summarised in the case **Jersey Evening Post Ltd Vs. Al Thani (2002) JLR 542 at 550:**

“A court is *functus* when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court *functus*, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision, any challenge to its ruling on adjudication must be taken to a higher court if that right is available”

The above position was further taken by the **Supreme Court of Kenya in Menginya Slim Murgani Vs. Kenya Revenue Authority (2014) e KLR.**

13. A reading of the 16th May, 2019 judgment is clear that (paragraph 28-30) the said judgment was not final, nor were the proceedings concluded. The judgment/orders were not perfected; something had to be done to perfect the judgment; thus the orders and directions to the Narok Land Registrar to ascertain and fix the boundaries between the two land parcels subject of the dispute – **paragraph 30 (1) – (3).**

14. It is only after the boundary has been fixed that the final orders/judgment will be delivered; and only after that will the court become *functus officio* – **paragraph 30(4) and (5).** Thus, it is my finding that this court has not become *functus officio* as its judgment is yet to be perfected.

15. Further under **Section 18 and 19 of the Land Registration Act, 2012**, (extensively cited in the judgment) the court reserves powers to continue to supervise the process, after its decision that there exists a boundary dispute, where the boundary had not been fixed in registered land as is the case in the suit hereto.

16. **Section 18(2)** states 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”.

17. **Section 19(1)** mandates the Land Registrar to indicate on a filed plan for the survey of the land, to define in the register, the precise position of the boundaries of a land parcel in question, and file a report containing the necessary particulars and note in the register that the boundaries have been fixed and the plan shall be deemed to accurately define the boundaries of the parcel.

18. The above is what the directions/orders that the court envisaged when it issued the orders under paragraph 30 (1), (2) of the judgment, without which the judgment, as is, would be unenforceable, and therefore a paper judgment, of no use to the parties.

Is the Applicant entitled to Orders Sought?

19. The applicant has urged the court to give final orders in line with **paragraph 30 (4).**

By the Land Registrar's letter to the court, the defendant's land parcel has been subdivided resulting to Parcel Nos. 3991 and 3992. No indication was given as to whether the sub-divisions have been sold out to third parties or not.

The applicants/plaintiffs parcel is intact. No subdivisions have been effected.

There is, in existence at the Lands Office Narok, and at the County Survey Department, the survey plans and maps of the entire section encompassing the two land parcels.

20. **Section 19 (3)** is specific that,

“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”.

Both the applicant’s and defendant’s parcels are registered. They have titles in their favour.

21. **Under Section 18 (1)**, there must be in existence a register and a cadastral map and a plan that indicates the approximate boundaries and situation of each of the land parcels; in particular the plaintiff’s parcel and the defendants parcel before the sub-division, at the commencement of the suit herein.

22. To perfect the judgment of the court, the court directions and orders in the 29th May, 2019 judgment ought to be complied with. It is not enough that the Narok County Land Registrar simply states that the Orders of the Court cannot be complied with. With some due diligence, and consultation with the Narok County Land Surveyor Documents stated under Paragraph 21 above will offer the necessary support to effect the directions of the court, the Orders will be complied to give effect to the judgment.

23. For the applicant, without the above steps provided under the **Land Registration Act NO. 3 of 2012**, being complied with, the court cannot give the final orders to perfect the judgment. To do so would in effect give to the parties a final judgment that would not be enforceable or executable, a paper judgment of no use to either of the parties.

To that extent, I give the following further orders that I feel are more appropriate in the circumstances to perfect the judgment of the court;

24. **That in line with Provisions of Section 18 and 19 of the Land Registration Act No. 3 of 2012;**

1) The Narok County Land Registrar and the County Land Surveyor, together and in consultation, using the cadastral maps, approved plans and registers of both land parcels that exist at the land and survey departments before the subdivision of LR NO. CIS-MARA/ILMOTIOK/2444 to Parcel Nos.3991 & 3992.

2) Move to the ground and define the precise position of the boundaries of the land parcels and fix the same as accurately as to define the final boundaries, within 60 days of this order, between LR. Narok/CIS-Mara/ Ilmotiok/468 and CIS-Mara/ Ilmotiok/2444 (now3991 & 3992).

3) A joint report shall thereafter be filed, and served upon the plaintiff and the defendant.

4) Mention for compliance and final orders on the 14th January 2021.

DELIVERD, SIGNED AND DATED ELECTRONICALLY AT KERUGOYA THIS 8TH DAY OF OCTOBER, 2020.

J.N. MULWA

HIGH COURT JUDGE

ADVOCATES:

Lelei & Associates

Maa Towers, 2nd Floor

NAROK

M/s Mongeri & Co. Advocates

Spikes Center,

NAKURU