



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 113 OF 2015

PAUL HIRBO ISATU.....PLAINTIFF/APPLICANT

VERSUS

ABDIRAHAM AKE HIRBO.....DEFENDANT/RESPONDENT

RULING

1. This suit relates to a boundary dispute. The plaintiff had sought a declaration that he is entitled to possession and ownership of L.R. No. Marsabit/Mountain/700 (the suit parcel) as determined by the District Land Registrar on 14/12/2011 and implemented on 30/7/2014. He therefore prayed for vacant possession and an order restraining the Defendant from interfering with his ownership of the suit land.

2. In his defence the Defendant stated that there was a boundary dispute with the previous owner of the suit parcel, i.e. Duba Tadicha to which defendant had filed a case; **Marsabit PMCC No. 9 Of 2009 Abdiraham Ake Hirbo Vrs Duba Tadicha**, the said Duba Tabicha having encroached on 2 metres of his land, which case was determined in his favour.

3. Vide a Ruling dated 20/2/2018 this honourable while deliberating on the report made on 18/2/2011 found the same not being legible and did not form part of the documents the plaintiff relied on during the trial. The court noted that the determination of the report was to the effect that the boundary dispute was not heard and determined as required by **Section 21 (2) of the Registered land act cap 300**. The court therefore made recommendations that a fresh report be filed by the Land Registrar. It is this fresh report that this honourable Court relied on to make its final determination.

4. In the Judgment delivered on 8.11.2018, the court stated that;

“Likewise, in the present case the court does not have the technical knowledge to determine the dispute. The drafters of the law must have had this scenario in mind hence the enactment of Section 18 & 19 of the Land Registration Act.

It is worthy to note that the aforementioned provisions are a replica of Section 21 of the repealed Registered Land Act. It follows that the resolution of boundary disputes has always been in the purview of the Land Registrar. That is why I will proceed to accept the report and also give a determination based on the report.”

5. The plaintiff/applicant has since filed an application dated 6/12/2018 seeking the court to vary, review and/or set aside its judgement dated 8/11/2018. The application is supported by the sworn affidavit of **Paul Hirbo Isatu** and on grounds that; the advocate representing the defendant did not have a practising certificate at the time of filing the defence and is not authorised to act for and on behalf of the Defendant. The applicant is also dissatisfied with the report of the land Registrar Isiolo/Marsabit and that defendant has encroached on his property destroying the same.

6. The applicant further contends that this court ordered a fresh report and proceeded to adopt and rely on the same yet that report was faulty as against a previous report made by a qualified officer, thus the judgement was based on falsified allegations.

7. The defendant opposed the application vide the affidavit dated 29/03/2019. He averred that he was not aware that the previous advocate did not hold a current practicing certificate, and that the application does not raise the ingredients of a review since the same is curved out as an appeal.

Analysis and Determination

8. The issues for determination in this application are whether or not the pleadings filed by the defendant in this suit ought to be struck out on the basis of them being filed by an advocate without a valid practicing certificate and whether the judgement delivered by this honourable

Court ought to be varied, reviewed and/or set aside.

Practicing certificate

9. This court has already determined the matter vide the judgment delivered on 8.11.18. Thus, the court is functus-officio in so far as the issue regarding the practicing certificate of the advocate who drafted the pleadings is concerned. The applicant ought to have raised the issue during the subsistence of the suit, where the said advocates **Halake Rambo Muthoga and Muiruri advocates** would have had a chance to defend themselves on this issue. It is a fundamental principle of natural justice that no man should be condemned unheard - **“Aud Alteram Partem”**. However, I may point out that the supreme court of Kenya has pronounced itself on this issue in the case of **National Bank of Kenya Limited vs. Anai Warehousing Limited (2015) eKLR**, where it was held that;

“Section 34 of the Advocates Act, did not invalidate all documents prepared by an advocate who lacked a current practising certificate”.

REVIEW

10. The second issue for determination is whether this court ought to Review its decision. Order 45 of the Civil Procedure Rules, 2010 is very explicit that a court can only review its orders if the following grounds exist:-

- (a) There must be discovery of new and important matters which after the exercise of due diligence, were not within the knowledge of the applicant at the time the decree was passed or the order was made; or
- (b) There was a mistake or error apparent on the face of the record; or
- (c) There were other sufficient reasons; and
- (d) The application must have been made without undue delay.

11. In the **Court of Appeal case of; National Bank of Kenya Ltd vs Ndungu Njau Nairobi CA No. 211 of 1996**, it was held that;

“A review may be granted whenever the courts consider that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evidence and should not require a deliberate argument to be established. It will not be sufficient ground for review that another judge could have taken a different view of the matter, nor can it be a ground for review that the court proceeded on an incorrect expression of the law.”

12. Also see- **Francis Njoroge v Stephen Maina Kamore [2018] eKLR**

13. I have captured the brief history of the case and the circumstances that led the court to require a fresh report to be filed and subsequently relied on the same. There is no discovery of new and important matter as from the time of delivery of the judgment. I also do not find any other sufficient reasons raised. The same issues that were raised in the main suit have been restated in this application. What is clear is that the applicant was not content with the report of the land registrar, yet this is the report which the court adopted in its judgment. Thus, the recourse for the applicant does not lie in a review but in an appeal.

14. I therefore find that the application dated 6/12/2018 lacks merits and the same is therefore dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 12TH FEBRUARY, 2020.

IN THE PRESENCE OF:

C.A Kananu

Plaintiff in person – present

M/s Mbatiani holding brief for Behailu for defendant -present

Defendant - absent

HON. LUCY. N. MBUGUA

ELC JUDGE