



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT KISII

CASE NO. 175 OF 2014

JOHNSON NYAMOKO.....PLAINTIFF

VERSUS

OTISO ONDICHO.....1ST DEFENDANT

THE ATTORNEY GENERAL.....2ND DEFENDANT

R U L I N G

1. This suit was scheduled for hearing on 17th April 2018. The court upon preliminarily hearing the parties on the issues raised in the suit formed the opinion that the suit raised issues that fell within the mandate of the Land Registrar and the Surveyor to determine. The court in the circumstances made an order *suo moto* for the Land Registrar and the Surveyor to visit the disputed land parcels and to undertake a site inspection and to file their report in court. The court in making the order of reference expressed itself as follows:-

“Issues have arisen as to the origin of parcels 1341 claimed by the 1st Defendant and 1345 claimed by the Plaintiff. The Plaintiff challenges the existence of parcel 1341 which he claims to have been curved out of land parcel 1345. These are matters which only the Land Registrar can clarify. In the premises, I direct that the Land Registrar together with the Surveyor visit land parcels Nyaribari Masaba/Boguche/1341 and 1345 and to delineate their boundaries on the ground. The Land Registrar to also avail all documents relating to the creation of the two parcels of land and incase they were subdivisions the mutation forms and copies of transfer and land board consents as the case may be. The surveyor to avail a certified copy of the current RIM where these parcels of land are shown. The land registrars and surveyors report to be filed in court within the next 90 days from today. Mention on 30th July 2018 for further directions.”

2. The Plaintiff vide a plaint filed on 6th May 2014 had claimed that the 1st defendant acting in collaboration with the Land Registrar Kisii had trespassed onto the Plaintiff’s land parcel **Nyaribari Masaba/ Boguche/1345** and curved off a portion of the land in the 1st Defendant’s favour. The Plaintiff thus sought a declaration that the curving out of a portion out of his land was illegal and null and void and an order of injunction to restrain the act.

3. The 1st Defendant in his defence averred that he was the registered owner of land parcel **Nyaribari Masaba/Boguche/1341** which bordered land parcel **1345** and that it was the Plaintiff and/or his agents

who had persisted in trespass which issue had been the subject of determination in Keroka SRMCC No. 62 of 2013.

4. Following the order of reference of the dispute to the Land Registrar and the surveyor, the officers filed a joint report dated 11th July 2018 together with relevant annexures (enclosures). The report made the following observations:-

1. Both parcels exist on survey and land registry records.

2. Parcel Nyaribari Masaba/Boguche/1341 originated from parcel 1324 which was originally under the names of Kemunto Kwamboka Mema. The parcel is registered in the names of one Judson Otiso Ondicho with the acreage of 0.12Ha. This subdivision was registered on 6th October, 1982 in the Kisii Lands Registry.

3. Parcel Boguche/1345 originated from parcel 1340 which was in the names of Kemunto Kwamboka Mema. The parcel is registered in the names of the Plaintiff with a registered area of 0.57Ha. This subdivision was registered on 7th May 1984.

4. Both subdivisions were executed by the same proprietor, Kemunto Kwamboka Mema.

5. The Land Registrar and the Surveyor stated that they delineated the two land parcel boundaries (1341 and 1345) using the documents and records in their custody i.e RIM sheet No. 21 and mutations for both land parcels **Nyaribari Masaba/Boguche/1341** and **1345**. The Plaintiff dissatisfied with the report by the Land Registrar and the Surveyor filed a Notice of Motion application dated 7th November 2018 seeking to have the report set aside. The application by the Plaintiff/Applicant was expressed to be brought under Order 46 Rule 16 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The application prayed for the following orders:-

1. That the Land Registrar's and Surveyor's report dated 5th August 2015 and on 7th August 2015 filed in court be set aside.

2. That costs of the application be provided for.

6. The application was supported on the grounds set out on the face of the application and the affidavit sworn in support by the Plaintiff. The Plaintiff's contention was that the Land Registrar was biased and besides he was a party in the suit.

7. The 1st Defendant opposed the Plaintiff's application on the grounds of opposition filed on 2nd April 2019. The 1st Defendant averred that the application was misconceived and bad in law and was legally untenable. The 1st Defendant contended the application was an abuse of the court process and was devoid of any merit.

8. The application was argued by way of written submissions. The Plaintiff/Applicant's submissions were filed on 4th April 2019 while the 1st Defendant filed his submissions on 17th April 2019. The Plaintiff through his submissions argued that as the Land Registrar was named as a party in the suit he ought not to have participated in the preparation of the report as he could not be a judge in his own cause. It is on this account the Plaintiff contended the Land Registrar had reason to be biased. The Plaintiff further submitted there was a previous suit involving the same subject matter at Keroka Principal Magistrate's Court that had been dismissed and hence the instant matter was an abuse of the court. The Plaintiff further stated the complaint related to the Land Registrar's actions in March 2014 when the Land Registrar awarded a portion of the Plaintiff's land to the 1st Defendant and the complaint was not addressed. Finally, the Plaintiff submitted the report was not supported with any sketch diagram and no certified copy of the current RIM was availed.

9. The 1st Defendant in his submissions supported the report by the Land Registrar and the Surveyor arguing that the report was supported by the available records at the officers' respective offices. The 1st Defendant submitted that the issue related to the establishment of parcel boundaries which fell within the mandate of the Land Registrar and the Surveyor and the said officers exercised that mandate. The 1st Defendant sought for the dismissal of the Plaintiff's application and for the adoption of the Land Registrar's/Surveyor's report as judgment as it had disposed of the issues arising in the suit.

10. I have considered and reviewed the Plaintiff's application together with the affidavit in support thereof, the grounds filed by the 1st Defendant in opposition and the submissions made by the parties. The application as presented by the Plaintiff seeks to set aside a report that was clearly not made in these proceedings. The application seeks the setting aside of **"the land registrar's and surveyor's report dated 5th August 2015 and on 7th August 2015 filed in court set aside"**. The order of reference in the present matter was made on 17th April 2018 and the report was made on 11th July 2018 and filed on 4th October 2018. The Plaintiff's application thus does not relate to the report filed in this matter and even if the same is granted it would be superfluous as the order sought would not affect the report filed herein. Ordinarily, parties are bound by their own pleadings and the court cannot grant a party that which they have not prayed for.

11. However, to do justice to the parties, I will invoke the provisions of Article 159 (2) (d) of the Constitution that enjoins the court in exercise of judicial authority **"to administer justice without undue regard to procedural technicalities."** The Environment and Land Court Act equally under Section 19(1) enjoins the court to administer justice without undue regard to technicalities of procedure. Section 19(1) provides:-

"In any proceedings in which this Act applies, the court shall act expeditiously without undue regard to technicalities of procedure."

12. To enable the expeditious resolution of this matter, I will consider the reference to the wrong date of the report as inadvertent and excusable and proceed to determine the application on merits. The court in the instance will consider the substance of the application rather than strike the same out on a technicality. In taking the position that I have taken, I have taken cognizance of the fact that in this matter there was only one order of reference to the Land Registrar and the Surveyor and only one report was filed. Hence that would be the only report that would be the subject of an application to set the same aside.

13. The court at the beginning of this ruling outlined the background against which the order of reference to the Land Registrar and the Surveyor was made. From the pleadings, it was evident that the Plaintiff and the 1st Defendant owned separate and distinct parcels of land. The Plaintiff owned and was the registered owner of land parcel **Nyaribari Masaba/Boguche/1345** while the 1st Defendant was the owner and registered owner of land parcel **Nyaribari Masaba/ Boguche/1341**. The Plaintiff's claim was that the 1st Defendant had encroached onto and trespassed onto his (Plaintiff's) parcel of land.

14. The court in making the order of reference to the Land Registrar and the Surveyor to have the physical boundaries of the two parcels of land delineated on the ground was cognizant that the Land Registrar had mandate under Sections 18 and 19 of the Land Registration Act, 2012 to establish and fix boundaries of registered land. The Land Registrar and the Surveyor are the persons mandated under the law to establish and fix any such boundaries. They are the custodians of the land records and the survey records and possess the technical capacity and know how to exercise that mandate. Indeed jurisdiction is ousted from the courts to deal with disputes relating to boundaries of registered land under Section 18(2) of the Land Registration Act, 2012 which provides as follows:

18(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.

15. The report submitted by the Land Registrar and the Surveyor affirm the existence of both parcels **1345** and **1341**. The Surveyor as required submitted a Registry Index Map for **Nyaribari Masaba/Boguche** Registration Section Sheet No. 21 which clearly show the delineation of both parcels of land on the map. The Land Registrar equally furnished other documents from the parcel file which clearly illustrate the origin of the two parcels of land. From the documents the Plaintiff's land parcel **1345** measured 0.57Ha and the 1st defendant's land parcel **1341** measured 0.12Ha.

16. It is a truism that the size of land cannot expand, shrink and/or decrease unless there is amalgamation and/or subdivision. Similarly, the location/position of the land cannot change unless there is realignment of boundaries affecting several parcels of land. It is in view of these constant factors affecting land that make the custodians of the instruments relating to registered land namely the Land Registrar and the Surveyor as the best suited persons to determine boundaries affecting registered land.

17. Both the Plaintiff and Defendant were present when the officers carried out the exercise. The Land Registrar and the Surveyor are public servants charged with specific duties and responsibilities and had no reason to favour either of the parties in execution of their mandate under the law in compliance with the order of reference. The Plaintiff's assertion that the Land Registrar was biased was not substantiated and is without any basis.

18. The Land Registrar is absolved from any personal liability in regard to any acts executed by him in good faith in exercise of his duties/ functions under the Act. Section 13A(5) of the Act provides:-

(5) The Registrar shall not be held personally liable for lawful acts discharged by the Registrar under this act in good faith.

The Land Registrar in implementing the order of reference by the court effectively fixed the parcel boundaries as provided under Section 19 of the Land Registration Act, 2012. The boundaries so established and fixed remain the valid boundaries of parcels **1345** and **1341** in terms of Section 19(2) and (3) of the Act which provide as follows:-

19(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.

19(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.

19. Further the Plaintiff's averment that an earlier suit by 1st Defendant filed at the Principal Magistrate's Court at Keroka was dismissed in my view is of no consequence. The suit before the subordinate court was dismissed for want of prosecution for non-attendance by the Defendant. The suit was not determined on merits and would therefore not be *res judicata*. Besides, the issue in the present matter is one of determination of boundary and the court would not have had any jurisdiction in view of Section 18(2) of the Land Registration Act, 2012,

20. I am in the premises satisfied that the Land Registrar and the Surveyor acted in conformity with this court's order of reference dated 18th April 2018. The report dated 11th July 2018 and filed in court on 4th October 2018 was well supported by the documentation availed. The Land Registrar and the Surveyor determined and delineated the parcel boundaries as they were mandated to do. The determination by the Land Registrar and the Surveyor has fully resolved the issue of boundary of the two land parcels. It is evident that indeed in the Keroka SRM's Court Civil Case No. 62 of 2013 the parties had entered a consent on 18th July 2013 as per the court order attached to the Defendant's bundle of documents and inter alia the Land Registrar Kisii was authorized to mark the boundaries of the respective parcels of

land. The Land Registrar after visiting the land parcels on 18th March 2014 made a report on 8th May 2014 also included in the Defendant's bundle of documents where he confirms having established the boundaries of the two land parcels. The Land Registrar's finding was that it was the Plaintiff herein who had encroached onto the 1st Defendant's land parcel **1341**.

21. The upshot is that having considered and evaluated the Plaintiff's Notice of Motion dated 7th November 2018, I find no merit in the same and order the same dismissed. The report by the Land Registrar and the Surveyor has settled and disposed the issue in dispute in the suit. The Land Registrar's report absolves the 1st Defendant of any trespass. The parcel boundaries of the land parcel had not been established and fixed before the order of reference to the Land Registrar and the Surveyor by the court. The boundaries now having been delineated and shown to the parties in presence of the local administration, the plaintiff and the 1st Defendant should honour the boundary as established. The court adopts the report of the Land Registrar and the Surveyor as the judgment of the court and directs its implementation. The Plaintiff did not establish there was any trespass and/or encroachment by the 1st Defendant onto his land parcel **Nyaribari Masaba/Boguche/1345** and is not entitled to the orders sought in the Plaintiff and his suit is hereby dismissed.

22. Having regard to the nature of the case, I do not think it would be just to order costs against the Plaintiff. I order that each party will bear his own costs of the suit.

RULING DATED, SIGNED AND DELIVERED AT KISII THIS 19TH DAY OF JULY 2019.

J. M. MUTUNGI

JUDGE