



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC SUIT NO.56 OF 2018

BENSON MUTHOKA KIMEU

PAUL MWOLOLO KAVITI.....PLAINTIFFS

VERSUS

HARRISON MUNYOKI KITUU

PAUL MUEMA KITUU

PETER NDAMBUKI KITUU

MUTUA KITUU

MWAIWA KITUU

KITONGA KITUUDEFENDANTS

RULING

1. What is coming up for ruling is the 1st Defendant's Applicant's Notice of Motion application expressed to be brought under Sections 18, 19 and 20 of the Land Registration Act, Section 3A of the Civil Procedure Act Order 50 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law for orders: -

1) THAT the subject matter be referred to the Lands Registrar Makueni for determination and implementation of the correct physical boundaries between land known as NZAUI/NZIU/294 and NZAUI/NZIU/503.

2) THAT the Land Registrar Makueni be given a reasonable time frame within which to determine and implement the correct physical boundary to the parcel of land herein.

3) THAT the costs of this Application be in the cause.

2. The application is dated 11th June, 2019 and was filed in court on 13th June, 2019. It is predicated on the grounds on its face and is supported by the affidavit of Harrison Munyoki Kituu, the 1st Defendant/Applicant herein, sworn at Nairobi on undisclosed date.

3. The Plaintiffs/Respondents have opposed the application vide the replying affidavit of Benson Muthoka Kimeu, the 1st Plaintiff/Respondent herein, sworn at Machakos on 26th July, 2019 and filed in court on even date.

4. Directions to dispose off the application by way of written submissions were issued on 17th July, 2019. The 1st Defendant/Applicant and the Plaintiffs/Respondents filed their submissions on 30th September, 2019 and 13th November, 2019 respectively.

5. The 1st Defendant/Applicant has stated in grounds 1, 2, 3, 4 and 5 of the application that the subject matter of the suit is a dispute between the Plaintiff and the defendant as to the boundary between Nzau/Nziu/294 and Nzau/Nziu/503, that the Land Registrar is the most convenient and best equipped person to determine the correct boundary demarcation between the two parcels of land, that the Land Registration Act requires matters of this nature to be determined by the Land Registrar before any court can entertain them, that it is in the best interest of justice that this application be considered and the orders sought be granted and that the Respondents will not be prejudiced if the application is allowed.

6. The 1st Defendant/Applicant has repeated the same grounds in paragraphs 2, 3, 4, 5 and 6 of his supporting affidavit.

7. The 1st Plaintiff/Respondent has deposed in paragraphs 2, 3, 4, 5, 6 and 7 of his replying affidavit that the contents of the application have been read and explained to him by his advocates on record and having understood the same, he has formed the opinion that the application is unmerited, frivolous and an abuse of the court process, that the case before the court is about implementation of the decision of case No.Nziu/49/69 of 04th August, 1970 marked as BMK1, that prayers (a)(b)(c) and (d) can only be granted by the court, that the Land Registrar has no power to order for an order of cancellation and/or correction of the acreage captured in a title deed without an order of the court as sought in the amended plaint and that the establishment of the boundary can only be based on the decision made by the Adjudication committee and not on the title documents in which wrong acreage is captured.

8. In their submissions, the Counsel for the 1st Defendant/Applicant pointed out that there are four (4) undisputed facts namely: -

(a) *That via a decision of the Land Adjudication Committee, a boundary between the two parcels of land was established, a title was issued for Nzaui/Nziui 294. As well a title was issued for Nzaui/Nziu 503.*

(b) *The adjudication process and/or the demarcation of the parcels of land above was not challenged within 60 days as required by section 29 of the Land Adjudication Act.*

(c) *The title in Nzaui/Nziu 294 is a first title and it can only be challenged on account of fraud.*

(d) *The title No.Nzaui/Nziu 294 was not acquired fraudulently.*

9. Arising from the above, the Counsel submitted that the mandatory period of 60 days granted for challenging the demarcation and/or the adjudication process under the Land Adjudication Act long lapsed. That as such, a case challenging the acreage of the title deed issued upon successful adjudication cannot stand.

10. It was further submitted that the title herein is a first title and unless fraud is alleged and proved which is not the case herein, such title cannot be cancelled. The Counsel pointed out that the title herein has not been alleged to have been fraudulently acquired and neither has the Plaintiff sought for the cancellation of title deed number Nzaui/Nziu/294. The Counsel was of the view that any allegation that the issue is one of acreage as opposed to one of a boundary in nature cannot stand. The Counsel referred the court to paragraph 19 of the Court's ruling delivered on 03rd May, 2019 where the court observed, "*what has come out clearly is that there is a boundary dispute.*" The Counsel further referred the court to **Section 18(2) of the Land Registration Act, 2012** which 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."

11. Regarding the interpretation of the section, the Counsel for the 1st Defendant/Respondent cited the case of **Herman Leo Osula vs. Robert Idewa Emoil [2018] eKLR** where Mukunya, J held thus: -

"There is no doubt that the issue raised in the plaintiffs suit is a boundary dispute. The plaintiff plainly states as much in his pleadings. The suit therefore offends Sec.18(2) of the Land Act 2012 in that no determination has been done under that section. It is filed in a court that has no jurisdiction. The court cannot grant the orders sought. There is a specific procedure to address the issues raised in the suit."

12. The Counsel further cited the case of **Amos Mpeshe & 3 others vs. Salau Ole Sokon Modo [2016] eKLR** where J. M. Mutungi J held thus: -

"I therefore uphold the preliminary objection on the basis that pursuant to sections 16, 18 and 20 of the Land Registration Act 2012 the court lacks the jurisdiction to deal with a matter relating to a boundary dispute as in the instant suit. The boundary dispute having been determined and fixed by the Land Registrar as per the decision made on 26th July, 2012 which decision was upheld by the High Court in the Judicial Review Application No.441 of 2012 the Plaintiff's suit in my view is misconceived and incompetent and is an abuse of the process of the court."

13. Lastly, the Counsel cited the case of **Wills Ocholla vs. Mary Ndege [2016] eKLR** where S. M. Kibunja J observed thus: -

"this court is without jurisdiction to determine the said boundary dispute until after the Land Registrar pronouncement on the issue."

14. The Counsel concluded by submitting that this court has no jurisdiction to deal with the matter like this and the Land Registrar Makueni is the one clothed with the jurisdiction to determine the boundaries between the parties and urged the court to allow the application.

15. On the other hand, the Counsel for the Plaintiffs/Respondents submissions were that paragraphs 4, 5 and 6 of the Replying affidavit clearly show that the dispute is not about boundary but the implementation of the decision that led to the boundaries being established. The Counsel added that the dispute is about wrongful implementation of a decision of a committee on establishing the boundaries and that based on those boundaries, title deeds have already been issued. The Counsel went on to submit that based on the unlawful implementation of the decision of the committee, during the adjudication, the land that was claimed by the Plaintiffs/Respondents has been substantially reduced. The Counsel added that referring the case to the Land Registrar will not aid in resolving the case since the court will have to make a finding

whether the committee decision in case No.Nziu/49/69 was correctly implemented.

16. Whereas I do agree with the Respondents that the court in its ruling delivered on 03rd May, 2019 had observed that there appears to be a boundary dispute between the parties herein, the amended plaint dated 07th June, 2018 shows that the Plaintiffs/Respondents are out to ensure the full implementation of the case committee decision No.Nziu/49/69 which decision is said to have awarded the land claimed by the Defendants/Applicants to the Plaintiff/Respondents herein. In addition, the Plaintiffs/Applicants seek for compensation of destroyed crops and fruit trees. As was correctly submitted by the Plaintiffs'/Respondents' Counsel, there are matters that are outside the ambit of the Land Registrar's jurisdiction. Suffice it to say, they touch over and above the boundary dispute and it will serve no useful purpose to refer the dispute herein to the Land Registrar. In the circumstances, therefore, my finding is that the application has no merits and same is dismissed with costs to the Plaintiff's/Respondents.

Signed, dated and delivered at Makueni via email this 29th day of **April, 2020**.

MBOGO C.G.,

JUDGE.

Court Assistant: Mr. G. Kwemboi

MBOGO C.G, JUDGE,

29/04/2020.