



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 842 OF 2017

KAUSAU OLE KURENDE.....PLAINTIFF

VERSUS

THE LAND REGISTRAR

(KAJIADO NORTH SUB COUNTY).....1ST DEFENDANT

THE DISTRICT LAND SURVEYOR

(KAJIADO NORTH SUB COUNTY).....2ND DEENDANT

LENTEK SOKOYON.....3RD DEFENDANT

SARAPIN SOKOYON.....INTENDED 4TH DEFENDANT

MURERA CHURCH.....INTENDED 5TH DEFENDANT

SIMITA OLE PARANTAI.....INTENDED 6TH DEFENDANT

RULING

What is before Court for determination is the 3rd Defendant's Notice of Motion application dated the 28th May, 2019 brought pursuant to Articles 40, 50 and 60 of the Constitution, Order 2 Rule 15 and Order 44 of the Civil Procedure Rules. The 3rd Defendant seeks the following orders:

- a. The suit/ claim be struck out and/or dismissed against the 3rd Defendant *in limine*.
- b. In the alternative and without prejudice to paragraph (a) hereof, the orders issued by this Honourable Court on 2nd April, 2019, 2nd October, 2018 and 24th January, 2018 be reviewed, varied or set aside.
- c. That the costs of this Application be provided for.
- d. The Honourable Court do make any or further order as may it deem fair and just to grant in the circumstances.

The application is premised on the grounds on the face of it and the supporting affidavit of LENDEKI SOKOYUNI where he deposes that the parcels of land mentioned in the dispute were part of Olchoro Onyori Scheme which was adjudicated in 1973. He claims at the time of adjudication, the sizes of the land parcels were ascertained. Further, they were later confirmed by survey and beacons affixed. He confirms being the proprietor of parcel of land formerly known and described as KJD/ OLCHORO – ONYORE/ 282 which has since been subdivided into several parcels of land. He explains that the Plaintiff was the proprietor of land formerly known as KJD/ OLCHORO – ONYORE/ 68 which has since been subdivided into several pieces of land. He denies that his parcel of land ever neighboured the Plaintiff's parcel. Further, that his late brother's land parcel number KJD/ OL CHORO – ONYORE/ 262 and the 4th Defendant's land parcel number KJD/ OL CHORO – ONYORE/ 283 were between his land and the Plaintiff's. He contends that all the aforementioned parcels of land have since been subdivided. Further, that some of the resultant subdivisions have since been transferred to third parties He avers that he has no relationship with the Plaintiff who now wants to trespass on his land. He denies interfering with the Plaintiff's beacons on his parcel of land formerly known as KJD/ OL CHORO ONYORI/ 68. He states that three of the community elders who were part of the Adjudication Committee in 1973 are still alive and willing to give a true and factual account of the previous including current status of their respective pieces of land as was originally adjudicated. He insists there is no triable issue between the Plaintiff and himself. Further, there is no prayer made against him.

He reiterates that the Plaintiff has failed to demonstrate how he participated in the subdivision of the Plaintiff's land. He states that the three orders issued by this Court on 2nd April, 2019; 2nd October, 2019 and 24th January, 2018 directing the 1st Defendant who is a party to this suit to determine a boundary dispute herein contravenes the rules of natural justice and the right to fair hearing. He further states that summons to determine the boundary dispute should not only be issued to the original owners of the parcels formerly known and described as KJD/ OL CHORO/ ONYORE/ 282, 68, 262 and 283 but to all the third parties who now own the subdivided parcels of land. Further, that the Plaintiff's claim against him be struck out or in the alternative the orders issued on 2nd April, 2019; 2nd October, 2019 and 24th January, 2018 be set aside or reviewed.

The Plaintiff opposed the application by filing a replying affidavit where he deposes that it is premature as the issues raised therein especially as to whether the 3rd Defendant has encroached on the Plaintiff's land can only be determined after the survey that had been ordered by the Court on diverse dates. He claims the application totally disregards the directions issued by this Court and clearly shows the 3rd Defendant has something to hide. He explains that his original parcel of land Kajiado/ Ol choro Onyore/ 68 was subdivided into Kajiado/ Ol choro Onyore/ 1379; 1380 and 1381 respectively. Further, Kajiado/ Ol choro Onyore/ 1379 has been subdivided to eight (8) more parcels. He contends that the mutation for Kajiado/ Ol choro Onyore/1379 indicated it measured 45.02 hectares instead of 73.86 hectares. Further, the reduction was occasioned by encroachment by other people including the 3rd Defendant who owns Kajiado/ Ol Choro/ Onyore/ 282. He avers that the resultant subdivisions of the 3rd Defendant's land shows the new parcels in total measure 100.64 hectares which is more than 72.39 hectares which was the original measurement for Kajiado/ Ol Choro/ Onyore/ 282. He reiterates that since a survey had been ordered by the Court, it would be illogical to allow the instant application before the 2nd Defendant presents its report.

The 3rd Defendant/Applicant and the Plaintiff/Respondent filed their respective submissions to canvass the instant application.

Analysis and Determination

Upon consideration of the Notice of Motion dated the 28th May, 2019 including the respective parties' affidavits, annexures and submissions, the following are the issues for determination:

- Whether this suit should be struck out and/or dismissed as against the 3rd Defendant.
- Whether the Court should review and or set aside its orders issued on 2nd April, 2019, 2nd October, 2018 and 24th January, 2018 respectively.

As to whether this suit should be struck out and/or dismissed as against the 3rd Defendant.

The 3rd Defendant contends that this suit does not raise any triable issue against him. He submits that his parcel of land does not neighbour the Plaintiff's land. Further, the Plaintiff does not have a justiciable claim against him. He has relied on the decisions of **J. P Machira t/a Machira & Company and Independent Electoral and Boundaries Commission & Another V Stephen Mutinda Mule & 3 Others (2014) eKLR** to support his averments. Further, the Plaintiff had not enjoined all necessary parties for the final determination of this matter. He further submitted that the Plaintiff has not succinctly set out the violations of his rights. He relied on various decisions including **Kenya Medical Laboratory Technicians and Technologists Board & 6 others V Attorney General & 4 others (2017) eKLR**; **Anarita Karimi Njeru V Republic (1979) eKLR**; **Mumo Matemu V Trusted Society of Human Rights Alliance & Others (2013) eKLR** and **Ledidi Ole Tauta & Others V Attorney General & 2 Others (2015) eKLR** to support his arguments.

Order 2 rule 15 of the Civil Procedure Rules provides as follows: **'(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that— (a) it discloses no reasonable cause of action or defence in law; or (b) it is scandalous, frivolous or vexatious; or (c) it may prejudice, embarrass or delay the fair trial of the action; or (d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.'**

From the averments in the Plaintiff, I note the Plaintiff has raised an issue of alleged reduction of the acreage of his land. I note at paragraph 4 of the Plaintiff, he has stated that the 3rd, 4th, 5th and 6th Defendants have their respective parcels of land namely KJD/ Ol Choro Onyore/ 282, 283, 126 and 2880 which all neighbour his parcel of land. In the case of **Delphis Bank Limited v Caneland Limited [2014] eKLR**, the Court of Appeal on striking out pleadings held that: **'The leading local case on interpretation of Rule 13 of Order VI of the Civil Procedure Rules on which the application striking the defences was based is perhaps D.T. Dobie & company (Kenya) Ltd vs Muchina which counsel for the appellant referred to us. In the case, Madan JA, as he then was, opined in an obiter dictum that; "The power to strike out should be exercised only after the court has considered all the facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinions should be expressed as this would prejudice the fair trial and would restrict the freedom of the trial judge in disposing the case."**

In relying on this decision and based on the facts before me, I find that from the averments in the Plaintiff, the respective affidavits including the annexures, there are triable issues raised which cannot be determined at this interlocutory stage. I opine that this matter should proceed to full trial to enable the court make a proper determination on its merits. In terms of including the other third parties who own the resultant subdivisions from original land parcel numbers Kajiado/ Ol Choro Onyore/ 68, 262, 282 and 283, I concur with the 3rd Defendant on this point and direct the Plaintiff herein to ensure that they are all included in this suit.

As to whether the Court should review and or set aside its orders issued on 2nd April, 2019, 2nd October, 2018 and 24th January, 2018 respectively.

The 3rd Defendant has sought for review of the said Orders of the Court insisting the said Orders turn the 1st and 2nd Defendants into arbiters in their own cause contrary to the rules of natural justice. Further, the said orders raise a likelihood of bias and violates the 3rd Defendant's

right to fair hearing. He has relied on the decisions of **Moses Wachira V Niels Bruel & 2 Others (2013) eKLR**; **Ernst & Young LLP V Capital Markets Authority & Another (2017) eKLR** and **Philip K. Tunoi & Another V Judicial Service Commission & Another (2016) eKLR** to buttress these arguments.

Section 80 of the Civil Procedure Act and Order 45 Rule 1 (1) of the Civil Procedure Rules makes provisions on review of Court Orders.

Section 80 of the Civil Procedure Act provides that:—**“Any person who considers himself aggrieved— (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”**

While Order 45, rule 1 (1) of the Civil Procedure Rules stipulates thus: ‘ **Any person considering himself aggrieved— (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.**’

I note the Orders sought to be reviewed concern referring the dispute herein to the Land Registrar, Kajiado North (1st Defendant herein) for determination of the respective boundaries. From a perusal of the Plaintiff’s claim herein, I note the fulcrum of the dispute herein revolves around boundaries of respective parcels of land. In relation to determination of a dispute touching on boundaries, section 18 of the Land Registration Act provides that:’ **(1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel. (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. (3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary: Provided that where all the boundaries are defined under section 19(3), the determination of the position of any uncertain boundary shall be done as stipulated in the Survey Act, (Cap. 299).**’ From a reading of these provisions, it is clear that it is the Land Registrar legally mandated to deal with the boundary dispute in the first instance before the matter can be handled by the Court. The 3rd Defendant seems to have an issue with this legal provision and insists this violates natural justice and fairness. I opine that there is no exception to the 3rd Defendant subjecting himself to this process and in the event he is aggrieved with the orders from the Land Registrar, he has a recourse to appeal. It is my considered view that he cannot pre-empt the outcome of the boundary dispute by claiming he will not get a fair hearing and yet he has not subjected himself to this process as required by law. Further, for an order to be reviewed, there has to be an error apparent on the face of record or discovery of new and important evidence, which is devoid from the 3rd Defendant’s averments. In the circumstance, I find that his averments have not met the threshold for review of this Court’s orders which were based on a clear legal provision. He further states that summons to determine the boundary dispute should not only be issued to the original owners of the parcels formerly known and described as KJD/ OL CHORO/ ONYORE/ 282, 68, 262 and 283 but to all the third parties who now own the subdivided parcels of land. I am of the view that these are the facts he needs to present to the Land Registrar, Kajiado North prior to the determination of the respective boundaries.

It is against the foregoing that I find the application dated 28th May, 2019 unmerited and will disallow it. Costs will be in the cause.

Dated, Signed and Delivered via email this 27th Day of May, 2020

CHRISTINE OCHIENG

JUDGE