



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC CASE NO. 76 OF 2019

SHADRACK KORIR.....PLAINTIFF/ RESPONDENT

- VERSUS -

FELIX KIPKEMBOI SIMEL.....1ST DEFENDANT/APPLICANT

ABRAHAM KIMARU.....2ND DEFENDANT/APPLICANT

SALOME J. SIMEL.....3RD DEFENDANT/APPLICANT

RULING

This ruling is in respect of an application dated 16th September 2019 by the defendant/ applicants seeking for the following orders:

- a. The Honourable Court be pleased to order the Nandi County Land Surveyor to demarcate the boundary between the parcels of land known as **NANDI/KOKWET 22** and **NANDI/KOKWET/554**;
- b. The resultant Survey report be submitted before this Honourable Court within 7 days;
- c. The County Commander, Nandi County to provide security for effective compliance of the order (a) above;
- d. Costs of this Application be in the cause.

The parties agreed by consent that the status quo be maintained pending the hearing of this application inter partes. Counsel further agreed to canvass this application vide written submissions but only the applicants filed their submission by the time this ruling was being written. There was no response to the application by the respondent.

Counsel listed 3 issues for determination by the court as follows:

On the jurisdiction of the court to grant the prayers as sought, whether the resultant survey report should be submitted before the court and whether the provision of security during the survey is necessary.

Counsel submitted that the court has jurisdiction to hear and determine this matter as per Section 13 (1) of the Environment and Land Court Act. She further submitted that **Section 18 (2) and 19 of the Land Registration Act No. 3 of 2012 confirms this** Court has the jurisdiction to compel parties to appear before the Land Registrar once a matter is lodged in Court **which** provides that the determination of the boundaries of a parcel is initially the preserve of the Land Registrar:

“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.”

Ms Chesio cited the case of **Hon. Henry Kosgey v Brian Cuthbert & another [2019] eKLR** where Ombwayo J. compelled parties to appear before the Land Registrar for purposes of determining the boundary dispute. Further in the case of **Willis Ocholla vs Mary Ndege [2016] eKLR** the Court made the following finding on the issue of jurisdiction of the court **in view of the provisions of Section 18 (2) and 19 of the Land Registration Act No. 3 of 2012.**

“That in terms of Section 18 (2) of the Land Registration Act, proprietors of registered land with a boundary dispute are

obligated to first seek redress or solution from the Land Registrar before moving or escalating the dispute to this court.....That the provisions of Section 18 (2) of the Land Registration Act shows clearly that the court is without Jurisdiction on boundary disputes of registered land until after the Land Registrar’s determination on the same has been rendered.”

It was Ms. Cheso’s submission that this matter is a boundary dispute between land parcel NANDI/KOKWET/22 measuring approximately **38.04 Ha** translating to **93.99 acres** and registered in the names of the 2nd and 3rd Applicants and the bordering land parcel NANDI/KOKWET/554 registered in the name of the Plaintiff/Respondent.

Counsel also submitted that the respondent purchased land parcel No. NANDI/KOKWET/554 on 11th January 2007 and as per the sale agreement the property measures **3 Ha** which translates to **7.41 acres** and that the 2nd and 3rd Applicants are executors in the estate of **KIPYEGO ARAP SIMEI(deceased)** vide succession proceedings **ELDORET HCP&A NO. 245 of 2004** wherein the Grant of Probate issued to them was confirmed on 8th February, 2017 and a Certificate of confirmation of the Grant was issued in 9th March, 2017.

That the estate of **KIPYEGO ARAP SIMEI** (deceased) vide succession proceedings **ELDORET HCP&A NO. 245 of 2004** comprises of among other properties, the property known as NANDI/KOKWET/22 measuring approximately **38.04 Ha** whereby the 2nd and 3rd Applicants being executors of the estate of **KIPYEGO ARAP SIMEI(deceased)** transferred the property known as NANDI/KOKWET/22 measuring approximately 38.04 Ha into their own names on 11th September, 2018 pursuant to their statutory powers and duties. Further that subsequent to the transfer, the 2nd and 3rd Applicants initiated the process of allocating the property known as NANDI/KOKWET/22 measuring approximately **38.04 Ha** to the beneficiaries of the Estate **KIPYEGO ARAP SIMEI (deceased)** as per the Certificate of Confirmation of Grant; however, the same was halted by the boundary dispute.

Ms Cheso submitted that the genesis of the boundary dispute is that the Respondent illegally excised and hived off 4 acres from NANDI/KOKWET/22 which was confirmed by a private survey that NANDI/KOKWET/22 measuring approximately 38.04 Ha was **less by 4 acres**. That in the spirit of finding an amicable resolve to the boundary dispute, the Applicants approached the Respondent who adamantly refused to submit to the same.

Counsel relied on the provisions of Section 19(1) of the Land Registration Act on the role of the Land Registrar in the resolution of boundary disputes as follows:

If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.

Counsel submitted that the 2nd and 3rd Applicants had fully paid the survey fees, whereby the Nandi County Surveyor and the Nandi Land Registrar had scheduled a survey of the abovementioned properties on 11th December 2018 and 25th January 2019 but the same could not take place. That the Respondent had been issued with reasonable notice as per Section 23 of the Survey Act No. 25 of 1961 and Section 91 of the Land Registration Act cited above, but the same was frustrated by the Respondent and his agents, servants and or employees in attempt to cover up his illegal acts of excising 4 acres from NANDI/KOKWET/22.

On the issue as to whether the resultant survey report should be submitted before this court, counsel reiterated that the dispute herein is one relating to boundary between land parcels NANDI/KOKWET/22 and NANDI/KOKWET/554 and the Land Registrar not only possesses the jurisdiction under Section 18(2) Of the Land Registration Act but also has the necessary expertise to determine and ascertain the boundaries as pointed out in George Kamau Macharia v Dexka Limited [2019] eKLR. Further that the respondent in his plaint particularly in paragraphs 6, 7, 8, 9, 10 also confirms that the dispute is a boundary dispute.

It was counsel’s submission that the Respondent in his Replying affidavit produced an independent surveyors report annexed as “SK5” and that by the Respondent presenting his own independent Surveyor’s report does not constitute a boundary determination as contemplated by Section 18 and 19 of the Land Registration Act as was held in the case of Lucy Agape Wayodi v Kenya National Highways Authority & 2 others [2019] eKLR by **Ombwayo J** that:

The Petitioner’s own independent survey and surveyor’s report cannot substitute the determination of the boundary by the Land Registrar as provided for in **Section 18 and 19 of the Land Registration Act**.

That the Nandi County Surveyor’s report will indicate the true and actual boundaries of the properties and the extent of trespass and illegal intrusion of the Respondent into parcel NANDI/KOKWET/22 which is capable of conclusively determining this dispute. Counsel urged the court to order that upon survey the report be submitted in court.

On the issue of provision of security during the survey, counsel submitted that **Section 24 of the National Police Service Act No. 11 A of 2011** provides for the functions of the Kenya Police Service. Section 24(a) (b)and (c) which notes: **The Functions of the Kenya Police Service shall be the-**

a. Provision of assistance to the public when in need.

b. Maintenance of law and order.

c. Preservation of peace. Accordingly, this provision obligates the Kenya Police to provide security if directed or ordered by the court to do so.

Counsel submitted that under section 51(b) of the National Police Service Act No. 11 of 2011, the County Commander must obey and execute all orders lawfully issued and as such this court has powers to ensure that the County Commander provides security assistance to the team that is going to conduct the survey.

Ms Chesio therefore urged the court to allow the application as prayed.

ANALYSIS AND DETERMINATION

This is an application for the court to order that the County Land Surveyor to demarcate the boundary between the two suit parcels of land. The issue for determination is whether the court has jurisdiction to grant the orders sought and whether the suit before the court is premature. Is the suit a boundary dispute and if so, is it in the right forum?

Section 18 (2) and 19 of the Land Registration Act No. 3 of 2012 provides as follows

18.(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.

This section provides that a boundary dispute between proprietors of registered land are obliged to first seek redress from the Land Registrar before escalating it to court. This essentially means that the first port of call is at the Land Registrar's office before moving to court. There is no evidence that the same was done.

Section 19(2) further states as follows:

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.

There is evidence that the respondents were given notice to appear before the Registrar but they did not honour the summons. The respondents have also attached a survey report from an independent surveyor which shows that this is a boundary dispute.

In the case of George **Kamau Macharia v Dexka Limited [2019] eKLR J. Kemei** observed as follows:

From the above provisions of the law, it is manifestly clear that the above section gives the mandate to the Land Registrar to resolve boundary disputes of land with general boundaries. Registry Index Map (RIM) only indicates approximate boundaries and the approximate situation on the ground. Even if this Court was to hear and determine this matter it will still require the input of the Land Registrar. The framers of section 18(2) of the Land Registration Act placed this matter before the Land Registrar who has the technical advice and resources of the District Surveyor to determine and ascertain the boundaries. It is trite law that where the law has given a legal obligation to a department of Government, it is important for the Court to let that department proceed to meet its legal obligations.

The court should not duplicate roles given to experts to perform. There are specific provisions of the law that gives the Land Registrar the role of fixing boundary disputes. Why would the court do it and it will still require the expertise of a surveyor or a Land Registrar?

This is the kind of suit that I would strike out but since there are other orders sought for in the plaint, I will order that the Nandi County Land Surveyor do proceed to demarcate the boundary between **NANDI/KOKWET /22 and NANDI/KOKWET/554**, and file a report in court within 30 days. I order that the Nandi County Commander do provide security during the survey exercise.

DATED and DELIVERED at ELDORET this 30th DAY OF JUNE, 2020

M. A. ODENY

JUDGE