



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
MISCELLANEOUS CIVIL SUIT NO. 40 OF 2014

**IN THE MATTER OF: AN APPLICATION BY TERRY C. MAINA (The Ex parte Applicant)
FOR AN ORDER DIRECTED AT THE DISTRICT**

AND

**IN THE MATTER OF: THE APPLICATION OF SECTIONS 18, 19, 86 AND 101 OF THE
LAND REGISTRATION ACT (CAP 300), LAWS OF KENYA,**

AND

**IN THE MATTER OF: THE APPLICATION BY TERRY C. MAINA TO THE DISTRICT LAND
REGISTRAR, KAJIADO FOR THE ASCERTAINMENT OF THE BOUNDARIES IN RESPECT
OF THE PARCELS OF LAND KNOWN AS KAJIADO/KAPUTIEI NORTH/36933 AND
KAJIADO KAPUTIEI NORTH/36934**

BETWEEN

TERRY C. MAINA APPLICANT

VERSUS

THE DISTRICT LAND REGISTRAR, KAJIADO RESPONDENT

RULING

The Applicant by a Notice of Motion dated 10th December 2013 founded under the provisions of sections 18,19, 86 and 101 of the Land Registration Act NO. 3 of 2012 and expressed to be brought under section 1A, 1B and 3A of the Civil Procedure Act seeks the following substantive orders:-

1. The Honourable court be pleased to give an opinion on the question whether the failure and/or refusal by the Registrar of Kajiado Lands Registry to ascertain the boundaries in respect of the Applicant's suit properties known as **Kajiado/Kaputiei North/36933** and **Kajiado/Kaputiei North/36934** vide his decision dated 14th May, 2013 upon being moved by the Applicant on 12th April 2012 and various other correspondences was proper execution of the functions of the Registrar under sections 18 and 19 of the Land Registration Act,
2. That the court do issue an order compelling the Respondent to immediately more as provided for

under section 19 of the Land Registration Act, to cause to be defined by survey, the precise position of the boundaries in respect of the Applicant's suit properties known as **Kajiado/Kaputiei North/36933** and **Kajiado/Kaputiei North/36934** question and 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 said parcels.

The application is supported on the grounds set out on the body of the application and on the supporting affidavit by **Terry C. Maina** the Applicant herein sworn on 10th December 2013. The Applicant sets out the following grounds in support of the application:-

- a. By the court's judgment of 15th February, 2012 delivered in **Machakos Judicial Review Cause NO. 258 of 2010** the court affirmed the Applicant's status as the duly registered and indefeasible proprietor of the parcels of land known as **Kajiado/Kaputiei North/36933** and **Kajiado/Kaputiei North/36934** and in respect of which the Applicant has valid certificates of title.
- b. Following the said decision, the Applicant sought to have the Respondent to establish the boundaries thereof.
- c. Despite the fact that the court had, in the aforementioned judgment conclusively determined the issue of ownership of the suit properties, the Respondent considered the Applicant's call for proper demarcation of the boundaries to the suit properties as tantamount to a dispute and declined to establish the boundaries thereof.
- d. The Respondent has variously indicated that he can only establish the said boundaries upon being served with a court to that effect.
- e. In view of the Registrar's said decision, a question has arisen with regard to the exercise of his powers under the Registration of Land Act and it is therefore sought by the Applicant to have the court give its opinion regarding the Applicant's move to have the boundaries to her aforesaid properties established by the Respondent and the Respondent's refusal to ascertain the same.
- f. Whereas the judgment referred to herein was delivered in Machakos, due to the fact that there is no environment and Land Court in Machakos, a court that has jurisdiction to entertain this matter, the present application could not be filed in Machakos and had to be referred to this court.

The Applicant in the supporting affidavit depones that she is the registered owner of the suit properties and has annexed the title documents issued in her name on 29th September 2010 which together with various correspondences and the copy of the ruling of the court in **Machakos Civil Misc. Case NO. 258 of 2010** are annexed and marked "TCM1". The Applicant reiterates the grounds on the face of the application in the supporting affidavit.

The Application was served on the Respondent who did not file any response and hence the application is unopposed. The Applicant on the directions on the court filed skeletal submissions on 11th February 2015. I have perused the application together with the annexures, and the submissions by the Applicant, and the lone issue in this matter is whether this is an appropriate matter for the court to intervene pursuant to the provisions of section 86(1) of Land Registration Act NO. 3 of 2012.

Section 86(1) of Land Registration Act provides:-

86. (1) if any question arises with regard to the exercise of any power the performance of any duty conferred or imposed on the Registrar or any aggrieved person shall state a case for the opinion of the court, and thereupon the court shall give its opinion which shall be binding upon the parties.

86. (2) The Rules Committee shall make rules on the procedure to be followed by the

Registrar or an aggrieved person under subsection (1).

The court is not aware that any rules as contemplated under section 86(2) of the Land Registration Act have been made. In the absence of any such rules the court would take comfort in section 1A, 1B and 3A of the Civil Procedure Act which enjoin the court to give effect to the overriding objective of the Act which is stated under section 1A (1) to be as follows:-

“The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportion of the civil disputes governed by the Act”.

Section 3A of the Civil Procedure Act clothes the court with inherent power to do justice whenever it is just to do so. Hence where the law falls short of making any provision the court can properly invoke its inherent power under section 3A to ensure justice is meted out and the ends of justice are met.

Section 3A provides:-

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”.

The fulcrum of the Applicant’s present application is the ruling delivered in the referred to case at the **Machakos High Court Misc. Case NO. 258 of 2010** where **Asike- Makhandia, J** (as he then was) gave a ruling up-holding the Applicants proprietorship of the suit land being **Kajiado/Kaputiei North/36933 and 36934**. In the said ruling the Judge stated:-

“The Applicant is the registered proprietor of the suit premises and has title to the same. Her interest therein is absolute and indefeasible and may only be challenged in a court of law and not in the tribunal established pursuant to the provisions of the Land Disputes Act”.

As there is no indication whether the ruling by **Makhandia, J** was appealed and/or whether any suit has been brought challenging the title of the Applicant under section 26(1) of the Land Registration Act 2012 the position remains the Applicant is the registered proprietor of the suit properties and her titles are absolute and indefeasible. As such registered owner she is entitled in law to have the boundaries of her parcel of land established and fixed in accordance with the appropriate survey maps delineating the parcels of land.

The Land Registrar is obligated under section 19(1) and (2) to act on an application by an interested party to define and fix the boundary in its precise position after giving notice to all owners and occupiers of land adjoining the boundary in question. As I understand the provisions of section 19 of the Land Registration Act, the duty of the Land Registrar upon being moved by a party is to establish and fix the boundaries on the basis of the titles held by the applicant and to use any survey maps in case they exist and if any amendment needs to be made on the survey map a note of that would require to be made. The titles held by the applicant clearly show the acreages of the respective parcels of land and in my view this is what should be reflected on the ground. Unless there is a formal order of the court varying, such acreage the ground size of the land ought to correspond as nearly as possible to the area indicated on the titles allowing for any permissible marginal difference.

The court in the circumstances holds that the Land Registrar, Kajiado is under a duty and obligation under the provisions of sections 18 and 19 of the Land Registration Act NO. 3 of 2012 to act on the application by the Applicant herein to fix the precise positions of the boundaries in respect of Land Parcels **Kajiado/Kaputiei North/36933** and **Kajiado/Kaputiei North/36934**. I accordingly direct that the Land Registrar **Kajiado County** do within 90 days from the date of being served with this order/Ruling cause to be defined by survey, the precise position of the boundaries in respect of land parcels known as **Kajiado/Kaputiei North/36933 and Kajiado/Kaputiei North/36934** registered in the name of **Terry C. Maina** in terms of section 18 and 19 of the Land Registration Act 2012.

Costs of the Application in the cause.

Ruling dated, signed and delivered this.....12th.....day of.....March...2015.

J. M. MUTUNGI

JUDGE

In the presence of:

..... For the Plaintiff

..... For the Defendant