



No. 244

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO.5”B” OF 2008

PAULO ORANGA MUMA PLAINTIFF

VERSUS

DOMINIC MUMA KWORO DEFENDANT

RULING

1. The plaintiff brought this suit against the defendant on 27th February 2008 seeking the following reliefs, namely:
 - a. **An order that the District land surveyor do undertake a survey at the defendant’s cost to establish and restore the access road between land parcel LR No. West Kitutu/Bomatara/1219 and Land Parcel No. LR No. West Kitutu/Bomatara/3113.**
 - b. **A permanent injunction to restrain the defendant, his assigns, servants, agents and/or any other person claiming under the defendant’s title from trespassing onto, cultivating or howsoever interfering with the plaintiff’s peaceful use, possession and enjoyment of land parcels known as LR Nos. West Kitutu/Bomatara/3111, 3112 and 3113.**
 - c. **General damages for trespass**
 - d. **Costs of and incidental to this suit**
 - e. **Interest on (c) and (d) above at court rates.**
2. The plaintiff’s claim against the defendant was that the plaintiff was at all material times the registered proprietor of all those parcels of land known as LR Nos. West Kitutu/Bomatara/311, 3112 and 3113 (hereinafter referred to as the “**the plaintiff’s properties**”) while the defendant was the owner of all that parcel of land known as LR No. West Kitutu/Bomatara/1219 (hereinafter referred to as “**Plot No. 1219**”). The plaintiff claimed that sometimes in the year 1999, the defendant without any right or lawful cause destroyed an access road between Plot No. 1219 and the plaintiff’s parcel of land known as LR No. West Kitutu/Bomatara/3113 (hereinafter referred to as “**Plot No. 3113**”) and trespassed on the plaintiff’s properties and commenced cultivation thereon despite protests from the plaintiff. The plaintiff claimed that despite demand and notice of intention to sue having been served upon the defendant, the defendant has failed, refused and/or neglected to stop the said acts of trespass a situation that left the plaintiff with no alternative but to file this suit.
3. The defendant filed a statement of defence on 12th March 2008 in which he denied the plaintiff’s claim in its entirety. The defendant admitted that according to the survey map for the area where Plot No. 3113 and Plot No. 1219 are situated, there is supposed to be a road of access between the two parcels of land. He contended however that the said access road only exists on the map but not on the ground. The defendant denied that he has trespassed on or encroached on the plaintiff’s

- properties. On 9th July 2008, the plaintiff's advocates on record and the defendant who was then acting in person entered into a consent before Musinga J. (as he then was) under which it was ordered that the District Land Surveyor, Kisii do move to the suit premises and determine the boundary between Plot No. 1219 and the plaintiff's properties and that the said officer do file his report in court within 45 days from the date of that order. Pursuant to the said order, the District Surveyor Kisii/Gucha districts, one, Mr. Gordon H. Odhiambo prepared a report dated 16th October 2008 after visiting the site and filed the same in court on 17th October 2008. When the matter came up for mention on 2nd February 2009, the plaintiff's advocate was present but the defendant who was still acting in person did not appear. The plaintiff's advocate informed the court that the district surveyor had prepared and filed a report in court but according to the plaintiff's advocate the said report was not in compliance with the consent order that was made on 9th July 2008. The plaintiff's advocate applied orally to the court to allow the plaintiff to appoint at the plaintiff's own cost a private surveyor to go once again to the suit premises together with the district surveyor, Kisii/Gucha Districts and determine the boundaries between the Plot No1219 and the plaintiff's properties. The plaintiff's advocate proposed that the said private surveyor should file his report in court within 45 days.
4. The court (Musinga J.) allowed the plaintiff's oral application as prayed. The said order was extracted and served upon the District Surveyor, Kisii/Gucha Districts and the defendant duly endorsed with a penal notice. Following this second order, Mr. Gordon H. Odhiambo the then District Surveyor prepared another report dated 7th September 2011 which was filed in court on 19th September 2011. In his first report that was filed in court on 17th October 2008, the said district surveyor had concluded that the dispute between the plaintiff and the defendant was not a boundary dispute but a land claim which can only be determined by the court but not by the surveyor. In the second report that was filed in court on 19th September 2011, the said district surveyor made several observations and in his conclusion, he left the matter to court to make its own determination on the dispute. The district surveyor's second report dated 7th September 2011 was read to the parties by the court on 3rd February 2012. On 8th March 2012, the defendant who had by then appointed an advocate to act for him expressed reservations about the report and sought time to make an application to set the same aside. The said advocates were given seven (7) days within which to file the said application which they never filed.
 5. The plaintiff has now moved the court under sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya and order 46 rule 18 of the Civil Procedure Rules, 2010 seeking orders that; - judgment be entered for the plaintiff against the defendant in terms of the District Surveyor's report dated 7th September 2011 and that the said surveyor do proceed to restore the boundary between Plot NO. 1219 and the plaintiff's properties in accordance with the said report and that the defendant do meet all the costs and expenses associated with the said exercise. The plaintiff sought further orders that consequent upon the said judgment being entered, the court should issue an injunction against the defendant as prayed in the plaint and that this suit be set down for assessment of damages payable to the plaintiff in terms of prayer (c) of the plaint. The plaintiff's application which was supported by the affidavit sworn by the plaintiff on 27th March 2012 was brought on the grounds that the District Surveyor's report dated 7th September 2011 was prepared and filed in court by the consent of the parties, that the said report was not challenged by the defendant and that the said report is categorical that the defendant has trespassed on the plaintiff's properties. The plaintiff has contended that the dispute over the boundaries of Plot No. 1219 and the plaintiff's properties having been referred to the District Surveyor for determination by consent of the parties and the said officer having determined the same, it would only be fair if judgment is entered in terms of that report.
 6. The plaintiff's application was opposed by the defendant through a replying affidavit sworn on 7th February 2013. In opposition to the application, the defendant contended that the District Surveyor, Kisii/Gucha District, Mr. Gordon H. Odhiambo visited the suit properties twice and prepared two (2) conflicting reports which were all filed in court and forms part of the court record. The defendant contended that in the said District surveyor's first report dated 16th October 2008 he indicated that there was no boundary dispute between the parties while in his second report dated 7th September 2011 which is sought to be enforced by the plaintiff, he seems to have

arrived at a different conclusion. The defendant has contended that in view of the conflicts in the two reports the court cannot be called upon to enter judgment in favour of the plaintiff only on the basis of one of the reports. The defendant contended further that the consent recorded in court on 9th July 2008 did not provide that the parties would be bound by whatever determination is arrived at by the District Surveyor. The defendant contended that the consent that was entered herein by the parties for the District Surveyor to visit the site of the disputed properties and determine their boundaries did not amount to a reference to arbitration under the provisions of the Civil Procedure rules. The defendant contended that the District Surveyor's report dated 7th September, 2011 is a mere expert opinion on which the court cannot solely rely on as a basis to enter judgment for the plaintiff. The defendant contended that to allow the plaintiff's application would be to deny the defendant an opportunity to be heard.

7. On 24th April 2013, the advocates for the parties agreed to argue the plaintiff's application by way of written submissions. The plaintiff filed his submissions on 2nd September 2013 while the defendant filed his submissions in reply on 5th December 2013. I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the defendant's affidavit in opposition to the application and the parties' respective written submissions. As I have stated at the beginning of this ruling, the plaintiff's application was brought under Order 46 rule 18 of the Civil Procedure Rules 2010. What I need to determine in the application before me is whether the court order made on 2nd February 2009 pursuant to which the District Land Surveyor's report dated 7th September 2011 was prepared and filed in court amounted to an award on the basis of which this court can enter judgment in favor of the plaintiff herein. As I have stated at the beginning of this ruling, the parties herein entered into consent on 9th July 2008 pursuant to which the District Land Surveyor was to move to the suit premises and determine the boundary between Plot No. 1219 and the plaintiff's properties.
8. This consent in my view was not made pursuant to Order 46 rule 1 of the Civil Procedure Rules, 2010 or the equivalent order in the repealed Civil Procedure Rules and the parties did not agree that they would be bound by the said determination by the District Land Surveyor. The District Land Surveyor proceeded pursuant to that consent order to visit the site of the suit premises and prepared a report dated 16th October 2008 that was filed in court on 17th October 2008. The plaintiff had a problem with this report. From the court record, when the matter came up for mention of 2nd February, 2009, the plaintiff's advocate claimed on that the report dated 16th October 2008 did not comply with the court order of 9th July 2008. The plaintiff's advocate did not elaborate however in what respect this report did not comply with the consent order aforesaid. Without having this report dated 16th October 2008 struck out of the court record, the plaintiff applied to court on that day for leave to have a private surveyor go to the suit premises with the District Surveyor and determine the boundary of Plot No. 1219 and the plaintiff's properties. The plaintiff's advocate asked for the report by the private surveyor to be filed in court within 45 days from the date of the court order allowing the application. As I have mentioned above, the court allowed the plaintiff's application as prayed. The effect of this order of 2nd February 2009 was that; the private surveyor appointed at the plaintiff's expense was to go to the site of the suit premises accompanied by the District Surveyor, determine the boundaries of Plot No. 1219 and the plaintiff's properties and file his report in court within 45 days from the date of the order.
9. It has been contended by the plaintiff that the report dated 7th September 2011 filed herein on 19th September 2011 which is the basis of the plaintiff's present application was made pursuant to the court order of 2nd February 2009 aforesaid. I am unable to agree with this contention. According to the order made on 2nd February 2009 that was extracted on 13th February 2009, the boundary of Plot No. 1219 and the plaintiff's properties was to be determined by a private surveyor appointed by the plaintiff and it was the said private surveyor who was to file his report in court within 45 days. The report dated 7th September 2011 was prepared by the District Surveyor Kisii/Gucha Districts and not by a private surveyor appointed by the plaintiff. This is the same surveyor who had prepared the earlier report dated 16th October 2008 which the plaintiff had found unsatisfactory. The report dated 7th September 2011 was therefore not made in accordance with the terms of the court order made on 2nd February 2009. The report was made by unauthorized

person and it was also filed out of time. It follows that even if the order of 2nd February 2009 was a reference, the report dated 7th September 2011 which the plaintiff claims to be an award was not made by the appointed arbitrator and as such cannot be entered as a judgment under Order 46 rule 18 of the Civil Procedure Rules, 2010. Even if I am wrong in the conclusion that I have arrived at as regards the person who was to visit the site and prepare the report pursuant to the order of 2nd February 2009, I would have still held that the order made by the court on 2nd February 2009 did not amount to a reference under Order 46 rule 1 of the Civil Procedure Rules for two other reasons. First, a reference under Order 46 rule 1 of the Civil Procedure Rules must be made by agreement of both parties.

10. As I have earlier stated, the order issued by the court on 2nd February 2009 was not made by consent. The record of the court is clear that when the order was made, only the plaintiff's advocate was present in court. The plaintiff's advocate's submission that the order of 2nd February 2009 was made by consent does not find support in the court record and the extracted order that was issued on 13th February 2009. The matter having been referred to the plaintiff's private surveyor without the consent of the defendant, such reference cannot amount to a reference under order 46 rule 1 of the Civil Procedure Rules and cannot give rise to an award that can be entered as a judgment under order 46 rule 18 of the Civil Procedure Rules.
11. The other reason why I would also have held that the order of 2nd February 2009 did not amount to a reference even if it had been made by consent is that there was no consensus between the parties expressed in the said order that the parties had referred the dispute in this suit for determination by the District surveyor and that they had agreed to be bound by whatever determination is made by the said surveyor. The report by the said surveyor cannot therefore amount to an award capable of being entered as a judgment.
12. I have said enough to show that the plaintiff's application dated 27th March 2012 is not for granting. The application is dismissed with costs to the defendant.

Delivered, dated and signed at Kisii this 16th day of May 2014.

S. OKONG'O

JUDGE

In the presence of:-

N/A	for the Plaintiff
Mr. Minda	for the Defendant
Mr. Mobisa	Court Clerk

S. OKONG'O

JUDGE