



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 983 OF 1996

JOHN MUTURI KARIUKI.....1ST PLAINTIFF
MWANGI THUO.....2ND PLAINTIFF
JULIUS GITAU KARIUKI.....3RD PLAINTIFF
IVAN WAINANINA.....4TH PLAINTIFF

VERSUS

MONICA NYOKABI.....1ST DEFENDANT
KABARI WANGUNYU.....2ND DEFENDANT
MUNGAI S/O NGANGA.....3RD DEFENDANT
NDUNGU KARARI.....4TH DEFENDANT
CHIEF LAND REGISTRAR, NAIROBI.....5TH DEFENDANT

AND

JOHN CHEGE1ST INTERESTED PARTE
LUKAS KIMANI MUGWIMI.....2ND INTERESTED PARTE
MARY NJERI.....3RD INTERESTED PARTE
MUNGAI NGANGA.....4TH INTERESTED PARTE
JOSEPH IRUNGU.....5TH INTERESTED PARTE
FRANCIS MAINA.....6TH INTERESTED PARTE
STEPHEN KIBUGI.....7THE INTERESTED PARTE
WANJIRU WARIKA.....8TH INTERESTED PARTE
MARY WANYAKA.....9TH INTERESTED PARTE
GITAU NJOROGE.....10TH INTERESTED PARTE

RULING

Introduction and background

1. This matter has a long history dating way back in the 1960s and relates to the subdivision of a parcel of land being **L.R. No. Dagoretti/Riruta/961** (“the suit property”). In 1989, a survey was carried out with the consent of the proprietors and the land was sub-divided into 20 units. The sub-division exercise has however over the years been marred by disagreements amongst the Parties and claims of revocation of Survey Plans by the City Council of Nairobi and the Commissioner of Lands.
2. The subject of the present ruling regards the execution of this Court’s decree arising from a judgment dated 29th January, 2004 in which I pronounced the following Orders:
 - a. ***The Director of City Planning and Architecture of the City Council of Nairobi should on a date convenient to him but in any event within the next 30 days visit the Land Title No. DAGORETTI/RIRUTA/961 and prepare sub-division Plans for the said Title.***
 - b. ***On the date of that visit, he should be guided by the conditions set by the City Council of Nairobi at its minute 11 of proceedings for the Works and Town Planning Committee Meeting of 15.2.1989 a copy of which should be attached to the decree when serving the said Director.***
 - c. ***In preparing the Plans aforesaid; the Director of City Planning should take into account the fact that the Plaintiffs jointly are entitled to 2 acres out of the 2.3755 hectares less the acreage to be excised from the entire parcel to meet the conditions imposed by the City Council of Nairobi with regard to sewer, roads, truncations at the road junctions, drainage and such other shared necessities as the Director may deem fit to create on the land.***
 - d. ***The Parties should thereafter at their own expense register their separate titles and the same should be issued by the Chief Registrar of Titles.***
3. Subsequent to my Judgment, the court, by consent of Parties made a substitution of the 'Director of City Planning and Architecture of the City Council of Nairobi' in the decree with 'the Provincial Surveyor' . The Order granted on 27th July, 2004 by Hon. Justice Ransley read as follows;
 - a) ***That the Decree of this Honourable Court given and dated on 29th day of January 2004 be amended by substituting the Director of City Planning and Architecture of City Council of Nairobi with that of the Provincial Surveyor of Nairobi in the Ministry of Lands and Settlement.***
 - b) ***That in so complying with the said Decree, the said Provincial Surveyor shall ensure as far as practically possible that the parties affected by the said survey shall retain their respective ground portions.”***
4. The Court Order of 29th January, 2004 and 11th December, 2009 mandated the Provincial Surveyor of Nairobi Province to draw the sub division scheme Plan of **Dagoretti/Riruta/961** to facilitate issuance of respective sub-plot titles to their owners. The scheme plan was to incorporate the Nairobi City Council approval conditions given on its minutes of 15th February, 1989.
5. Thereafter, two different reports were filed on behalf of the Provincial Surveyor. It is these reports that are the subject of the present determination as the Parties seek the intervention of the court as to which report should be adopted in execution of the earlier decree. According to the report filed by Mr. S.N. Njihia, the Provincial Surveyor, dated 20th March, 2012, the office picked the suit parcel sub-plot boundaries as pointed out by the owners on 22nd March, 2011 subsequent to

which the following observations and recommendations were made:

- i. *That the boundary picking was intended to assist the planning of the sub-division scheme plan as per the Planning Act, Cap 286*
 - ii. *That the actual owners of the sub-plots and their respective acreages be given to enable the Planner and the Surveyor get authentic information or instructions to facilitate planning and surveying of the sub-plots*
 - iii. *That the planning of the sub-division scheme plan be mandated to the authority identified by the Act (The Director of Physical Planning). Subsequent relevant approvals will require to be availed before the survey is carried out.*
6. In a subsequent report filed on behalf of the Provincial Surveyor on 11th July, 2012 by one, B.K. Gitonga, it was reported that picking was done and that all the parties were in agreement with the boundaries except the owners of the two parcels marked "A" and "B" in the report. Together with the report was a communication from the Director of Survey indicating that the earlier report was authored by a surveyor other than the one who visited the ground and that the same ought to be declared a nullity.
 7. When the parties appeared before me on 3rd August, 2012, following consent of the Parties, I asked the Parties to address me on the import, value and content of the two reports dated 20th March, 2012 and 10th May 2012.

Plaintiff's case

8. In their submissions of 23rd October, 2012, the Plaintiff and allegedly '12 other Interested Parties' have pleaded that the Amended Sub-division Plan Report filed by Mr. Gitonga should be adopted and that the Provincial Surveyor (Mr. Gitonga) be given direction to complete the survey exercise by re-visiting the site for identification of boundaries. They have also urged that the final Report be drawn in consultation with the Director, City Council Planning and Architecture Department, for the purposes of approving the amended sub-division plan and that thereafter the amended Plan be sent to the Commissioner of Lands for approval and final issuance of Title Deeds.
9. According to the 1st Plaintiff, decisions by the Council or its Committees are made by way of resolutions evidenced by minutes of the relevant meeting. In his Further Affidavits of 22nd October, 2012 and 8th November, 2012, it is the 1st Plaintiff's contention that the judgment of the Court made reference to approval conditions set out by the Council in the Minutes of Council meeting of 15th February, 1989 and that any departure from the judgment and decree would amount to an attempt at re-writing another judgment.
10. The 1st Plaintiff blames the delay in execution of the judgment on the 1st defendant whom he accuses of plots to 'grab' his piece of land and raises issues of alleged overlap of the subdivisions. I shall not go into depth on these allegations as it will later become apparent that they are unnecessary for the purpose of the present determination.
11. Regarding the Defendant's plea that the proposed Amendment Plan dated 24th August, 2006 drawn by one Mr. David N. Gichohi, a Private Planner be adopted, the Plaintiffs assert that the said Plan was subsequently nullified by court on 11th December, 2009. In that Order, Hon. Justice Mbogholi granted the following main Orders;
 - i) ***That the Defendants by themselves, their agents and/or servants be restrained from registering any title or titles on Land Title No. Dagoretti/Riruta/961 on the basis of the purported Proposed Amendment to approved sub-division Plan surveyed and drawn by Private Planner David N. Gichohi and dated 24th August 2006, attached hereto or any until further orders of this Honourable court.***

ii) *That in the alternative there be a stay of execution of decree issued in the above case on 29th day of January 2004 and dated 19th day of February 2004 and amended by the order of this Honourable court issued on 27th day of July, 2005 until further orders of this Honourable court.*

iii) *That the said purported proposed Amendment to Approved Sub-division Plan of Land Title Number Dagoretti/Riruta/961 surveyed and drawn by David N. Gichohi a Private Planner be set aside and/or declared null and void.*

iv) *That the said matter of amendment of sub-division Plan of Land Title Number Dagoretti/Riruta/961 be remitted to the Provincial Surveyor Nairobi in the Ministry of Lands and Settlement as ordered by the Court in its original and amended order of this Honourable court issued on 27th day of July, 2005 and issued on 1st day of September 2005.*

12. Following the learned Honourable Judge's Order, the Plaintiffs filed a Notice of Motion under **Order XLIV Rule 1(i)(a)(2) and Order L Rule 1** of the Civil Procedure Rules seeking to set aside the Court's ruling and the pursuant Orders of 11th December, 2009. In dismissing the application, the court noted at page 3 that, *"Instead of complying with the said direction, the applicants have moved this court to stay the execution of the said ruling and or vary or set it aside. With profound respect, going by the history of this case the said orders are intended to delay the completion of this exercise to the prejudice of the parties."*

The Plaintiffs' position in a nutshell is that the report by Mr. Gitonga aforesaid should be adopted and implemented.

Interested Parties

13. In their Affidavit of 22nd August, 2012, sworn on behalf of some of the Interested Parties by one Mr. John Chege, they describe Mr. B.K. Gitonga's report as misleading and in particular singled out the phrase that, *"All the parties were in agreement with the boundaries except the owners of the two parcels marked A and B..."* It was deponed that the Sketch Plan as drawn distorted the entire scheme in a skewed manner to benefit a few people and the same should not be relied on in executing the decree. In particular, it was pointed out that the Sketch Plan does not provide for the road that cuts through the land and does not reflect the ownership of each party's parcel and that it omitted many other public utility provisions. Mr. Gitonga's Report was further faulted on the ground that it is inconclusive as the Sketch Plan annexed thereto lacked approval from the Director of Physical Planning and further that no Land Board Consent was sought and obtained and made no reference is made to the role of the City Council of Nairobi, the Land Control Board and the Land Planner which parties are an integral Part of any sub-division scheme.

14. According to a Further affidavit dated 5th November, 2012 sworn on behalf of some of the Interested Parties by **John Chege**, they accused the Plaintiffs of misleading the Court by their Further Affidavit of 23rd October, 2012 and it is their position that Mr. S. N. Njihia's report be adopted by Court, which is the position that is also preferred by the Defendants. According to the deposition, the Interested Parties are strangers to the alleged demarcation alluded to by the Plaintiffs in their affidavits and which subdivision was rejected by the Provincial Surveyor as the same did not take into account the road network, sewer wayleave and road surrender as per the provisions of the **Physical Planning Act, Act No. 6 of 1996**.

15. Regarding the cancellation, the Interested Parties have annexed a letter dated 6th November, 1994 from the Ministry of Lands and Settlement addressed to the Provincial Surveyor confirming that the sub-division had been cancelled. The letter signed on behalf of the Provincial Surveyor addressed to the Land Registrar, Nairobi Area read in part, *"Therefore as per the above observations, I have seen that the survey was defective and hence the numbering of the new plots was done by mistake. Therefore when the proprietors of the plot present the survey for registration, please advise them to have the survey redone."*

16. In conclusion therefore, the parties urged that Mr. Njihia's report be adopted to guide the execution of the decree herein.

1st Defendant's position

17. By a Further Affidavit sworn on 8th November 2012 by one Dominic Thagishu Karari, a Co-administrator of the estate of the late Monicah Nyokabi Karari, it is deponed that the report by the Director of Surveyor through one B.K. Gitonga and his proposed sub-division plan is inappropriate for denying him his rightful share of the land. According to the deposition, the original acreage of each purchaser was bound to decrease owing to the inclusion by court of three more persons as beneficiaries making the number rise to twenty being the claimants to the suit premises.

18. According to him, the requirement of a physical planner could not be dispensed with by dint of **Section 41** of the Physical Planning Act which requires a registered physical planner to prepare a local physical development plan for approval by the local authority and as such any survey plan not preceded by an approved local development by such a physical planner is a nullity. The 1st defendant therefore supported the report by the Provincial Surveyor.

19. I should merely add here that the report also noted complaints over the boundary pickings with some owners alleging that they were not informed of the visit and were therefore unrepresented during the resurvey of the suit land.

Determination

20. I have scrutinized the depositions of all Parties and in my view, the only question for this court's determination is whether this Court can intervene and make Orders as to the right report to use in execution of its decree of 2004 as amended and further orders of 11th December, 2009.

21. The Parties have expressed various sentiments regarding the validity and otherwise of the reports. I have evaluated the depositions filed by the Parties with regard to the reports and I am constrained to find that this Court has to put a stop to any further re-opening of the matter. My finding is informed by various reasons. Firstly, This court, having issued its Judgments and Orders became *functus Officio*. It cannot then again sit in enforcement of the same Order outside review of the said Orders. Separation of powers demands that there must be division between the judicial function and the executive function; in this case, the subdivision by the Provincial Surveyor. I say so because what the Parties seem to be asking this court to do, is to immerse itself in the executive function and direct which is the 'correct' or 'appropriate' Scheme Plans to carry out its Orders. The court cannot adjudicate then execute its own Order.

22. Secondly and more importantly, the court has already made known its verdict through the decisions of 19th January, 2004 as amended and the subsequent Orders in 2005. This court may not engage in an exercise whose effect is to scuttle or rekindle the issues already settled by the court. I say so especially because the Parties in their depositions have addressed the court on various aspects of ownership over the suit property.

23. It is my view that this is an attempt to re-open the survey issue and I decline to adopt such a stance. It is a forbidden path which I will not follow. This matter has been pending execution for almost a decade now and for justice to be done, parties must be allowed to enjoy the fruits of their judgment. In addition to the national values and principles enshrined under **Article 10** of the **Constitution**, this court is enjoined, in the discharge of judicial authority to adhere to certain principles set out under **Article 159** of the **Constitution** key among them being the principle that justice is not to be delayed.

24. That said, it is against justice the principle of expeditions of justice to allow more time for this matter to continue winding its way through the courts for over a decade and it is the duty of the

court to put a stop to such a venture. The matter has seen better days in courts and this case needs to be terminated and the court must stop any further attempts that have the effect of denying the Plaintiffs the fruits of judgment in **Civil Suit No. 983 of 1996** and which judgment was not appealed against.

25. My finding is also informed by the fact that the Executive ought to be allowed to perform its Executive roles. The court made certain directions directed to the executive regarding the Survey Plans. The duty of the court is to adjudicate and render its judgment and not to be involved in the determination of what is the best way to enforce its own decrees. The office of the Provincial Director of survey will need to pursue an option that best brings the realization of the courts decree of January 2004 as amended and it is not for this court to get involved in the minutiae of its enforcement.

26. The court has done its role upon pronouncement of its decision and the ball is now in the decree-holders' court to enforce the judgment. I will reiterate what my learned brother stated in his earlier Ruling that, **“It is now upon the parties to get together and detail the Provincial Surveyor to comply with the court order and hopefully this matter shall be laid to rest**” If the Parties are dissatisfied with the manner of discharge of duties or the final decision by the office of the Provincial Surveyor or other relevant body, they have a right to challenge the same in the appropriate manner and the court can then intervene accordingly. What this court is trying to do is avoid piecemeal intervention and Orders whose net effect is unnecessary delays in realisation of justice for the Parties and possible defeat of its very own Orders which have not been set aside by a higher court.

27. I have come to the finding that the Office of the Provincial Surveyor needs to be allowed to independently and in accordance with the law carry on and complete its survey pursuant to this court's orders. Let the Office of the Provincial Surveyor settle any 'in-house' issues and present a common front in execution of its duties and now decree of court. This will not be possible if the court is called to intervene at every stage of the execution process. Does this mean that the Parties go empty-handed? The wider interests of justice demand that I give certain directions.

28. In that regard, I shall order as follows;

i) The Order of stay of execution dated 11th December 2009 of decree issued on 29th day of January 2004 and amended by the order of this Honourable court issued on 27th day of July, 2005, is hereby lifted.

ii) I order that the Office of the Provincial Surveyor shall, in consultation of the Parties involved expeditiously proceed to completion the sub-division exercise pursuant to this court's earlier orders which are in the hands of that office.

iii) Each party to bear its own costs.

29. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 5TH DAY OF APRIL, 2013

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court Clerk

Mr. Manu for Defendant's

Mr. Aluoch for plaintiff's

Mrs. Ngugi holding brief for Mr. Ojienda for Interested Parte

Order

Ruling duly read.

ISAAC LENAOLA

JUDGE

5/4/2013