



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISCELLANEOUS CIVIL APPLICATION 267 OF 2010

KASSIM WERE ABDALLA.....APPLICANT

VERSUS

THE DISTRICT LAND REGISTRAR.....1ST RESPONDENT

BALBIR SINGH SANDHU.....2ND RESPONDENT

J U D G M E N T

The applicant's notice of motion dated 29-9-2012 pray for the following reliefs:-

(a)That this honourable court be pleased to grant an order of judicial review by way of certiorari to bring this court the undated report compiled by the District Land Registrar Kisumu Mr. R.W. Ngaanyi over the boundary dispute between L.R Kisumu/Kogony/4046 and 4076 versus Kisumu/Kogony/2678 conducted on 9th November 2009, and to have the same quashed together with any other subsequent proceedings taken thereon or reports made thereon, including the Land Registrar's decision to have the applicant surrender to him the title deeds relating to the parcels of land known as Kisumu/Kogony/4046 and 4076 as contained in the letter dated 18th June 2010.

(b)That this honourable court be pleased to grant an order of Judicial Review by way of prohibition restraining the District Land Registrar Kisumu and the 2nd respondent from acting on the said undated reported referred to in prayer (1) herein above otherwise deregistering the applicant's parcels of land known as Kisumu/Kogony/4046 and 4076, and 4076 and 4075 respectively or otherwise dealing with the relevant register in such a manner as to suggest that the said parcels of land do not exist or in any manner at all interfering with the register relating to these parcels of land in purported determination of a boundary dispute, resurvey or in any manner at all whose effect would either deregister the said parcels of land or otherwise reduce their acreage or sizes disclosed in the register.

(c)That the respondents be condemned to bear the costs of this proceeding.

The same is supported by the statement as well as the verifying affidavit of **Kassim Were Abdala**.

The gist of the said application is that the applicant is the registered owner of parcels Nos. **Kisumu/Kogony/4046,4076,4047 and 4075** which were a resultant sub division of land parcel No. **Kisumu/Kogony/2670**. After the subdivision of Kisumu/Kogony/2670 the resultant parcel Kisumu/Kogony/4046 and 4047 are now bordering Kisumu/Kogony/2678 which is owned by the 2nd respondent.

The applicant further argued that due to a boundary problem between him and the 2nd respondent the 1st respondent convened a meeting on 9-11-2009. According to the respondent the report emanating from that meeting did not resolve the boundary issue as measurements on the ground were not determined.

On 18-1-2010 the 1st respondent invited the parties for another meeting on 22-1-2010 but the applicant did not attend as he was attending the graduation of his child in Kampala.

On 29-1-2010 when the said exercise was to be undertaken the applicant objected on the ground that there was no parcel of land known as Kisumu/Kogony/2670 the same having been extinguished after the sub division into the four parcels earlier alluded.

According to the applicant therefore no exercise was done on 29-1-2010 but later the 1st respondent with the help of police officers trespassed onto his parcel of land and began fencing off land parcel No. Kisumu/Kogony/4046 and 4076.

Later on 18-6-2010 the 1st respondent demanded that he surrenders the title deeds for parcel No. Kisumu/Kogony/4046 and 4076. which prompted the filing of this suit.

The 1st respondent has opposed the application through the replying affidavit of one **W.N. Nyaberi**. The essence of the said reply does not deny the sub division of land parcel No. Kisumu/Kogony/2670 into four portions. According to Mr. Nyaberi it emerged after sub division and issuance of titles to the applicant that there was an overlap between land parcel No. 4046 and 4076 which ought to be corrected.

The said affidavit further confirms that a rectification on the boundaries had already been undertaken and that titles No. Kisumu/Kogony/4076 and 4046 are no longer in existence. The 2nd respondent filed a replying affidavit dated 12-11-2010 where he has accused the applicant of having curved out his parcel of land and created new titles namely Kisumu/Kogony/4076 and 4046.

The purpose of Judicial Review is not to delve into the merits and demerits of the issues in dispute. Judicial Review proceedings are special proceedings meant to correct any administrative wrong and to ensure that proper procedure is followed in arriving at the decision by any administrative bodies or quasi tribunals.

The now repealed Land Registered Act Chapter 300 of the Laws of Kenya, under section 21 (2) thereof states:-

“Where any uncertainty or dispute arises as to the position of any boundary the registrar, on the application of any interested party shall, on such evidence as the Registrar considers relevant, determine and indicate the position of the uncertain or disputed boundary”.

Clearly therefore the 1st respondent had the legal mandate to determine the boundary dispute between the parties herein.

One issue that emerges from the proceeding and the affidavit evidence before me is that by the time the exercise was undertaken or the complaint lodged the applicant had already obtained titles in his favour for land parcel No. Kisumu/Kogony/4046 and 4076.

The dispute determined vide minutes of 9-11-2009 produced as annexure KWA 3 in the affidavit of the applicant is worth producing hereunder. **Background and observation:-**

“My observation is that while Mr. Kassim applied for a re-survey to be conducted on his portion, the neighbour was not informed and the said expansion overlapped onto Mr. Balbir’s land parcel No. 2678. The portion that Mr. Balbir has fenced on the ground is mostly taken reserve”. He went

further to recommend that “Balbir’s parcel (2078) is to be pointed out to him as it existed in the original map prior to the re-survey. This should be done by the District Land Registrar”.

This connotes a futuristic exercise. The same was not concluded on the material day. On 18-1-2010 the 1st respondent wrote to the applicant stating that they would visit the land on 22-1-2010 to determine the boundaries. Of great significance is that the said letter quoted land parcels No. Kisumu/Kogony/2678 and 2670. Clearly, this was incorrect as by then land parcel No. 2670 was no longer in existence.

However the applicant through undated letter replied to the 1st respondent excusing himself that he would not be available on 22-1-2010 as he would be attending his daughter’s graduation in Kampala on the said date.

From there, there seemed not to have been any communication except a letter date 18-6-2010 addressed to the applicant by the 1st respondent demanding that he surrender titles No. Kisumu/Kogony/4046 and 4076 for reconstitution. The said letter stated in part:-

“During the District Land Registrar’s visit to the ground it was realized that the said re-survey led to encroachment into land parcel No. 2678 which belongs to Balbir Singh. In view of the above the said title deeds need to be rectified so as to restore the original boundaries”.

I have carefully perused the pleadings herein and I do not see any meetings that were held after 9-11-2009.

I have not been shown whether there was a meeting on 22-1-2010 or 29-1-2010 or thereafter or at all. If this is the case therefore, I shall be right to conclude that the only meeting that was held was that of 9-11-2009.

As earlier observed therefore, the meeting of 9-11-2009 in my mind was not conclusive. It was to be followed by another one where **“Balbir’s parcel (2078) is to be pointed out to him as it existed in the original map prior to the re-survey”.**

This was to be done by the District Surveyor and the District Land Registrar.

Apparently it appears that on 9-11-2009 both the District Land Registrar (the author of the report) and the District Surveyor were present.

Is it therefore possible that the respondent did another meeting where the boundaries were shown? This is difficult to tell as there were no minutes.

My conclusion therefore is that in the absence of another meeting after that of 9-11-2009 there was no boundary determination between the parcels owned by the applicant and the 2nd respondent.

The findings of 9-11-2009 cannot be implemented as they are. There ought to have been another meeting as a follow up to the recommendation of the meeting of 9-11-2009.

In any case section 142 (1) (c) of the now repealed Registered Land Act chapter 300 Laws of Kenya which states:-

“142 (1) the Registrar may rectify the register or any instrument presented for registration in the following cases:-

142 (1)(c) “where upon resurvey, a dimension or area shown in the register is found to be incorrect, but in such case the Registrar shall first give notice to all persons appearing by the register to be interested or affected of his intention so to rectify”.

These powers are granted to the 1st respondent to exercise but he must do so fairly and judiciously. I do not see from the pleadings herein how the rectification was done and therefore necessitating the rectification of the register.

The 1st respondent in my mind is attempting to exercise his powers capriciously. There must be evidence that he went to the site in the presence of at least the applicant and the 2nd respondent, whether they have witnesses or not to fix the boundaries as earlier intended on 8-11-2009.

In the premises and for the foregoing reason I do find that the boundary issue between the applicant and the 2nd respondent was never resolved pursuant to the provision of the law.

The purported exercise done by the respondent breached the cardinal rules of natural justice namely that an opportunity was not accorded to the applicant to state his claim after the proceedings of 9-11-2009.

The notice of motion dated 29-9-2010 is allowed with costs to the applicant.

Dated and signed and delivered at Kisumu this 13th day of July, 2012.

**H.K. CHEMITEI
JUDGE**

In the presence of:

.....for the applicant

.....for the respondent

HKC/va