REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE 3 OF 1990

NDIRANGU KARAIGUA .... PLAINTIFF

VERSUS

THE ATTORNEY GENERAL)

MARK KARIUKI KAIGANAINE) .... DEFENDANTS

R U L I N G

I am confronted with an application dated 3rd December 2008 by way of Notice of Motion. It is expressed to be brought under section 3 and 3A of the Civil Procedure Act and all other enabling provisions of the law. In the application, **Mr. Ndirangu Joseph Karaigua** hereinafter referred to as *"the applicant"* seeks as against the **Attorney General** and **Mark Kariuki Kaiganaine** hereinafter referred to as *"the 1st and 2nd respondents"* respectively, prayers that this court do issue an order directing the Nyeri District Land Registrar to amend/alter the Registry index map that was erroneously amended and restore the boundary to reflect the situation on the ground when the 2nd respondent first bought land parcel **Ruguru/Chieni/252** and costs of the suit.

There are 7 grounds upon which the application is made, that is:-

"**1. This suit was filed by the applicant after the Nyeri District Land Registrar purported to determine an alleged boundary dispute between him and the second respondent.**

2. The Land Registrar shifted the existing boundary thus awarding the second respondent part of the applicant's land.

3. The Land Registrar went ahead to amend the Registry Index Map to reflect that anomaly.

4. By consent of the parties the District Land Registrar and the District Land Surveyor were required to visit the dispute and file their report.

5. The report was filed and later made a judgment of the court.

6. The report was to the effect that the previous Land Registrar erroneously shifted the boundary and amended the Registry Index Map.

7. The District Land Registrar should visit the dispute to correct the error which is both on the Registry Index Map and on the ground.

The application was further supported by an affidavit sworn by the applicant. In pertinent paragraphs he has sworn that:

"**1. ....**

2. THAT I am the registered owner of parcel of land Ruguru/Chieni/251 and the second respondent who is my neighbour is the owner of Ruguru/Chieni/252.

3. THAT the two parcels of land are as a resultant of sub-division of Ruguru/Chieni/76.

4. ....

5. That the second respondent bought the other portion later and immediately claimed that there was a boundary dispute.

6. THAT the Land Registrar Mr. Mudimbia visited the alleged boundary dispute and without any reason shifted the boundary and went on to amend the Registry Index Map to reflect the anomaly.

7. THAT I was aggrieved by the decision and decided to file this suit against the parties herein.

8. THAT on 18th July 1996 by consent the District Land Registrar and the District Surveyor were ordered to visit the dispute and file their report.

9. THAT the report was filed and read to us and although the second respondent did all he could to frustrate the report it was adopted as the judgment of the court.

10. THAT thereafter I proceeded to extract the decree and again after a lot of frustrations it was approved.

11. THAT now it remains the work of the District Land Registrar to correct the anomalies he detected so as to restore the status as at the time the second respondent bought the land."

In his oral submissions in support of the application, **Mr. Mugo,** learned advocate for the applicant stated that he relied wholly and solely on what the applicant had deponed to in support of the affidavit. However he added that the matter had been concluded and that no prejudice would be occasioned to the respondents if the orders sought were granted. Finally he submitted that the application was not seeking to amend the decree.

The application was opposed. Though the 1st respondent did not file a replying affidavit **Ms Munyi**, learned Principal Litigation Counsel submitted on matters of law on his behalf. She submitted that rules are made to be followed. That the applicant was bound to follow the rules of procedure. This application ought to fail for failure to follow procedure. **Ms Munyi** was of course alluding to the fact that Section 99 which deals with amendment of decrees had not been invoked by the applicant in this application. Instead the applicant had invoked sections 3 & 3A of the civil procedure Act. The applicant cannot invoke sections 3 & 3A of the Civil Procedure Act where there is specific statutory provision which would meet the necessities of the case. In this case the applicant ought to have invoked section 99 of the Civil Procedure Act.

On his part, **Mr. Wahome**, learned advocate for the 2nd respondent filed grounds of opposition to the

application. He stated that the application was misconceived, incompetent, fatally and incurably defective, bad in law, untenable and cross abuse of the court. He also maintained that the application was frivolous and vexatious since there was already a decree on record and the matter was thus Res Judicata. Finally the 2nd respondent contended that the application was otherwise malafides, lacks merit and ought to be dismissed.

In his oral submissions in opposition to the application, **Mr. Wahome** submitted that the application seeks to amend a decree and add another ground directed at the Land Registrar. This court cannot amend a decree which was as a result of an award. The award if faulty ought to have been sent back to be reviewed. **Mr. Wahome** also pointed out that the applicant could not invoke sections 3 & 3A in the application when there are clear provisions that deals with amendment of decrees. In support of this submission**, Mr. Wahome** referred this court to the following authorities:

1. Mediterranean Shipping Co. SA v/s International Agriculture Enterprises Ltd. & EXCO (MSA) Ltd (1990) KLR 183

2. Alice Wangari Ndumo v/s Patrick Ngumi Githae & 2 others HCCC No. (NYI) 28 of 2002 (UR)

3. Kenya Commercial Bank Ltd v/s David Gachuiga & 2 others HCCC (NYI) 64 of 1995.

I have carefully considered the application, the supporting affidavit, grounds of opposition, respective oral submissions and the authorities cited as well as the Law. Much as the applicant claims that the application does not seek to amend the decree issued herein on the 11th July 2000, if the truth be told that is exactly what the applicant is hoping to achieve by this application. I have perused the decree and noted that prayer C of the claim was to the effect "**........ THAT the District Land Registrar Nyeri be ordered to cause the Register Index Map to be amended to reflect what is obtaining in the mutation form and on the ground and the second Defendant do honour and respect the boundary he found when he bought this land ...."** Though couched a bit differently this is the same order the applicant is seeking to achieve by the instant application. However it would appear that prayer (c) aforesaid was not granted in the final decree. For what was granted in the decree was:

"**(a) The current Register Index Map (RIM) is erroneously amended and does not reflect the situation on the ground as at the time the second defendant bought his parcel of land number Ruguru/Chieni/252.**

(b) It should be noted that a map is not an authority on general boundaries.

(c) Costs of the suit to the Plaintiff."

Prayer (c) aforesaid having not been reflected in the final decree it must be deemed that it was denied. By this application the applicant is seeking to reinstate the said prayer in the decree through the backdoor. It is not lost on me that the decree was in fact drawn and extracted by the advocates of the applicant. If they felt strongly that prayer (c) of the claim had been granted, nothing stopped them from incorporating the same in the final decree. They omitted the same completely meaning that they were satisfied that same had not been granted.

That aside, I would still have refused to grant the application on the basis that sections 3 & 3A of the Civil Procedure Act should not be invoked where there is specific provision of the law that would meet the exigencies and or necessitates of instant application. In other words section 99 of the Civil Procedure Act deals with amendments of decrees and orders. The applicant cannot invoke section 3 & 3A of the Civil Procedure Act in pursuit of the instant application. I have had occasion to rule on this question in the past. In the case of **Kenya commercial Bank Ltd** (supra) this is what I said:-

It is trite law that inherent jurisdiction of the court should not be invoked where there is a specific statutory provision which would meet the exigencies and or necessities of the case. *Section 3A*

which grants this court the inherent jurisdiction should never be invoked by litigants in an application where a specific legislation confers jurisdiction. In the instant case, the application being one for a review of an order made earlier by this court, *Order XLIV Rule (i)* of our Civil Procedure Code automatically comes in to place as it specifically provides for how such an

application should be made and the grounds upon which it should be entertained. There was therefore no need for the applicant to invoke the inherent jurisdiction of this court in the application. To do so in the presence of a specific legislation that deals with the matter would in my view render the application fatally incompetent. I am therefore in total agreement with Justice Okwengu when she states in the case of Alice Wangari Ndumo (supra) that:

"………**It is evident that the appellant erred in seeking reliance on section 3A of the civil procedure Act to bring her application. That section is inappropriate to invoke the inherent powers of the court where there are no specific provisions provided ……….in the instant case there are clear provisions dealing with applications for setting aside**

orders of dismissal. Indeed the appellant cited the provisions which is order 1XB rule of the civil Procedure Rules …..It is evident that the appellant complicated her situation by citing section 3A of the civil Procedure act which was unnecessary. It is the bringing in of this section that rendered her application defective.

I would adopt the same reasoning and rationale in the circumstances of this application. I would however substitute *order 1XB rule 8 with order XLIV* as the latter order is cited by the applicant in his application."

I still stand by my above sentiments and or observations. In the circumstances of this case, the applicant ought to have called in section 99 of the Civil Procedure Act and not sections 3 & 3A of the Civil Procedure Act.

In the foregoing circumstances I agree with both **Mr. Wahome** and **Ms Munyi** that the application is incompetent and is accordingly struck out with costs to the respondents.

Dated and delivered at Nyeri this 7th day of May 2009

M. S. A. MAKHANDIA

JUDGE