



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

JR. MISC. NO. 7 OF 2018

FORMERLY

MISC. CIVIL APPLICATION NO. 419 OF 2009 MACHAKOS)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY ALICE MUKULU KYAA (*as the legal administrator ad litem of the estate of the*

LATE BENJAMIN KYAA KIOKO) FOR AN ORDER OF MANDAMUS

AND

IN THE MATTER OF THE LAND ADJUDICATION ACT CAP 284

AND

IN THE MATTER OF THE IMPLEMENTATION OF THE JUDGMENT/FINDING

AND/OR DECISION OF THE MINISTER FOR LANDS AND SETTLEMENT IN LAND APPEAL NO. 100 OF 2008

AND

IN THE MATTER OF PLOT NO. 254 AND 259 KIVANI ADJUDICATION SECTION

BETWEEN

REPUBLIC

VERSUS

THE DISTRICT SURVEYOR

MAKUENI DISTRICT.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

LINUS KILONZO NDIVO.....INTERESTED PARTY

EX-PARTE

ALICE MUKULU KYAA

(suing as the legal administrator

of the estate of the late

BENJAMIN KYAA KIOKO)APPLICANT

RULING

1. Pursuant to the court's ruling dated and delivered on the 15th February, 2012, the District Surveyor Makueni District was ordered vide an order of Mandamus to implement in strict interpretation the minister's decision made on the 28th January, 2009 by the District Commissioner Makueni in Land Appeal no. 100 of 2008 (Benjamin K.Kioko V Linus K. Ndivo) in respect of plot number 254 Kivani adjudication section. Aggrieved by the manner in which the Surveyor who is the first Plaintiff/Respondent herein had implemented the court's order, the Ex-parte Applicant moved the court on the 19th March, 2013. A Mr. Peter Seda who is a District Surveyor Makueni and who was in court on the material day was sworn in and he informed the court that he had implemented the court's order and filed a report as required. Thereafter, the court directed parties to submit on the issues arising from the said implementation process carried out by the District Surveyor.

2. It is only the Ex-parte Applicant who filed and served her submissions on the 24th May, 2013 the same being dated on even date.

3. The counsel for the Ex-parte Applicant submitted that annexure 2 referred to in the court's order constitutes copies of proceedings, judgement and a sketch drawn by the District Magistrate's Court, Kilungu in Civil Case number no. L 38 of 1972. The counsel further referred to page 35 of the Defendant/Applicant's submissions dated 16th November, 2011 and filed in court on 18th November, 2011 where he had premised on specific measurements in identifying the boundary. He pointed out that on the contrary, the District Surveyor only emphasized on what he could not do instead of doing that which he had been ordered to do. The counsel submitted that the Surveyor strayed when he purported to follow sheet number 7 and 12 without attempting to show the nexus of the sheet maps with the magistrate's sketch, and pointed out that the sheet maps which must have come into existence long after the magistrate's sketch, could not be made on the basis of implementation of the court order as the order to be implemented did not incorporate such maps.

4. The counsel went on to submit that the District Surveyor again erred in stating that he could not introduce the curve on the boundary, a matter which was not a term of the reference in the order to be implemented. The counsel termed the District Surveyor's statement as extraneous to the court order and thus a gross misdirection.

5. In addition, the counsel submitted that the magistrate's description of the boundary is not only by measurements but also by features such as trees and rivers and that it was plain obvious that the District Surveyor's report was not guided as prescribed in the order. The counsel termed the District Surveyor's Report as one that is atiose(sic) and incapable of satisfying the threshold of the order.

6. The District appeared before this court on the 24th October, 2018 where he repeated the issues that the Ex-parte Applicant has submitted on. He further stated that there is an ambiguity in that the court did not draw a map. He also stated in that in the appeal number 100 of 2008, it was ruled that the boundary be marked in a straight line without a curve and that the ambiguity in the ruling was that there were no reference points to make such a straight line.

7. In my view, the issues the surveyor has raised amount to appealing against this court's ruling in the wrong forum. Of importance to note is that the ruling dated 15th February, 2012 was not appealed against. It is clear to me that there is no ambiguity either in the ruling or in the judgement of the District Magistrate's Court Kilungu in L 38 of 1978 contrary to what the Surveyor would want this court to believe. Cognizant of the fact that court orders are never issued in vain, I agree with the Ex-parte Applicant that the first Respondent has not strictly implemented the minister's decision made on 28th January, 2009 in Land Appeal No. 100 of 2008 which order was found not difficult to comply with in the Judicial Review Ruling dated 15th February, 2012. In the circumstances, the first Plaintiff/ Respondent has the last chance to implement the said order within the next 45 days from the date of this ruling and file a further report in court.

SIGNED, DATED AND DELIVERED AT MAKUENI THIS 28TH DAY OF JANUARY, 2019.

MBOGO C.G,

JUDGE

IN THE PRESENCE OF:

Mr. Hassan holding brief for Mr. F.M Mulwa for the Ex-parte Applicant

No appearance for the Respondents

Interested Party present

Ms Nzioki Court Assistant

MBOGO C.G, JUDGE

28/1/2019