



REPUBLIC OF KENYA

IN THE LAND AND ENVIRONMENT COURT AT NYAHURURU

ELC MISC APPL NO 14 OF 2017

(FORMERLY NAKURU MISC NO 64 OF 2016)

DAVID MURAI KORI.....APPLICANT

VERSUS

THE DISTRICT LAND REGISTRAR NYANDARUA.....1st RESPONDENT

AND

JOSEPH KARIUKI KIBORO.....INTERESTED PARTY

RULING

1. Before me for determination is the Notice of Motion dated 12th May 2016 brought under Art 40 of the Constitution of Kenya, Sections 18,19, 86 and 100 of the Land Registration Act, Section 3 of the Environment and Land Court Act, Section 1A, 1B and Section 63 of the *Civil Procedure Act* and all other powers and Enabling Provisions of the law where the Applicant seeks:

i. **THAT** the honorable Court be pleased to give an opinion on the question on whether the failure and/or refusal by the Registrar of Nyandarua Lands Registry to ascertain the boundaries in respect of the Applicant's suit property known as Nyandarua/Mawingo/2872 (a subdivision of all that property formerly known as Nyandarua/Mawingo/2512) and the interested party's property known as Nyandarua/Mawingo/2522 upon being moved by the Applicant and the Interested party was proper execution of the functions of the Registrar under Sections 18 and 19 of the Land Registration Act;

ii. **THAT** the court do issue an order compelling the Respondent to immediately, as more provided for under Section 19 of the Land Registration Act, cause to be defined by survey, the precise position of the boundaries in respect of the Applicant's suit property known as Nyandarua/Mawingo/2872 (a subdivision of all that property formerly known as Nyandarua/Mawingo/2512) and the Interested party's property known as Nyandarua/Mawingo/2522 in question and file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the said parcels.

iii. **THAT** do issue an order compelling the Respondent to immediately cause boundary features to be fixed to demarcate the Applicant's suit property known as Nyandarua/Mawingo/2872 (a subdivision of all that property formerly known as Nyandarua/Mawingo/2512) and the Interested Party's property known as Nyandarua/Mawingo/2522.

iv. **THAT** costs be provided.

2. The said application is premised on the grounds on the face of it as well as the sworn affidavit of David Murai Kori sworn on the 12th May 2016.

3. This matter was placed before this court on the 6th February 2018 after lying dormant for two years after filing of the same. On the said date only Counsel for the interested party was in court wherein he sought for time to seek for further instructions from his client with whom he had lost touch after the matter took too long to be prosecuted since its inception in the year 2016.

4. On the two occasions, that is on the 17th April 2018 and 19th June 2018 when the same came up for mention neither of the parties was present. On the 11th October 2018 when the same came up for a further mention, Counsel holding brief for Counsel for the Applicant sought for the application to be disposed of by way of written submissions.

5. Despite service, the 1st Respondent and the interested party have neither filed any pleadings nor written submissions.

6. The Applicant herein filed his written submissions dated the 5th December 2018 on the 13th December 2018 submissions which I shall herein consider as being unopposed.

Applicant's case.

7. Briefly, the Applicant's case was that he was the registered proprietor of land parcel No. Nyandarua/Mawingo/2872 which is a sub division of Nyandarua/Mawingo/2512.

8. That the said property is adjacent to parcel No. Nyandarua/Mawingo/2522 owned by the interested party and as such they share a common boundary separated by a road that measures approximately 6 meters.

9. That sometime in the year 2014, a dispute between the two of them arose wherein the matter was referred to the Respondent herein who vide his report dated the 3rd April 2014 (Annexure 1 page 5) confirmed that the proprietors of land parcel No. 2522 had encroached on the road access by cultivating along it and fencing on the wrong side thereby creating a scenario where parcel No. 2522 and 2512 now had a common boundary instead of the two parcels being separated by a 6 meter access road between them.

10. This report was not in tandem with the letter by the district Surveyor dated the 21st February 2014 wherein he had suggested that the measurements of the parcels of land touching on the road be checked again to establish their correct measurements well as the measurements of the access road, since the measurements on the ground did not tally with the measurements on their documents.

11. That in the spirit of Article 159 of the Constitution both the Applicant and the interested parties vide an agreement dated the 25th September 2014, had agreed to have their parcels of land and the access road measured again as per the recommendations of the District Surveyor. They thus wrote a joint letter dated the 25th September 2014 to the Respondent and the District surveyor seeking that they implement the recommendations of the letter dated the 21st February 2014. Their request has not been acted upon by the Respondent to date.

12. The Applicant relied on the decided case of **Terry C Maina vs District Land Registrar, Kajiado [2015] eKLR** to submit that the Respondent ought to have established the boundaries afresh after having been moved by the parties herein.

13. He thus prayed that the court do direct that Respondent to exercise the powers bestowed upon him vide the provisions of Sections 18 and 19 of the Land Registration Act so as to settle the boundary disputes between them.

14. I have considered the Application herein, the authority, the law, as well as the written submission by Counsel for the Applicant herein.

15. In his Application, the Applicant has submitted that he and the interested party herein are proprietors of parcel of land known as Nyandarua/Mawingo/2872(a sub division of No. 2521) and No. Nyandarua/Mawingo/2522 respectively. That the two parcels of land are separated by a road measuring approximately 6 meters.

16. That pursuant to a boundary dispute in the year 2014, the parties submitted the same to the 2nd Respondent and were not satisfied with his report dated the 3rd April 2014. They preferred the recommendations made by the District surveyor in his report of 21st February 2014.

17. They then agreed amongst themselves to have their parcels of land re-measured afresh so as to incorporate the recommendations of the district surveyor wherein they informed the Respondent of their intentions vide their letter dated the 25th September 2014. That the Respondent had refused to act on their request unless directed by the court.

18. The Applicant thus seeks for an order to direct the Respondent to establish the boundaries to their respective parcels of land.

19. By virtue of Sections 18 and Section 19 of the Land Registration Act, the Land Registrar is empowered to fix boundaries.

20. *Section 86 (1) of the Land Registration Act stipulates that:*

'If any question arises with regard to the exercise of any power or the performance of any duty conferred or imposed on the by this Act, the Registrar or any aggrieved person shall state a case for the opinion of the Court and thereupon the Court shall give its opinion, which shall be binding upon the parties'

21. *Section 86 (1) of the Act therefore* reposed the jurisdiction to review the decision of the Land Registrar in Court From the above provision, it is clear that apart from the Registrar, **"any aggrieved person"** can to seek the opinion of the Court.

22. In the case of **Terry C. Maina** (Supra) the court held as follows;

The Land Registrar is obligated under section 19(1) and (2) to act on an application by an interested party to define and fix the boundary in its precise position after giving notice to all owners and occupiers of land adjoining the boundary in question. As I understand the provisions of section 19 of the Land Registration Act, the duty of the Land Registrar upon being moved by a party is to establish and fix the boundaries on the basis of the titles held by the applicant and to use any survey maps in case they exist and if any amendment needs to be made on the survey map a note of that would require to be made. The titles held by the applicant clearly show the acreages of the respective parcels of land and in my view this is what should be reflected on the ground. Unless there is a formal order of the court varying, such acreage the ground size of the land ought to correspond as nearly as possible to the area indicated on the titles allowing for any permissible marginal difference.

23. I therefore find that, based on the above captioned provisions of the law, the Applicant has made out his case.

24. Pursuant to the provisions of section 1A, 1B and 3A of the Civil Procedure Act I accordingly direct that the Land Registrar Nyandarua and Samburu **Counties** do within 90 days from the date of being served with this Order/Ruling, cause to be defined by survey, the precise position of the boundaries in respect of land parcels known as Nyandarua/Mawingo/2872 and No.Nyandarua/Mawingo/2522 pursuant to the provisions of section 18 and 19 of the Land Registration Act 2012.

25. The Applicant's Notice of Motion dated 12th May, 2016 is merited. The same is allowed as prayed with no costs as it was not defended.

Dated and delivered at Nyahururu this 26th day of February 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE