



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

JR NO. 2 OF 2019

REPUBLIC.....APPLICANT

VERSUS

THE CHIEF LAND REGISTRAR.....1ST RESPONDENT

THE DISTRICT LAND REGISTRAR.....2ND RESPONDENT

FRANCIS KAGUMA MUHOI.....3RD RESPONDENT

EXPARTE

REGINA WAMUYU KANYI

RULING

(Application for leave for commence judicial review for orders of mandamus to compel Land Registrar to execute orders granted in a separate matter; leave denied; orders to be sought within the completed case that gave directions to the Land Registrar)

1. Through an application filed on 21 February 2019, the applicant has sought the following orders:-

(i) Spent (certification of urgency);

(ii) The applicant herein be granted leave for an order of mandamus to compel the 2nd respondent (the District Land Registrar) to fix the boundary between LR No. Nyandarua/Oljoroorok Salient/1440 and Nyandarua/Oljoroorok Salient/610 by returning beacons to their original position as directed by a Court (sic) issued on 4th October, 2011 by the Nyahururu Senior Resident Magistrate issued in PMCC No. 31 of 2009 and the second issued on 4th May 2016 by the Environment and Land Court at Nakuru in Civil Appeal No. 188 of 2011.

(iii) The applicant herein be granted leave to apply for an order of mandamus to compel the 1st respondent (The Chief Land Registrar) to recall the register and recal the transfer initiated on LR No. Nyandarua/Oljoroorok Salient/1440.

(iv) The applicants herein be granted leave to apply for an order of Prohibition to prohibit the 1st respondent from initiating or going ahead with any transfer on property LR No. Nyandarua/Oljoroorok Salient/1440.

(v) That grant of leave prayed for herein do operate as stay in respect to property LR No. Nyandarua/Oljoroorok Salient/1440 pending hearing and determination of the substantive motion.

(vi) That costs of this application be provided for.

2. The application is based on various grounds and is supported by a Verifying Affidavit and a Statement of Facts. I have gone through these alongside a further verifying affidavit filed on 1 March 2019. What I have seen from these is that the applicant has been the owner of the land parcel Nyandarua/Oljoroorok Salient/ 1440 measuring 4.2 Ha (about 11.8 acres). The 3rd respondent on his part has been the owner of the land parcel Nyandarua/Oljoroorok Salient/610 (about 10.4 acres). Sometimes in the year 2008, the 3rd respondent purported to subdivide his land into the plots Nos. 18409 – 18422 but these subdivisions in total measured in excess of 17 acres. The applicant contended that the extra acreage had been got from her land parcel No. 1440. Owing to the dispute the 3rd respondent filed the case Nyahururu PMCC No. 31 of 2009

seeking to permanently restrain the applicant from the plots Nos. 18409 – 18422. The applicant filed a counterclaim seeking inter alia orders directing the District Land Registrar to fix the boundary between her plot No. 1440 and the 3rd respondent's plot No. 610. The matter was heard with the case of the 3rd respondent being dismissed whereas the case of the ex-parte applicant was upheld. The Court (Hon. A.B Mongare) ordered the Land Registrar to proceed and fix the boundaries to the plots No. 1440 and 610. Aggrieved, the 3rd respondent filed an appeal to this court. I heard the appeal and in my judgment delivered on 4 May 2016, I dismissed the appeal. I held further that the directive to the District Land Registrar to point out the boundaries may be executed.

3. In this application, the ex-parte applicant has averred that the District Land Registrar and the District Surveyor visited the suit properties on 12 and 13 July 2017. She states that in their report, they deliberately ignored the illegal subdivisions of the 3rd respondent, and instead found that it is other parcels of land which border her land on the upper side being subdivisions of the land parcel Nyandarua/Olajororok Salient/1908 as those which are encroaching on her land, which she claims is not the case. She has stated that on 27 March 2018, she wrote to the Chief Land Registrar appealing the decision and asking for a different Land Registrar to fix the boundaries, but that her letter has not been responded to. She states that she is now appealing that decision and wants the boundaries properly fixed.

4. I have considered this application, which, it will be recalled, is for leave to commence judicial review proceedings. Having considered the application, it does appear to me that what the ex-parte applicant wants is an execution of the order of court as made in the suit Nyahururu PMCC No. 31 of 2009, for in that case, the trial Magistrate did order the Land Registrar to proceed and fix the boundaries between the land parcels No. 610 and 1440. In the appeal, this court upheld the decision of the trial Magistrate and directed that the order to the District Land Registrar informing him to point out the boundaries be executed. In this application, the ex-parte applicant seeks orders inter alia of Mandamus to compel the District Land Registrar to return the beacons as ordered by the court in the case before the Magistrate and in the appeal before this court. To me, that appears to be an order in execution of a decree that was issued in another matter.

5. It is improper to file another suit seeking orders to execute a decree issued in another suit. This is provided for under Section 34 of the Civil Procedure Act, Cap 21, Laws of Kenya, which provides as follows :-

34. Questions to be determined by court executing decree

(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

(2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.

Explanation.—For the purposes of this section, a plaintiff whose suit has been dismissed, and a defendant against whom a suit has been dismissed, are parties to the suit.

6. I am unable to separate what is being sought in this case from what was sought in the suit Nyahururu PMCC No. 31 of 2009 and where already there is a decree. To me, the question whether the District Land Registrar and the District Land Surveyor are properly executing the decree in Nyahururu PMCC No. 31 of 2009 is a matter that needs to be addressed within that case and not by way of filing another suit, whether an ordinary suit, or by way of Judicial Review. If this court is to proceed to hear this suit, it may arrive at very different findings and issue orders that may conflict with those that have already been issued by the Magistrate's court and the court that heard the appeal from the decision of the Magistrate.

7. I am not therefore persuaded to grant leave to commence judicial review proceedings as requested by the ex-parte applicant in this motion. The ex-parte applicant is advised to seek a proper execution of the orders issued in Nyahururu PMCC No. 31 of 2009 within that suit. That court is the court with jurisdiction to determine whether or not its orders that boundaries between the land parcels No. 1440 and 610, is being properly executed or not, and the said court can issue all other directions deemed necessary in order to ensure that its decree is executed properly.

8. For the above reasons I dismiss this motion. I however make no orders as to costs.

9. Orders accordingly,

Dated, signed and delivered in open court at Nakuru this 26th day of March 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

No appearance on the part of M/s Onkendi Ombiro & Co. Advocates for the ex-parte applicant.

Court Assistant: Nelima Janepher.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU