



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 832 OF 2013

WILBERFORCE MUTHINGA NGURU.....1ST PLAINTIFF

RODAH WAMAITHA NGURU.....2ND PLAINTIFF

VERSUS

HEZRON MAINA TITUS NGURU.....DEFENDANT

RULING

The applicant through his application dated 18th May 2018 is seeking the following orders:

- (1) That the boundary between land parcels number Kiine/Kibingoti/Nguguine/4130, 4131 and 4132 be restored and each party to occupy his/her portion.***
- (2) The cost of restoring the boundary marks to await the outcome of Baricho Criminal Case number 106 of 2017, Republic Versus Mwangi Maina.***
- (3) Costs of the application be provided for.***

That application is premised on grounds that the defendant's son Elias Mwangi Maina uprooted the beacons put up on the boundaries of the suit land and that the defendant and his family has encroached on to the plaintiff's parcel of land. The application is opposed with grounds of opposition and a replying affidavit sworn on 14th November 2018. In his affidavit, the applicant contends that on 22nd April 2016, judgment was in their favour against the defendant who is their elder brother whereby land parcel L.R. No. Kiine/Kibingoti/Nguguini/71 was sub-divided into three equal portions with each of the parties herein getting their own portions. It is further contended that soon thereafter, the defendant/respondent expressed his intention to appeal against the judgment and filed an application for stay pending appeal. However, that application was dismissed with costs.

Consequently, the title of land parcel No. Kiine/Kibingoti/Nguguini/71 was closed on sub-division giving rise to three new numbers namely Kiine/Kibingoti/Nguguini/4132 in the name of the 2nd plaintiff Rhoda Wamaitha Nguru, parcel No. Kiine/Kibingoti/Nguguini/4131 in the name of the defendant while parcel No. Kiine/Kibingoti/Nguguini/4130 was registered in the name of the 1st plaintiff. It is further alleged that the defendant's son one Elias Mwangi Maina uprooted the beacons and is now facing a criminal case at Baricho being No. 106/2017 which is pending. The applicant contends that the defendant and his family have encroached on to his parcel of land and that it is necessary to have the orders sought granted.

In his grounds of opposition dated 31st October 2018, the respondent averred that the application is untenable and an abuse of the Court process. The respondent further averred that this Honourable Court lacks jurisdiction to entertain the instant application under ***Order 18 of the Land Registration Act No. 3 of 2012***. The respondent contends that the application seeks substantive orders which can only be issued in a substantive suit. The respondent also stated that this Honourable Court is functus officio in the matter. The same arguments are repeated in his replying affidavit where the respondent deposed that the main suit herein has already been heard and determined and that the decree has even been executed whereby land parcel No. Kiine/Kibingoti/Nguguini/71, the initial subject matter of the suit has been sub-divided into 3 portions with the resultant parcels being Kiine/Kibingoti/Nguguini/4130, 4131 and 4132. It is further contended that the aforesaid parcels of land have been transferred to their respective owners and that there is no pending claim for this Honourable Court to litigate upon since the main suit has already been determined and the Court's decree executed.

I have considered the affidavit evidence contained in the affidavits both in support and opposition to the said application. I have also considered the submissions by counsels for both the applicant and the respondent. I have equally considered the authorities cited and the applicable law. It is not in dispute that this Court delivered its judgment on the dispute between the parties on 22nd April 2016. That judgment determined the dispute between the parties whereby a decree was subsequently issued. In ***Black's Law Dictionary, 9th Edition, judgment*** is defined as follows:

“A Court’s final determination of the rights and obligation of the parties in a case. The term judgment includes an equitable decree and any order from which an appeal lies”.

Where a Court renders itself in a dispute between parties and a decree is issued, the Court becomes *functus officio*. Once a Court of competent jurisdiction renders itself on all the issues in controversy in the case, the matter is determined by the issuance of a decree. The Court thereafter becomes *functus officio* and the matter goes for execution or the appellate Court if a party is aggrieved by the Court’s determination of the issues in dispute. The parties cannot re-litigate on new issues.

In the present application, the applicant is seeking an order for restoring boundaries between three parcels of land which were created after the judgment and decree of this Court issued on 22nd April 2016. The application in my view raises new issues which cannot be litigated afresh in this case which has been finalized. There is would be no end to litigation if we were to allow fresh issues to be litigated in a matter that is already heard and determined. I also find that the **Land Registration Act No. 3 of 2012** gives the Land Registrar powers to determine matters relating to a dispute regarding boundaries of registered land. **Section 18 (2)** thereof reads as follows:

“18 (2) The Court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section”

In the case of **JERSEY EVENING POST LIMITED VS AL THANI (2002) J.L.R 542 AT 550**, the Court held:

“The Court noted that, a Court is *functus officio* when it has performed all its duties in a particular case. The doctrine does not prevent the Court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the Court *functus* when its judgment or order has been perfected”.

The above decision affirms the position in law that where a Court has rendered itself on a dispute between parties and a decree has been issued, the Court becomes *functus* and must down its tools unless called upon to correct some clerical errors or hearing an application for review of the judgment. The application by the applicant is seeking to restore boundaries which are sub-divisions of L.R. No. Kiine/Kibingoti/Nguguini/71. The application in my view is a new cause of action which cannot be litigated under this suit where the judgment and decree has been preferred and executed. The authorities relied by the applicant in my view are distinguishable and therefore irrelevant to the circumstances of this case.

In the final analysis, I find the application dated 18th May 2018 lacking merit, scandalous and an abuse of the Court process. The same is hereby dismissed with costs to the respondent.

READ and SIGNED in open Court at Kerugoya this 20th day of March 2019.

E.C. CHERONO

ELC JUDGE

20TH MARCH, 2019

In the presence of:

1. Mr. Kagio for Applicant
2. Ms Wangechi Munene holding brief for Mr. Chomba for Respondent