



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC NO. 61 OF 2018

KABOYI MERKOR.....PLAINTIFF

VERSUS

LOMUKE PUSIKWANG.....1ST DEFENDANT

THE COUNTY LAND ADJUDICATION &

SETTLEMENT OFFICER, WEST POKOT COUNTY.....2ND DEFENDANT

COUNTY LAND SURVEYOR, WEST POKOT COUNTY.....3RD DEFENDANT

COUNTY LAND REGISTRAR, WEST POKOT COUNTY.....4TH DEFENDANT

THE ATTORNEY GENERAL.....5TH DEFENDANT

RULING

1. By a Notice of Motion dated 12/2/2019, the plaintiff seeks the following orders:-

(1) That this court be pleased to direct that the County Surveyor Trans-Nzoia County and the Deputy Registrar of this High Court, in the presence of the local area Chief and Elders do visit land comprised in Title No. West Pokot/Chepareria/558 and 490 and ascertain the following:

(i) Whether the plaintiff and the defendant occupy land comprised in West Pokot/Chepareria/558.

(ii) Whether there are any physical marks/temporary boundaries separating the plaintiff and the defendant of Title Deed No. West Pokot/Chepareria/558.

(iii) How many acres of land are currently under the occupation of the plaintiff on parcel No. 558 and how many acres are occupied by the defendant on the same parcel of land.

(iv) Whether the plaintiff and/or any of his family members are in occupation of land comprised in Title Deed No. West Pokot/Chepareria/ 490 as alleged by the defendant and how far is land parcel No. 558 from 490.

(v) Whether the mapping of Title Deed No. 490 agrees with the adjudication records as far as its ground position is concerned.

(2) That the offices concerned herein above to compile and file their report within 30 days from the date of the court's order.

2. The application is premised on the grounds on the face of the motion and supported by the affidavit of plaintiff sworn on 12/2/2019 as well as the plaintiff's further affidavit filed on 5/3/2019.

3. The grounds are that the plaintiff's claim is that he has been occupying and using part of what is now known as land **parcel No. 558** for over **50** years while the defendant indicates that the plaintiff has his own land **No. 490** where he stays with his family; that the defendant alleges that it is the plaintiff's son who is occupying approximately **10** acres of land on parcel No. **558** while the plaintiff indicates that he is on the suit land and that he is occupying almost half of parcel No. **558**; that the defendant alleges that **3** sons of the plaintiff occupy title deed No. **West Pokot/Chepareria/490** while the plaintiff denies it stating that neither himself nor his family member occupies and/or cultivated

land **parcel No. 490**; that as per the adjudication record forming part of the record of this court, land **parcel No. 490** is supposed to be on **Map Sheet No. 40** but according to mapping parcel No. 490 is placed on **Map Sheet No. 41** hence the ground for 490 as per adjudication records and as per mapping does not agree and that because of the parallel allegations between the plaintiff and the defendant this court will not suffer any prejudice if it directs that an independent government county surveyor and/or an independent private surveyor do visit the parcels concerned and to come up with the actual ground report to assist this court to have the actual position pertaining this case.

4. The application has been responded to by the 1st defendant through a replying affidavit sworn by **22/2/2019**. It is deponed that the cause of action in the plaint is a claim for **60** acres; that his defence is that the plaintiff is not in possession of part of the defendant's land but that the plaintiff's son is in possession, with the defendant's consent of some **10** acres; that the plaintiff moved out of the land leaving his son there; that the cause of action is not encroachment, trespass or boundary dispute and a site visit by a surveyor or surveyors is not necessary; that the responsibility of proving the applicant's claim lies solely on him; that the titles were issued after an exhaustive process under the **Land Adjudication Act Cap 284** and no objection was raised by applicant thereto; that the application is an attempt to circumvent the orders of this court made in a ruling dated **15/11/18**.

5. The 2nd, 3rd, 4th and 5th defendants opposed the application and filed grounds of opposition **15/2/2019** in which they aver that the granting of the motion would be prejudicial to the defendants in that the applicant seems to be seeking the court's intervention to prove his case. It is also alleged that the motion would have the effect of finalizing the suit before a hearing and it is a concealed attempt at an appeal against the orders of this court made on **15/11/18**.

6. The plaintiff filed written submissions on **5/3/2019** and the 1st defendant on **13/3/2019**. I have considered the application, the response of the respondents and the submissions filed.

7. It is clear to this court that the plaintiff's application seeks to have a surveyor go to the ground and declare which portion the plaintiff and the defendant respectively are in occupation of. I agree that the details that emanate therefrom would assist the court in the determination of this suit, but is that the only consideration that this court should have when determining the instant application? In my view, I think not. I must consider whether it is in the interests of all parties to grant the orders sought and, if granted on what terms.

8. It is already stated in reply by the 1st respondent that the purpose of the application is to circumvent the order of **15/11/18** in this suit. That order stated that status quo shall be maintained and there shall be no further development of the land and no further use or cultivation beyond the areas currently used or cultivated by the plaintiff's remaining son till the determination of the instant suit. It also ordered that no further persons shall be brought onto the suit land to occupy it or any portion thereof.

9. This court has therefore already issued an order of status quo to remain pending the determination of the suit on its merits. Does this mean that a surveyor can not access the suit land to verify facts that this court may rely on? In my view the answer is 'no'.

10. There is no doubt that this court can order a surveyor to visit suit land in deserving cases. It is for the applicant to demonstrate that the order is deserved in each case. In the present case the applicant has sought to have the surveyor establish the land each party is occupying. It is in the interest of all parties in this case to have the facts as to who resides on which parcel verified. That can be done with the help of a report made by a qualified surveyor.

11. I do not see in which way the application before me can in the remotest sense be called an appeal against the orders made by this court on the **15/11/2018**. What may be said is that the orders as framed in the instant application are more in favour of the proof of the plaintiff's claim. Is that a good ground for declining the application? I think not.

12. When an application of this nature is brought and the court is in agreement with the respondents that the orders may predominantly be in aid of the plaintiff's case, the court may grant the application on certain terms.

13. I find that the instant application can be granted with special orders as to costs both of the application and of the exercise proposed in those orders.

14. I therefore dispose of the same by issuing the following orders:

(1) That the County Surveyor Trans-Nzoia County shall in the presence of the local area Chief and Elders do visit land comprised in Title No. West Pokot/Chepareria/558 and 490 and ascertain the following:

(i) Whether the plaintiff and the defendant occupy land comprised in West Pokot/Chepareria/558.

(ii) Whether there are any physical marks/temporary boundaries separating the plaintiff and the defendant of Title Deed No. West Pokot/Chepareria/558.

(iii) How many acres of land are currently under the occupation of the plaintiff on parcel No. 558 and how many acres are occupied by the defendant on the same parcel of land.

(iv) Whether the plaintiff and/or any of his family members are in occupation of land comprised in Title Deed No. West Pokot/Chepareria/ 490 as alleged by the defendant and how far is land parcel No. 558 from 490.

(v) Whether the mapping of Title Deed No. 490 agrees with the adjudication records as far as its ground position is concerned.

(2) That the County Surveyor shall compile and file his report within 30 days from the date of the court's order.

(3) The costs of this application and the costs of the exercise by the county surveyor shall be borne by the applicant.

Dated, signed and delivered at Kitale on this 30th day of April, 2019.

MWANGI NJOROGE

JUDGE

30/4/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Kiarie for 1st respondent

Mr. Wambura for the applicant

Mr. Wabwire for the 2nd - 5th respondents

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

30/4/2019