



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 277 OF 2017

JULIUS MUSEMBI MATIVOPLAINTIFF

VERSUS

AMOS MUTINDA KALUNGU1ST DEFENDANT

SAMUEL MUNGUTI MWANGANGI2ND DEFENDANT

STEPHEN MUTHOKA MAKAU3RD DEFENDANT

ELASTO MBUVI MUTETI4TH DEFENDANT

TETT WILLIAM DAVID.....5TH DEFENDANT

RULING

1. In the Notice of Motion dated 30th July, 2018, the Defendants are seeking for the following orders:

a. That this Honourable Court be pleased to order that the District Land Registrar do visit the parcels in issue and that is parcel No. Matungulu/Kyaume/2425 and no. L.R. No. 23302 (original number 11800/93/9) to enable the Surveyor fix beacons.

b. That this Honourable Court do order that the District Surveyor to fix beacons to mark the said boundaries between parcel No. Matungulu/Kyaume/2425 and L.R. No. 23302 both parcels located within Tala Market in Machakos County for the purpose of establishing the correct and proper boundaries so that the District Land Surveyor may fix the beacons thereof.

c. That the costs of this Application be provided for.

2. The Application is supported by the Affidavit of the 2nd Defendant who has deponed that the claim by the Plaintiff is for encroachment on parcel number Matungulu/Kyaume/2425; that there is a road separating parcel number Matungulu/Kyaume/2425 and L.R. No. 23302 and that a suit was heard and the Plaintiff found liable for encroaching and interfering with the Defendants' proprietary rights.

3. In response, the Plaintiff filed Grounds of Opposition in which he averred that the District Surveyor visited the parcels of land in issue on 29th September, 2018 and established beacons; that the Surveyor subsequently prepared a report dated 4th November, 2008 showing the encroachments complained of in the suit and that the Application seeks to re-do what has already been done.

4. Both the Plaintiff's and the Defendants' advocate filed written submissions which I have considered.

5. In his Complaint, the Plaintiff has averred that he is the registered proprietor of land known as L.R. No. 23302 while the Defendants jointly own land known as Matungulu/Kyaume/2425 on which the Defendants have established a petrol station known as "Pentagon".

6. According to the averments in the Complaint, the Plaintiff later on realized that the Defendants had blocked a public road by constructing the petrol station and have also excised a portion of the Plaintiff's land and that the Plaintiff filed Machakos High Court Miscellaneous Application No. 65 of 2010 in which the court issued orders in his favour.

7. In his Complaint, the Plaintiff is praying for a declaration that there is no public road of access through his land L.R. No. 23302 and for a mandatory order directing the Defendants to open up the public road of access.

8. The Defendants, at an interlocutory stage, want this court to direct the Surveyor to visit the two parcels of land and fix beacons. The issue

of where the beacons are supposed to be is the issue before the court. Consequently, it is for each party to hire a Surveyor to prepare a report and submit it during the hearing of the case.

9. It is not the business of the court, which is supposed to be an impartial arbiter, to direct Surveyors, at an interlocutory stage, to fix beacons which are in contention. Such an order presupposes that the court has already made a decision on the position of the beacons, which is not the case. If indeed those beacons are already fixed, as argued by the Defendants, then that evidence should be produced in court during trial. The Defendants are at liberty to receive a report from an independent Surveyor. It is only after the court has taken evidence that a final order on the position of the boundaries can be made.

10. In the circumstances, I find the Application dated 30th July, 2018 to be unmeritorious. The Application is therefore dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 21ST DAY OF JUNE, 2019.

O.A. ANGOTE

JUDGE