



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 130 OF 2011

ASTRID DORIS PETRA BWANA.....PLAINTIFF/RESPONDENT

VERSUS

SILESIA NS OF DON BOSCO.....DEFENDANT/APPLICANT

RULING

1. The defendant/applicant moved the court under the provisions of Sections 3A of the Civil Procedure Act seeking the grant of the following orders;

(a) Spent;

(b) That this Honourable Court be pleased to Order that the Director of survey do undertake the exercise of ascertaining the actual boundaries of Plot Kwale/Galukinondo/373 to enable the applicant get its 2.4 hectares per the title deed.

(c) That costs of this application be in the cause.

2. The application is supported by the grounds listed on its face and the affidavit sworn by Fr. Eric Mairua. Fr. Mairua deposed that the County Surveyor ignored the map and plan layout of their land and dismissed the map as unauthentic. Secondly that the findings of the County Surveyor contradicts the findings of former Kwale County Surveyor Mr Keitany. Thirdly that the County Surveyor used GPS method of survey which is unreliable without justifying the reasons for his actions. That as a result of the County Surveyor's actions, the applicant lost approximately 2 acres of land. He urged the court to issue the orders in the interest of justice.

3. The application is opposed by the plaintiff who has filed grounds of opposition together with a replying affidavit. The contents of the two pleadings are the same and lists some of the following reasons for their objection.

(a) The above task was completed successfully in the presence of all the concerned parties.

(b) The report has not yet been adopted by the court and we have not been served with the same.

(c) That irrespective of the method used by the County Surveyor it's the office which has the mandated requisite record, knowledge and expertise on land survey issues.

(d) There is also no evidence or law against the use of any system of survey, equipment, methodology or machinery.

4. The plaintiff filed his submissions on 19th February 2019 which I have read its contents and considered. The applicant did not file any submissions. Guided by the pleadings on record, the contested report dated 23rd October 2017 was filed after this application. The applicant did not annex a copy of the report he is unhappy with in his application was made. However the one placed on record on 14th November 2018 does not mention that GPS was the methodology used.

5. Whether or not GPS method was used is a matter which can only be dealt with if the maker of the said document is called to testify/present his report and questions put to him. Secondly this application was filed before the report was admitted as evidence. It will be difficult for the court to interrogate it *vis-a-vi* another report through an interlocutory application as the court is being urged to do.

6. It is my considered opinion and I so hold that if the applicant is unhappy with the findings of a report in his possession, the best approach is to appeal that decision through the Chief Land Registrar as is provided in law. The consent order required the exercise to be undertaken by the County Land Surveyor and the County Land Registrar and the Land Registration Act provides appeal process. What the court is being asked to do at this stage is putting the cart before the horse i.e determining the dispute before hearing all parties.

7. In any event, nothing stops the applicant from writing to the Director of Surveyors to undertake the exercise on his behalf. There is no evidence of correspondence addressing the Director of Surveys to do the exercise and the Director refusing to so act thus necessitating seeking the assistance from this court as has been done.

8. Consequently for the reasons that the report has not been admitted in evidence nor the maker called to explain himself, I find the application has been prematurely filed. Secondly for the reason that the office of the Director of Surveys has not been called upon but neglected and or refused to act, I find that the application is lacking in merit. Accordingly I proceed to dismiss it with costs to the plaintiff.

Dated, Signed and Delivered at Mombasa this 23rd day of July 2019.

A. OMOLLO

JUDGE