



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERICHO**

**E.L.C NO. 33 OF 2016**

**CATHOLIC DIOCESE OF NAKURU.....1ST PLAINTIFF/RESPONDENT**

**CATHOLIC DIOCESE OF KERICHO.....2ND PLAINTIFF/RESPONDENT**

**KEMEI KIPKURUI (Chairman of Brook**

**Catholic Church Council).....3RD PLAINTIFF/RESPONDENT**

**VERSUS**

**RAEL RONO**

**(Acting as legal representative of the**

**Estate of Joseph Koech and Isaac Rono.....1ST DEFENDANT/APPLICANT**

**JOSEPH KOECH.....2ND DEFENDANT/APPLICANT**

**EMILY BIOMNDO (Acting as legal representative of the**

**Estate of Jona Biomndo (deceased).....3RD DEFENDANT/APPLICANT**

**RULING**

1. The application for determination before me is a Motion on Notice dated 8<sup>th</sup> March, 2019 and filed on the same date. It is expressed to be brought under **Sections 3A, 1A and 1B of Civil Procedure Act (Cap 21)** and **Order 51 Rule 1 of the Civil Procedure Rules, 2010**. The applicants – **RAEL RONO, JOSEPH KOECH and EMILY BIOMNDO** – are the defendants in the suit herein while the respondents – **CATHOLIC DIOCESE OF NAKURU, CATHOLIC DIOCESE OF KERICHO and KEMEI KIPKURUI** – are the plaintiffs.

2. The application has the following four (4) prayers:

***Prayer 1:** That the surveyor's report dated 4/5/2018 be expunged and the proceedings of 9<sup>th</sup> July, 2018 adopting it be set aside.*

***Prayer 2:** That the orders of 24/10/2018 ordering removal of structures on the disputed Land parcels be set aside or discharged.*

***Prayer 3:** That the court proceeds to the site to make its own observations before further proceeding.*

***Prayer 4:** That orders do issue that the matter proceed for hearing.*

3. The grounds on which the application is anchored stipulate, inter alia, that the matter is not a boundary dispute as the respondents would wish the court to believe that; the surveyor restricted himself to only seeking to obtain the full size of Land parcel NO L.R KERICHO/KIPCHIMCHIM/1517 without surveying the adjacent land parcels KERICHO/KIPCHIMCHIM/1697 and KERICHO/KIPCHIMCHIM/3412; that the surveyor acted alone with the applicants being mere spectators; and that the Land Registrar was not there yet the court order required him to be there.

4. Further, the applicants stated that land parcels NOS L.R NO KERICHO/KIPCHIMCHIM/1517, KERICHO/KIPCHIMCHIM/1697 and KERICHO/KIPCHIMCHIM/3412 are distinct parcels of Land and the Survey exercise rendered non-existent land parcel NO 1697 on the ground, thus occasioning a miscarriage of justice. The three parcels of land have had their boundaries existing for over three decades while

the structures ordered removed by the court were put up over two decades ago. The survey report was said to be inaccurate, misleading, and prejudicial to the applicants.

5. The application came with a supporting affidavit that amplified the grounds advanced.

6. The respondents responded to the application vide a replying affidavit dated 14<sup>th</sup> June, 2019 filed on the same date. They deposed, inter alia, that both sides agreed on a re-survey (it is apparent there was an earlier survey); that resurveying was done; that the applicant's counsel requested for appearance of the surveyor to interpret survey findings and that was done; that the survey report was then adopted by the court; that the applicant's counsel promised to advise defendants to comply with the orders made by the court but there was no compliance; that the applicants are acting with impunity; and finally that the application is not merited as it is an afterthought and also an abuse of the court process.

7. The application was canvassed by way of written submissions. The applicant's submissions were filed on 10<sup>th</sup> September, 2019. It was submitted, inter alia, that the surveyor hived off land which is almost equal to the size of the land owned by the plaintiffs. It was submitted too that the visit to the site was supposed to involve both the surveyor and the Land Registrar but was done by the surveyor only. The surveyor was said to be biased and partial. He was accused of confining his survey exercise to finding out the size of land parcel NO 1517, leaving out parcel NO 3412. And the exercise, it was further submitted, should have been about ascertaining the boundary between parcel NO 1517 and 3412, not establishing the size of parcel NO 1517.

8. The applicants also submitted that they were not involved or included in the exercise. They "*were made strangers in their land*" and the surveyor went ahead and created new boundaries, in effect disregarding the boundaries that had been in existence for over three decades. The surveyor's report was therefore said to be "*misleading and grossly inaccurate,*" only serving "*to prejudice the applicant's case as it extinguishes the Land parcel L.R NO KERICHO/KIPCHIMCHIM/1697 and considerably reducing the size of KERICHO/KIPCHIMCHIM/3412.*" It is the applicants' view that justice can only prevail by according them an opportunity to be heard, which, in their view, is only "possible if the court strike out the report and the proceedings adopting the same."

9. The respondents submissions were filed on 30<sup>th</sup> October, 2019. According to the respondents, the survey exercise was meant to establish the boundary between parcel NOS 1517 and 3412. The surveyor is said to have visited the site and done his work after communicating his intention to visit. The applicants were said not to have given enough reasons for striking out or expunging the surveyor's report. Further, it was submitted that it is not true to say that the applicants were condemned unheard. The respondents submitted that the applicants "*were present during the survey exercise and gave their input that they were not in objection to the exercise.*" They were said to have gone "*further to append their signatures giving the exercise a clean bill of health.*" The respondents posed the question "*now why the sudden change of heart?*"

10. The respondent finally submitted that the applicants application is not merited. It was said to be frivolous and a waste of court's time. The court was asked to dismiss it.

11. I have generally had a look into the pleadings. I have considered also the application under consideration, the response made, and the rival submissions. I find it useful to have regard to the history and antecedents preceding the filing of the application at hand. The idea of visiting the site was mooted on 19<sup>th</sup> February, 2018. Both sides accepted the idea. The court ordered that the site be visited by both the Surveyor and Land Registrar.

12. On 7<sup>th</sup> May, 2018, the matter came up in court to confirm filing of the surveyor's report. It was confirmed that the report had been filed. On 23<sup>rd</sup> May, 2018, the court, upon request by both sides, directed that the surveyor come to the court to interpret his report. The surveyor then came to court on 9<sup>th</sup> July, 2018 and explained, or interpreted, his report. The court was told that the applicants put up structures on the respondents land. Counsel then on record for the applicants did not cross-examine the surveyor. The court then adopted the surveyor's report.

13. On 24<sup>th</sup> October, 2018, Counsel for the respondents informed the court that the applicants had put up new structures on the respondent's land. Counsel for the applicants was present in court and he asked for time to ask the applicants to remove the structures. The court issued an order that the structures be removed. On 22<sup>nd</sup> November, 2018, Counsel for the applicants herein informed the court that the applicants were in the process of removing the structures.

14. Then on 18<sup>th</sup> February, 2019, the story completely changed. The applicant had another counsel who informed the court that there were no new structures to be removed. He at the same time asked the court to give directions. The court directed that a formal application be made to set aside the demolition. The application at hand is that formal application. It came not only with a prayer seeking to set aside the order of demolition but also with a raft of new prayers. If all these prayers are granted, the net effect will be to nullify the history and background already highlighted here and to re-start the process on terms pleasing and/or satisfying to the applicants.

15. It is plain to me that the applicants counsel was present in all the relevant proceedings that took place relating to the survey exercise. When a party engages counsel in a suit, the actions of counsel pertaining to the suit are binding on the party. It is no different in this matter. Things were going well in these proceedings until the new counsel for the applicants came on record. Though the applicants new counsel is not saying it, he seeks to undo what the former counsel had done. While this is possible in some instances, it becomes difficult where, as in this case, the former counsel is not demonstrably shown to have been at fault or proved to have acted without instructions.

16. The court record itself does not show unfairness. It is clearly a record of what took place. The surveyor was faulted for going to the site alone. The applicants are shown to have been present. Did they object to the carrying out of the the survey exercise? The answer is No. Did they object to his report here in court when it was presented? The answer is No. But they now belatedly make an about-turn. They cast aspersions on the surveyor and implicitly do the same on their former counsel. I would understand and even agree that the report can be

expunged or set aside if the Land Registrar visited the site without a surveyor BUT NOT when a surveyor visits the site without the Land Registrar. For anybody familiar with how such exercises are carried out, the surveyor is the expert; the Land Registrar is the record keeper. And the Land Registrar can delegate to the surveyor. But it can't happen the other way round.

17. The applicants would also wish the court itself to visit the site and make its own observations. But it bears pointing out that the court cannot go it alone. It would require the expertise of the same surveyor that the applicants have a problem with. And this is for the simple reason that the court does not have its own expertise in the matters. It would require to be guided. But this is even beside the point. The more crucial consideration is whether the applicants have laid a sound basis for the prayers they are seeking. My view is that they have not. Their reasons are wishy-washy and unhelpful. Nothing was done behind their backs.

18. I would wish to point out that the survey carried out does not mark the end of the case. The case is yet to be heard. No trial has yet taken place. I fail to understand what the applicants mean when they say they are already condemned unheard. And if for some reason they mean being condemned unheard in relation to the survey exercise carried out, suffice it to observe that the survey report clearly shows they were present and, together with the respondent, pointed out a common point, stated by the surveyor as "defined boundary", from where the exercise started. Further, any hearing that the applicants may have wanted can still be presented to court during hearing.

19. That said, it is necessary to clarify that I have read the surveyor's report. If the applicants persuade the court as to its inadequacy or deficiencies during hearing, the court will not be opposed to another exercise. But such exercise will only be supplemental to, and not in replacement of, the exercise that the applicants are challenging now. I say this because a cursory glause at the report readily reveals that while the size of parcel NO 1517 is shown, neither the size nor location of the parcels said to be owned by the applicants is shown. I am only citing one deficiency. There could be others and it is upon the applicants to show or demonstrate the others during hearing. The court's main interest is to do justice.

20. But the merits of the application before me are not shown. I am not persuaded that I should grant any of the orders sought. The applicants want to set back the pace or progress of the case. They can not be allowed to do so. I hereby dismiss their application with costs.

**Dated and signed at Kericho this 29<sup>th</sup> day of November, 2019.**

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**A. K. KANIARU**

**JUDGE**