



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT EMBU

ELC MISC NO. 7 OF 2016

KANGITHI POSTA.....1ST APPLICANT

NJAGI NGARI.....2ND APPLICANT

VERSUS

DAVID NDWIGA NJAGI.....1ST RESPONDENT

LAND REGISTRAR MBEERE.....2ND RESPONDENT

AND

EDWARD NJERU NYAGA.....INTERESTED PARTY

RULING

1. By a chamber summons dated and filed on 23rd November 2016, the Applicants sought the following orders;

- a. That this honourable court be pleased to issue an order directing the Land Registrar Mbeere to visit land parcel No. Evurore/Kathera/222, Evurorre/Kathera/244 and Evurore/Kathera/221 on the ground.*
- b. That this honourable court to order the OCS Siakago Police Station to provide security in compliance of the orders. (Sic)*
- c. That costs of the orders.*

2. The said application was supported by a joint affidavit sworn by the 2 Applicants on 23rd November 2016. It was stated in the said affidavit that the 1st Applicant was the registered owner of *Title No. Evurore/Kathera/222* (hereinafter described as parcel No. 222) whereas the 2nd Applicant was said to be the registered owner of *Title No Evurore/Kathera/224* (hereinafter described as parcel No. 224).

3. The Applicants further stated that their said parcels bordered another one known as *Title No. Evurore/Kathera/221* (hereinafter described as parcel No. 221) which belonged to a third party. It was contended that the boundaries and beacons for the said three parcels were not visible on the ground hence they wanted the Land Registrar Mbeere (hereinafter described as the Registrar) and the District Surveyor (hereinafter described as the Surveyor) to visit the site to determine and mark the boundaries of those parcels of land. The Land Registrar Mbeere was named as a Respondent.

4. The Applicants later on filed a similar application dated 20th January 2017 in which they joined David Ndwiga Njagi as a Respondent. The said David Ndwiga (hereinafter described as the 1st Respondent) filed a replying affidavit in opposition to the said application sworn and filed on 14th February 2017. He denied being the registered owner of parcel No. 221 and stated that in any event the relevant boundaries and beacons were clearly visible on the ground.

5. The said application was heard on 7th March 2017 and the court delivered a ruling on the same day allowing the Applicants' application for determination of boundaries. The Land Registrar Mbeere was directed to do the needful and file a report in court within 30 days.

6. The land Registrar eventually filed his report in court on 6th April 2017. When the said report was published to the parties, the Applicants stated that the Registrar and surveyor had not completed the assignment since they had not placed any beacons on the ground to mark the

boundaries. On his part, the 1st Respondent informed the court that the Registrar did not undertake his duties properly.

7. The court consequently issued a summons to the Registrar to attend court and address the concerns raised by the parties. The Registrar appeared in court on 23rd November 2017 and informed the court that although the Surveyor had taken measurements of all the concerned parcels of land, he did not place any beacons along the boundaries. He had simply shown the parties the boundaries and placed some sticks along the boundaries.

8. The court was not satisfied that the Registrar and the Surveyor had completed the assignment of determining the boundaries and directed them to complete it by affixing permanent beacons on the ground. The Registrar was to file a report on completion of the exercise within 30 days.

9. The Registrar ultimately filed another report on 5th January 2018 in which he stated that a second site visit was undertaken and that beacons were cemented along the boundaries as determined. He indicated that the Surveyor took measurements on the second visit which did not differ from the previous measurements taken during the first visit.

10. By a notice of motion dated 1st December 2017 and amended on 28th February 2018 Edward Njeru Nyaga sought to be joined as an interested party in the proceedings. He was joined as an interested party whereby he sought the following orders;

a. That the District Land Registrar's report dated 6th April 2017 be set aside.

b. That the District Land Registrar and District Surveyor be ordered to conduct a fresh survey to properly determine the boundaries of parcel Nos Evurore/Kathera/222, 2866, 2867, 2868 and 244.

c. That the said new report be supported by sketches/illustrations showing specific dimensions of each parcel and acreage and that all boundaries be based on the RIM and various mutations used in the subdivision of parcel No. 221.

11. The said application was supported by the affidavit of Edward Njeru Nyaga sworn on 28th February 2018 in which he stated that parcel No. 221 was no longer in existence but had since been sub-divided to create new parcel Nos. 2866, 2867 and 2868. He was the owner of parcel No. 2868. He faulted the Registrar and Surveyor for making reference to parcel No. 221 which did not exist and for failing to involve him in the determination of boundaries.

12. The said application was opposed by the Applicants. They were of the view that the Registrar and Surveyor had done and completed their assignment and complied with the earlier court orders. They supported the Registrar's report and asked the court to dismiss the interested party's application.

13. The 1st Respondent, on his part, supported the application by the interested party. He wanted the reports on record to be set aside and for a fresh survey and determination of boundaries to be undertaken.

14. Mr Okwaro for the interested party emphasized that the Registrar and Surveyor did not do their work professionally since they referred to parcel No. 221 in the report. He submitted that the said report was prepared without reference to the available records at the Land's Office. He pointed out that the said report was not supported by sketches or similar drawings.

15. The court has considered the amended application by the interested party, the Applicants' response thereto and the oral submissions of all the concerned parties. The main issue for consideration herein is whether or not the interested party has made out a case for the orders sought in the amended application.

16. The court has noted from the record of proceedings that on 7th March 2017, the court ordered the Registrar and Surveyor to visit parcel Nos 222, 244 and 2866 and determine the boundaries thereof. Parcel No. 221 was not included in the order. Vide a report dated 6th April 2017 the Registrar indicated that the assignment was undertaken. The report indicated that amongst the persons present during the site visit were the 1st Respondent and the interested party. The said report also indicated that parcel No. 221 had been sub-divided into three (3) portions from which parcel Nos. 2866 and 2868 were derived.

17. The report further indicated that upon measurements being undertaken by the Surveyor, it was found that the interested party had encroached into parcel No. 244 by 17 meters whereas the 1st Respondent had encroached into parcel No. 222 by 14 meters. The Registrar also attached a copy of the measurements taken by the Surveyor which indicated that the mutation on the first sub-division of parcel No. 221 differed totally with the mutation prepared during the subsequent sub-division of the new numbers.

18. In those circumstances, could it be said that the report of the Registrar was prepared unprofessionally and should therefore be set aside? In my view, the said report was not prepared without reference to the Survey records. Both the Registrar and the Surveyor were alive to the fact that parcel No. 221 had been sub-divided and was no longer in existence. That was quite clear from the report filed in court.

19. The 2nd page of the Registrar's report stated as follows;

"The parcel 221 had been sub-divided into three portions where parcel 2866 and 2868 where got from" (sic).

20. On the other hand, the surveyor stated as follows in his notes to the Registrar;

“It was observed that during the first sub-division of Evurore/Kathera/221, the mutation forwarded differs totally with the mutation prepared during the second sub-division of the resultant new Nos.”

21. It is, therefore, clear beyond doubt that both the Registrar and Surveyor were aware of the sub-division of parcel No. 221. The Surveyor was so keen as to discover the discrepancies in the mutations for sub-division of parcel No. 221. The Surveyor could see through the mischief of the persons who undertook the said sub-divisions. That probably explains why the interested party framed prayer 2C of his amended notice of motion in the manner he did. He wanted all the boundaries to be determined on the basis of the suspect mutations of what used to be parcel No. 221.

22. The court finds that the interested party has failed to demonstrate that the Registrar’s report dated 6th April 2017 was unprofessionally done or that it was based upon non-disclosure of material facts. The court finds that the interested party was involved in the determination of boundaries by the Registrar. The mere fact that the said report was not accompanied by sketch plans did not affect its validity. The court did not require the Registrar to include such sketches. The task assigned was to determine the boundaries and place bacons on the ground. The court is satisfied that the Registrar and Surveyor did their work.

23. In the premises, the court finds no merit in the interested party’s amended notice of motion amended on 28th February 2018. The court finds it totally mischievous and misleading. The same is for dismissal and it is hereby dismissed with costs to the two Applicants assessed at Kshs 20,000/- for both to be paid within 30 days from today. In default of payment, the Applicants shall be at liberty to execute for the costs.

24. It is so decided.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 28th day of JUNE, 2018.

In the presence of the 1st and 2nd Applicants in person, the 1st Respondent in person, Mr Okwaro for the interested party and in the absence of the 2nd Respondent.

Court clerk Mr Muinde.

Y.M. ANGIMA

JUDGE

28.06.18