



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 19 OF 2011

CALEB MINJIRE WAMBUGU.....PLAINTIFF

VERSUS

ISIAH KAVULAFU.....1ST DEFENDANT

JOSEPH SHIYENJI.....2ND DEFENDANT

RULING

1. The Notice of Motion dated **23/10/2018** and filed in court on **24/10/2018** has been brought by the defendants. It seeks the following orders:

(a) **This application be certified urgent and the same be fixed for hearing on priority.**

(b) **The survey exercise carried out on 10th July, 2018 and the Report dated 11th July, 2018 prepared by Christine C. Kapsiliot for and on behalf of the County Surveyor be set aside and the plots in issue be re-surveyed.**

(c) **The parties be allowed to engage an independent surveyor to visit the site for purposes of determining the location of the Plots 109 and 110 and which exercise should commenced from Plot No. Kaplamai/Kaplamai Block 3/Muhuti/103 and end at Plot No. 116.**

(d) **That the defendants be allowed to produce further documents/evidence in support of their case, more particularly official searches and photographs relating to Plot No. Kaplamai/Kaplamai Block 3/Muhuti/105 and 106 and further evidence be adduced by erstwhile officials of Muhuti Farm relating to sub-division and allocation of plots to members.**

(e) **Any other orders the court shall deem fit to make in the interest of justice.**

(f) **Costs be in the cause.**

2. The applicants have brought the application under **Section 1A, 1B and 3 and 3A of the Civil Procedure Act and Order 46 rule 15 and 16, Order 51 rule 1 of the Civil Procedure Rule and Article 159 of the Constitution and Section 3 and 19 of the ELC Act 20100.**

3. The grounds upon which the application is made are contained at the foot of the application. They are that the survey exercise was carried out in a sloppy manner; that the mind of the surveyor was already fixed as she had prior knowledge of her finding made in respect of **Plot No. 109** based on an earlier report; that the surveyor failed to involve all the parcel of the land at Muhuti Farm, particularly **Plot No. 103 to 106**, inclusion of which would have assisted in the ascertaining the exact location, edges, boundary marks and any features in respect of **Plot No. 109 and 110**; that the survey report has no RIM reference number neither did the surveyor refer to the area list or the original mutation that was done to ascertain the position on the ground; that the survey report refers to a road between **Plots Nos. 113 and 112** yet the position on the ground differs with the said Report in that the access road is between **Plot Nos. 114 and 113**; that the surveyor did not adhere to the set down survey standards, practice and procedure and further, the survey report and letter of visit are contradictory and that further evidence was not within the knowledge or custody of the defendants and the same is crucial as it shall enable court make fair determination of the issues.

4. The application is supported by the affidavit of **Joseph Shiyenji** the 2nd defendant herein. The gist of the affidavit is that on **26/6/2018** the deponent and the 1st defendant were informed that the survey exercise would be done on **4/7/2018** at **10.00 am**; that they waited until **2.00 pm** only to learn it had been postponed by the surveyor; that on **10/7/2018** the defendants were informed verbally that the surveyor will visit the site whereupon the 1st defendant being unable to attend asked the 2nd defendant and one James Lugalaba to represent him; that two surveyors came to the site and did the exercise but never explained to the defendants what they were doing; that however the defendants

observed that the surveyor commenced the exercise at **Plot 107** and terminated at **Plot 116** without asking them for any features or land marks to assist in the exercise; that the surveyor omitted to take measurements in respect of all relevant plots at Muhuti Farm which begin at **Plot 103** and end at **Plot 116**; that two excess roads traversing that range of plots were not taken into consideration; that they went with the advocate on the ground and did a comparative analysis of the surveyor's report and what is on the ground and came up with their own findings; that a common man would not understand the report of the surveyor.

5. The applicants filed their submissions on **8/11/2018** and the respondent on **12/11/2018**.

6. The plaintiff's submission in the matter is that the surveyor's report cannot be set aside as the surveyor has not testified over the said report and once he testifies the parties will have the opportunity to cross examine her. Secondly it is stated that the said report is not the equivalent of arbitration award that can be set aside and remitted for reconsideration and therefore **Order 46 Rule 15** and **16** are inapplicable. It is also submitted that the applicants do not need an order of this suit to engage an independent surveyor as they have not yet closed their defence case however the proposed production of such a report by an independent surveyor is objected to as coming to late in these proceedings. Lastly it is submitted that the applicants have already filed the documents they intended to use in their defence and that the additional documents intended to be produced are in respect of **Plot No. 105** and **106** which are not the disputed plots.

7. I have considered the application and the response.

8. It is noteworthy that this suit is not yet heard to conclusion and that the defendants still have the opportunity to call any evidence including expert evidence that they may desire to call to counter any expert evidence that has been adduced or is intended to be adduced in this suit. Indeed that is the usual method of countering expert evidence.

9. This court is not able to tell from the application and at this stage whether the alleged omissions of the surveyor who filed her report are of any consequence or not.

10. It is also not clear why the applicants who were represented by the 2nd defendant never voiced any concerns during the survey exercise mandated by this court.

11. On **23/2/2017**, the defendants' application for adjournment was declined and the plaintiff's evidence was taken and on the same day counsel for the defendants stated that he was unable to cross examine the plaintiff.

12. On **8/11/2017** the defendants' application for adjournment was declined and the plaintiff was cross examined. **PW2** also testified and was cross examined. On the same day the defendants objected to an application that the surveyor be called as a witness which objection was overruled on the same day.

13. On **20/4/2018** the defendants sought another adjournment and the court granted it.

14. On **24/4/2018** the defendants complained that they were not present when the surveyor visited the site and the court ordered that the surveyor revisits the site. The fresh report was not ready until **11/7/2018**. It was filed the next day.

15. The matter came up on **4/10/18** when the plaintiff closed his case and **DW1 DW2** and **DW3** testified and another adjournment was sought by the defendants. The court also ordered the plaintiff to serve the surveyor to attend court. The next action of the defendants was to make the current application and on **31/10/2018** this court ordered that the application be disposed of first.

16. I have set out a brief history of the recent events in the matter as herein above to demonstrate that the defendants, if they were so minded, to present expert evidence to counter the report of the surveyor that is already on the record.

17. In my view the application dated **23/10/2018** can not be granted in terms of **prayer (b)** as the maker of that report can be called for cross examination if the parties so wish.

18. The application can also not be granted in terms of **prayers (c)** and **(d)** as the defendants do not need any directions from this court as to how to conduct their case or the type of evidence that they need to call.

19. **Prayer (e)** is general in nature and in any event this court does not have any other orders to make in this case at the present moment unless prompted to do so.

20. In my view the application is one more effort from the repertoire of the defendants and is calculated to keep the date of judgment further away. It is an abuse of the court process. This is improper as this is an old matter that needs to be finalised.

21. I find that the application dated **23/10/2018** and filed by the defendants on 24/10/2018 has no merits. The same is hereby dismissed with costs to the plaintiff.

Dated, signed and delivered at Kitale on this 29th day of November, 2018.

MWANGI NJORGE

JUDGE

29/11/2018

Coram:

Before -Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Wanyonyi for defendant

Ms. Wanjala for plaintiff

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

29/11/2018