



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 143 OF 2008

ATANASIO M'EKANDI PLAINTIFF

VERSUS

ANTONY KAUNGA DEFENDANT

RULING/JUDGMENT

1. Defendant has filed an application dated 23.7.2018 where he is seeking for the review of the court's orders of 19/7/2018 and also to arrest the writing and delivery of the judgment. He desires that viva voce evidence be adduced. He contends that the land registrar and surveyor ignored the registered mutations of the suit plots in their reports. The orders of 19.7.2018 were that the Judgment would be delivered on basis of the reports filed by the Land Registrar. Applicant avers that he was not given an opportunity to tender his evidence in the case and that his advocate was absent when the directions were given.

2. The application is opposed via the replying affidavit of the respondent/plaintiff who states that orders given by the court are self-explanatory and issued pursuant to a consent by the parties who were now bound by the report. Further, plaintiff /respondent avers that the visit to the two parcels of land was made by the officers who had custody of the documents relied on in fixing the boundaries.

3. Advocates for the parties urged the court to deliver a ruling based on the material filed in support for and in opposition to the application.

4. I have delved into the record of this matter and I find that this is not the first time the applicant is trying to renege on a consent order regarding how the suit will be determined. Way back on 25.2.2014, a consent was agreed upon by the parties where they wanted the Land Registrar and the surveyor to mark the boundary between plot no. 1910 and 1909. A year and few months later on 5.6.2015 applicant had made an application to review the consent. That application was dismissed on 18.2.2016.

5. I handled this file for the very first time on 9/3/2017 when the court was informed that parties would record a consent, and could the court give a mention date. Thus on 19.7.2017. another consent was recorded as follows:

“By consent of the parties herein, the land Registrar in-charge Tigania West sub-county do visit land parcels No. Akithi 2/1909 and 1910 in presence of the parties and their respective private surveyors to mark the boundaries and file a report thereof in court. Parties to share the costs”.

6. On 6.11.2017, another consent was recorded as follows:

“By consent the District land registrar and district land surveyor Tigania west Sub-County do visit land parcel no. Akithi/Akithi section 2/1910 and 1909 in the presence of the parties and their respective private surveyors (if they deem it necessary) and mark the boundary thereof and file a report. Parties to share costs”.

7. On 19.7.2018, Mr. Gatari, advocate for plaintiff addressed the court as follows: **“May court write a judgment based on the two reports”**. Mr. Gitonga holding brief for H. Gitonga for defendant had responded as follows: **“That is Okay”**. The court set the date for Judgment as 10/10/2018. It is this judgment that defendants wants to arrest so that the case can be heard by way of oral evidence. Going by all the consents that have been recorded in court it appears that the dispute is a boundary one.

8. This is a case where the defendant appears not to take consent orders seriously. Judge Njoroge did note this in his ruling of 18.2.2016 when he was dismissing defendant's application to set aside the consent, where he stated that **“Advocates are professionals unlike laymen, it cannot be that they don't know what they are doing. No fraud is alleged. No untoward influence has been alleged”**.

9. In all the instances when this matter came before me including the date of 19.7.2018, defendant was represented. He cannot turn around to say that his advocate was absent, yet there was a counsel holding his brief.

10. Further having noted that the dispute is a boundary one, then the experts in this area are the ones who are better placed to resolve the matter. Such experts are the surveyors and land registrar.

11. **Section 18 (2) of the Land Registration Act** provides that; ***“The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.”***

12. In **Mombasa H.C.C NO. 188/2011, Unique Sunshine Environment Services vs. Varomaro ltd**, the court had this to state regarding a boundary dispute ***“Section 21 (4) of the Registered Land Act, now repealed by the Land Registration Act No. 3 of 2012 is in pari materia with section 18 (2) of the latter Act as follows: The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.”***. The court declined to entertain the dispute citing lack of jurisdiction and even declined to refer the matter to Kilifi District land Registrar for the boundary dispute resolution though the court stated that parties were at liberty to proceed before the Land Registrar.

13. The case of **Andrew Marigwa versus Josephat Ondieki Kebati ELC.NO.1163/2016 KISII**, has an uncanny resemblance to the present case. In Andrew Marigwa case, the plaintiff /applicant had filed an application seeking orders to have the reports of the County Land Registrar and County Surveyor (which had been requested by the court) disregarded ostensibly because the said officers had not used the correct documents, particularly mutation forms in compiling their reports. Judge Mutungi invoked the provisions of section 18 and 19 of the Land Registration act and stated as follows; ***“Recognizing the instant suit related to a boundary dispute which definitely the court lacked the technical ability to deal with, the court made a reference of the matter to the Land Registrar and the County Surveyor who are the persons mandated under the Act to deal with disputes relating to boundary. The Land Registrar is the custodian of the records relating to land, have the technical ability or capacity to determine, establish and fix boundaries of parcels of land as required under the Land Registration Act, 2012”***. The court further stated that ***“From the observations and findings by the Land Registrar and the Surveyor there is in fact a need for the Registry Index Map to be amended to reflect the correct status as appears on the ground. The applicant by his application seeks an order that the Land Registrar’s and the Surveyor’s report be disregarded and the matter fixed for hearing. What would the court proceed to hear? The dispute would still remain a boundary dispute which the court cannot entertain under the provisions of Section 18(2) of the Land Registration Act, 2012. My view is that the Land Registrar’s reports have finally disposed of this matter. I hereby endorse the reports as judgment of the court and direct that the same be implemented”***. Both the application and the suit were hence dismissed IN THE Andrew Marigwa case.

14. In the present case, applicant wants the case to be heard by way of viva voce evidence because according to him, the reports of the Land Registrar and surveyor ignored the registered mutation forms of the suit plots. I find that the two reports are quite comprehensive. I also note that not only were the parties present with their own private surveyors, but the Land registrar even conducted the proceedings at the scene where parties testified and they were cross examined. What emerged is that Plaintiffs plot No. 1910 is less on the ground, whereas defendant’s plot no 1909 is more on the ground as compared to the measurements in the mutation forms. It follows that this is not a case where there is a need to amend the Registry Index Map (R.I.M). According to the Land Registrar, the correct boundary marks were put in place and that **the matter is treated as solved and finalized**.

15. My conclusion is that this case has been finalized in accordance with the applicable law (section 18 of the land registration act), and the court has nothing more to hear. I therefore decline to arrest the Judgment. It is not lost to this court that the dispute is very old, this being its tenth year in court. It is high time that it was finalized.

16. I proceed to enter judgment in terms of the Land Registrar’s report filed in court on 5/3/2018 where by the boundaries marked on the ground are to be taken as the correct boundaries. As defendant’s plot is the one which has encroached on to plaintiff’s plot, the defendant is to forthwith vacate the aforementioned portion which has overlapped unto plaintiffs plot. The suit is marked as finalized. The application of 23/7/2018 is hereby dismissed. Defendant is to pay the costs of the application of 23/7/2018 as well as the costs of the suit.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 8TH NOVEMBER, 2018 IN THE PRESENCE OF:-

C/A: Janet/Galgalo

Gatari ringera for plaintiff

H. Gitonga for defendant

Plaintiff

Defendant

HON. LUCY. N. MBUGUA

ELC JUDGE