



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 39 OF 2013

REBECCA JEPCHIRCHIR:..... PLAINTIFF

VERSUS

STEPHEN TANUI:.....1ST DEFENDANT

FRANCIS MALOMBA:.....2ND DEFENDANT

SAMWEL CHEPKULEI:.....3RD DEFENDANT

FRANCIS OSUNA:.....4TH DEFENDANT

PASTOR SIRIMA:.....5TH DEFENDANT

STEPHEN MUTISO:.....6TH DEFENDANT

RULING

INTRODUCTION

This ruling is in respect of an application brought by way of Notice of Motion dated 3rd April, 2017 by the defendant/applicants who sought for the following orders:

1. That this application be certified urgent and its service be dispensed with in the first instance.
2. That this Honorable court do order the UASIN GISHU County Surveyor to establish actual acreage of the suit land ELDORET MUNICIPALIY BLOCK 30(KAPYEMIT)/33 an file the report in court.
3. That further to prayer No. 2 above the said Uasin Gishu County Surveyor to identify the parties on the ground in respect of the suit land.
4. That costs of this application be provided for.

This matter is a part heard where the plaintiff had testified on 29th March 2017 before Justice Matheka. It was fixed for defence hearing on 16th May 2017 when the defence failed to attend and the court ordered that the defence close their case and a judgement date given for 24th May 2017. Before the judgement could be written the defendant/applicant filed an application dated 16th May 2017 for setting aside the orders closing the defence case in the absence of the lawyer. A ruling was delivered in respect of the said

application on 23rd May 2017 allowing the application to reopen the case for defence hearing.

On 29th March 2017 when this matter was slated for hearing, Counsel for the defence made an oral application to have a surveyor visit the suit land and come up with a report on the acreage but the same was opposed by Counsel for the plaintiff who stated that this is not a boundary dispute to warrant such survey. The court overruled the Counsel for the defendant and ordered that the matter do proceed for hearing which hearing took place.

I notice that it is the same application which is currently being pursued by counsel for the defendant. From the pleadings, there is no claim that the title was obtained by fraud or misrepresentation by the plaintiff. The defence and counterclaim does not mention anything about fraud or misrepresentation.

I am guided by the provisions of section 24, 25 and 26 of the Land Registration Act which provides for indefeasibility of title. I can only interfere when it is proven that the same was obtained by way of fraud or misrepresentation. This is not a boundary dispute where a surveyor can be ordered to ascertain where the boundary lies. This is a part heard matter where the defendant has not yet testified, he will still have an opportunity to lead evidence and call the relevant witnesses to prove his counter claim.

Apart from that this issue as mentioned above had been dealt with when the matter came up for hearing. I will not therefore rule again on it.

The upshot is that the application lacks merit and therefore is dismissed with costs to the plaintiff.

Dated and delivered at Eldoret on this 4th day of October, 2017.

M.A ODENY

JUDGE

Read in open court in the presence of:

Mr. Miyenda holding brief for Mr. Chepkwony for Plaintiff/Respondent

Miss Lelei for Defendant/Respondents

Koech- Court Assistant