



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 11 OF 2015

COSMAS N.E. KATHUNGU.....PLAINTIFF/APPLICANT

VERSUS

NJUE KIARIE.....1ST DEFENDANT/RESPONDENT

JANET WAIHUNI NJUE.....2ND DEFENDANT/RESPONDENT

RULING

1. By a notice of motion dated 11th April 2017 brought under Article 150 (1), 159 (1) (2) (b) and (d) of the Constitution of Kenya, section 3A of the Civil Procedure Act, Order 11 and Order 51 rule 2 of the Civil Procedure Rules, and section 17 of the Land Registration Act 2012, the Plaintiff sought the following orders;

a. That the District Land Registrar Embu, the District Land Surveyor Embu and the County Government of Embu Land Surveyor do carry out a survey to determine the following issues:

i. *Whether plot number Embu/Municipality/1112/1503 and plot number Embu/Municipality/1112/81 exist.*

ii. *Whether plot number Embu/Municipality/1112/503 and Embu/Municipality/81 were ever surveyed and their boundaries fixed and/or marked and if so what is the extent of the boundaries of each of the plots.*

iii. *On which of the two plots that is Embu/Municipality/1112/1503 and Embu/Municipality/1112/81, the building owned by the Defendants commonly referred to as Morning Glory Plaza stands.*

iv. *Whether there is any construction on plot number Embu/Municipality/1112/1503 and therefore whether there is any encroachment on plot number Embu/Municipality/1112/1503 by the Defendants.*

b. *That the report on the survey complete with sketches, drawings, dimensions and measurements be filed within 30 days from the date of the order or such other period as the court may deem appropriate.*

c. *That the Plaintiff and the Defendants be at liberty to have their own Land Surveyors during the said exercise.*

d. That costs be provided for.

2. The said application was based upon the grounds stated on the face of the said motion and supported by an affidavit sworn by the Plaintiff on 11th April 2017 together with the annexures thereto. It was stated in the said affidavit that the Plaintiff was the owner of plot No. Embu Municipality/1112/1503 whereas the Defendants were the owners of plot No. Embu/Municipality/1112/81. It was further stated that the Defendants had wrongfully encroached upon the Plaintiff's said property, fenced it off and erected a building thereon. The said affidavit and annexures thereto appear to indicate the existence of a boundary dispute and or an overlap of one plot onto the other.
3. The 1st and 2nd Defendants filed a joint statement of grounds of opposition dated 7th June 2017 in which they asked the court to dismiss the said application as lacking merit. The 2nd Defendant also filed a replying affidavit sworn on 9th June 2017 in opposition to the said application.
4. In her said replying affidavit, the 2nd Defendant denied that there was any encroachment onto the Plaintiff's aforesaid plot. It was further stated that the orders sought were unnecessary since the parties had filed their documents which would conclusively answer all the questions which the Plaintiff raised in his said application. It was the 2nd Defendant's case that their building was completed in 2005 and that the Plaintiff's plot was not in existence at the material time.
5. When the Plaintiff's said application first came up for hearing on 12th June 2017, the three advocates for the parties agreed to dispose of the same through written submissions. Each of the parties were given 14 days to file their respective submissions and the matter fixed for mention on 17th July 2017 to confirm compliance and fix a ruling date.
6. By 17th July 2017, none of the parties had filed their submissions hence the court extended the time for compliance by a further 30 days. The suit was fixed for further mention on 20th September 2017 to confirm compliance and fix a ruling date. There was a further extension of time to 11th October 2017 and by that time, only the Plaintiff and the 1st Defendant had filed their respective submissions. The court, therefore, proceeded to fix the said application for ruling on 7th December 2017.
7. The court has considered the Plaintiff's said application, the Defendant's grounds of opposition thereto, the 1st Defendant's replying affidavit and the submissions filed by the Plaintiff and the 1st Defendant. It would appear to me that the Plaintiff is basically seeking orders for the District Land Registrar and the County Embu Government Surveyor to assist the court in establishing the existence, location and boundaries of the two plots which are the subject of the dispute herein. He wants them to be ordered to undertake a survey and to file the relevant report together with sketches, drawings and dimensions.
8. The Defendants are of the view that the said application is misconceived and lacking in merit on 3 main grounds. First, the Defendants are of the view that there is sufficient material on record including survey records and survey reports to enable the court to determine the issues raised in the application. Second, it was submitted that the suit is part-heard and had remained part heard for many years. The Plaintiff had testified and he therefore knew the strengths and weaknesses of his case. The Plaintiff was therefore trying to improperly fish for additional evidence in support of his case. Third, the Defendants submitted that they have long completed their construction project and let out the building to various tenants.
9. The court has examined the record and noted that although the suit is part heard, the Plaintiff has not closed his case. The Plaintiff is yet to be cross-examined and he is yet to call additional witnesses. The court is aware that the parties have filed various documents, reports and survey plans which they intend to rely upon at the trial. However, there would be no harm in receiving an additional report from relevant government officers on the matters in dispute. There is no telling at this stage whether such report would be favourable or adverse to the Plaintiff or the Defendants. The court is satisfied that such report may assist the court in resolving some of the issues in controversy in this suit.

10. The court is not satisfied that completion of the building by the Defendants on the properties in dispute would affect the Plaintiff's said application. The Plaintiff's suit is still alive and all the issues in controversy are yet to be determined. So the completion or non-completion of a building project has no bearing on the application.

11. The court is, therefore, satisfied that the Plaintiff's application dated 11th April 2017 has merit and the same is accordingly allowed in terms of prayers (a) (b) and (c) thereof. The relevant report shall be filed in court within 60 days from the date of this order. The costs of the application shall be in cause. Any applicable statutory fees or charges in respect of the exercise shall be borne by the Plaintiff.

12. The court shall fix a mention date at the time of delivery of the ruling for the purpose of confirming compliance and giving directions on the hearing of the suit which has been pending for about 17 years.

13. Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 7th day of DECEMBER, 2017

In the presence of Mr Okwaro for the Plaintiff and Ms Wairimu for the 2nd Defendant and holding brief for Mr Morris Njage for the 1st Defendant.

Court clerk Leadys.

Y.M. ANGIMA

JUDGE

07.12.17