



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 147 OF 2012

ALI FARAH PLAINTIFF

VERSUS

MOSES OLE NASISIT 1ST DEFENDANT

KISHOIAN NADALA 2ND DEFENDANT

LETIMITO OLE KURARO 3RD DEFENDANT

DAVID KANASA 4TH DEFENDANT

KOISKIR OLE LEWOJO 5TH DEFENDANT

NGASHAR OLE BARATA 6TH DEFENDANT

MUSEINE OLE NKOIDILAH 7TH DEFENDANT

AND

MOIKO OLOIPUTA MIARON 1ST INTERESTED PARTY

JULIUS OLE MOKITA 2ND INTERESTED PARTY

LENKAE OLE METETA 3RD INTERESTED PARTY

RULING

1. The intended interested parties/applicants have by a notice of motion dated 16th October 2015 sought leave to be enjoined as interested parties in the instant suit. The application is premised on the grounds that appear on the face of the application and on the supporting affidavit sworn in support of the application by Moiko Oloiputa Maroi dated 16th October 2015. The applicants state they are chairman, secretary and treasurer respectively of the Olorieny Adjudication Committee and that the application is brought on behalf of the committee.
2. The applicants aver that information has come to light regarding plot number 9 Olorieny in respect of which the plaintiff and the defendants are litigating over in the present suit. The applicants state there is material discrepancy in regard to the actual size of the land owned by the plaintiff physically on the ground and the size as reflected in the documents and records held at the land adjudication and settlement office at Kilgoris and hence the dispute affects other persons owning

- land within the environs where the suit land is situated. The applicants state that the plaintiff's land on the ground is 208.42 hectares approximately and the same is delineated and the boundary is duly demarcated on the ground but aver that the entries and documents held at the land adjudication and settlement office erroneously reflects the size of the plaintiff's land to be 926.60 hectares. The applicants state that the plaintiff wants to take advantage of the discrepancy and/or error to appropriate 926.60 hectares on the ground instead of 208.42 hectares which would affect and impact on the interests of other land owners parcels of land.
3. The applicants/interested parties claim that having been part of the committee which was charged with the duty of adjudicating land in the area, they have an interest in ensuring that fair and equitable allocation was done to all the residents of the area including the plaintiff. The applicants' state they also stand to be affected as residents of the area having interests in the area unless the apparent error in the records relating to the plaintiffs parcel of land is rectified. The applicants state as members of the adjudication committee they are seized with vital and crucial information respecting the location of various boundaries of various parcels of land within Olorieny adjudication section and hence it would be fair and just for them to be enjoined as interested parties so that they could shed light on the disputed issues before the court.
 4. The plaintiff by a replying affidavit sworn by one Ali Farah on 3rd February 2016 opposes the application by the interested parties. The plaintiff avers that following adjudication of Oloirien Group Ranch, Farah Awad and 38 other members of the Group Ranch were adjudicated and had their plots demarcated from the group ranch and the plaintiff allocated **LR No. Transmara/Olorien/9** of which he is now the registered owner and therefore entitled to use and to occupy the same without any interference from the defendants and/or the interested parties. The plaintiff avers the applicants have no interest and/or locus to be enjoined in these proceedings and argues the applicants' application is legally untenable and is devoid of any merit and therefore should be dismissed.
 5. The applicants and the plaintiff filed written submissions to ventilate their arguments in support of and in opposition of the application. I have reviewed and considered the application and the only and real issue to determine is whether the applicants have demonstrated they have a recognizable legal interest in the suit which would make their participation in the suit necessary to enable the court to effectually and completely adjudicate upon and settle all questions in issue in the suit.
 6. In the instant suit the plaintiff avers that the defendants have unlawfully encroached and/or trespassed onto his Plot No. 9 Oloirien Adjudication Section in respect of which the plaintiff has now been issued a title deed number **Transmara/Oloirien/9** dated 3rd October 2012. The plaintiff seeks an order of permanent injunction against the defendants and damages for trespass.
 7. The defendants in a joint defence deny being in trespass of the plaintiffs parcel of land but rather state that they are in occupation of the parcels of land which were allocated to them during adjudication. The defendants state that a boundary dispute between the plaintiff, Kerrikan and Olorien locations was adjudicated upon in 2002 by the then Transmara District Land Registrar and Surveyor and that the area survey map was to be amended appropriately to reflect the true ground positions of the disputed boundaries.
 8. The court record shows that pursuant to an application dated 26th June 2013 by the plaintiff the court ordered the land registrar Transmara and the surveyor to visit the disputed land belonging to the plaintiff and to ascertain its boundaries. According to the reports subsequently filed by the land registrar and the surveyor there was unanimity between the land registrar and the surveyor that the plaintiff's land on the ground was about 208.42 hectares but not 926.60 hectares as appears on the records. I must observe that the discrepancy of the plaintiff's land as per the ground measurements and as per the record cannot be normal. If indeed the plaintiff's land as per the ground measurement is 208.42 hectares it would be disastrous to implement the measurement as per the records of 926.60 hectares as that would undoubtedly affect numerous other persons whose land may be comprised in the excess land over 208.42 hectares as delineated on the ground.
 9. The interested parties application as I understand it, is that the plaintiff's land on the ground is 208.42 hectares while the records held at the land adjudication and settlement office indicate the land to be 926.60 hectares and that the plaintiff is intent on taking full advantage of the discrepancy in the records to have the size of the land on the ground enlarged to 926.60 hectares. The applicants want to be enjoined to the suit so that they can protect the interests of the residents including themselves who stand to be affected if the erroneous record showing the plaintiff's land

to be 926.60 hectares is implemented on the ground. The interested parties have in support of their application annexed the report of the surveyor Transmara dated 25th November 2013 marked “MM2 (b)” which acknowledges the discrepancy.

10. It is not clear how the applicants, even if they were to be enjoined to the suit as interested parties would enable or assist the court in determining the extent of the plaintiff’s land. The plaintiff’s land is registered land and the provisions of Section 15 of the Land Registration Act, 2012 provide for the preparation by the office or authority responsible for the survey of land and maintenance of a map or series of maps for every registration unit. Section 16 of the Act provides for the amendment and/or alteration of boundary lines and the preparation of new editions on the instructions of the registrar in writing in the prescribed form in case of any error in regard to the records held and/or fault in respect of the survey of any parcel of land.
11. Sections 18 and 19 of the Land Registration Act 2012 gives power to the land registrar to have the boundary of any parcel of land established and fixed in the event of any dispute and in carrying out such exercise the land registrar is at liberty to receive such evidence as to the situation of the land parcel boundaries as may be necessary. Hence the Act recognizes that it is the land registrar acting in concert with the surveyor who would be best suited to resolve any issues relating to boundary disputes and not the courts. The land registrar has custody of all the necessary records and the surveyor in case of need renders the necessary technical support.
12. To the extent that in the present suit the issue appears to be as regards the situation of the plaintiff’s parcel’s boundaries in relation to the defendants parcel, I do not consider that the applicants would be necessary parties to enable the court adjudicate the question in issue. Order 1 rule 10 (2) provides who qualifies to be added as a party to a suit thus:-

Order 1 Rule 10 (2):

The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

13. The applicants state that having been involved as members of the committee they have vital and crucial information that could assist the court. With respect, any information the applicants may have would be in the nature of evidence and any party could call them to give evidence before the court or before the land registrar and or the court could *suo moto* if it considered their evidence necessary have them summoned to testify. It is my holding therefore that the applicants have no identifiable stake or interest in the suit before the court to render it necessary to have them joined as parties in the suit and I decline to order them to be enjoined.
14. The notice of motion by the applicants dated 16th October 2015 is without merit and the same is hereby ordered dismissed. I direct that each party bears their own costs of the applicant.

Ruling dated, signed and delivered at Kisii this 3rd day of June, 2016.

J. M MUTUNGI

JUDGE

In the presence of:

..... for the plaintiff

..... for the 1st and 7th defendants

..... for the 1st to 3rd defendants

..... Court Assistant

J. M MUTUNGI

JUDGE