



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

MISC. APPLICATION NO. 69 OF 2014

ZEBEDEO KINARA MORACHAAPPLICANT

VERSUS

KISII LAND REGISTRARRESPONDENT

AND

EMMANUEL OMARIBA MOGERE1ST INTERESTED PARTY

ELIZABETH MONGINA NYAMARI2ND INTERESTED PARTY

RULING

1. The applicant, Zebedeo Kinara Moracha by a Notice of Motion dated 2nd April 2014 made under Section 3, 3A and 63 (e) of the Civil Procedure Act sought an order that the Kisii Land Registrar do visit land parcel number **Nyaribari Chache/Keumbu/3147** and **3629** respectively to determine a boundary dispute and establish the position of the boundary between the two parcels. On 30th July 2014 the court granted an order interalia on the following terms:-

1. The land registrar Kisii shall visit the parcel of land known as LR No. Nyaribari Chache/Keumbu/3147 registered in the name of Zebedeo Kinava Moracha and LR No. Nyaribari Chache/Keumbu/3629 registered in the name of the said parcels of land on the ground and place necessary beacons to mark the said boundary.

2. The land registrar shall file his report in court within 60 days from the date hereof.

3. The land registrar shall be assisted by the Kisii District Surveyor in the exercise.

2. The land registrar after some delay and following an application by the applicant for enforcement of the court order granted on 30th July 2014 on 7th August 2015 filed a report dated 6th August 2015. As per the report the land registrar stated that the boundaries of the applicant's plot were established and boundary marks made and the applicant was advised to reinforce the boundary to avoid future disputed in regard to the boundary.

3. The proposed interested parties Elizabeth Mongina Nyamari and Emmanuel Omariba Mogere by a Notice of Motion dated 25th September 2015 which is the subject of this ruling seeks interalia that they be enjoined as interested parties in the instant matter and further the court do review and stay the ex parte

orders issued on the 31st July 2014 against the interested parties pending the hearing and determination of the proposed interested parties instant application. The proposed interested parties further seek an injunctive order restraining the applicant from interfering with land parcels Nos. **Kisii Nyaribari Chache/Keumbu/3629** and **3754** and/or destroying the boundary features and/or evicting the proposed interested parties from the said parcels of land. The proposed interested parties premised their application on the grounds set out on the face of the application and on the affidavit sworn in support thereof by Emmanuel Omariba Mogere on 25th September 2015. The deponent states that he is the registered owner of land parcel **Nyaribari Chache/Keumbu/3629** and avers that land parcel **Nyaribari Chache/Keumbu/3147** was a subdivision of land parcel **Nyaribari Masaba/Keumbu/1053** and not from land parcel **Nyaribari Chache/Keumbu/3629** owned by the interested party. The proposed interested parties claim that even though the court order required that the land registrar establish the boundaries of land parcels **Nyaribari Chache/Keumbu/3147** and **3629** the land registrar proceeded to implement the order without involving the proposed interested party who stood to be directly affected by the implementation of the court order.

4. The applicant filed a replying affidavit in opposition to the application by the proposed interested parties sworn on 21st October 2015. The applicant stated that the court order dated 30th July 2014 was appropriately implemented by the Land Registrar when he visited the site on 6th August 2015 and marked the boundaries. The applicant maintains the land registrar clearly and properly fixed the boundary between the said two parcels as ordered by the court. The applicant depones that on or about 25th September 2015 the interested parties and their agents descended on the applicant's land, damaged and/or destroyed the boundary marks and features which were fixed by the land registrar and the matter was under police investigation.

5. The application by the proposed interested parties was argued by way of written submissions. I have reviewed the application, the affidavit in support and in opposition and the parties filed written submissions and the issues for determination are whether there is any basis for joinder of the proposed interested parties to these proceedings and further whether there is any basis for review of the court order granted on 30th July 2014.

6. By the Miscellaneous Application brought by the applicant the only substantive prayer sought by the applicant was for the determination of the boundary between land parcel numbers **Nyaribari Chache/Keumbu/3147** and **3629**. The court granted this prayer and henceforth it was the obligation of the land registrar to give effect to the order. Indeed under the Land Registration Act No. 3 of 2012 the court has no jurisdiction to entertain matters relating to boundary disputes as that mandate is given to the land registrar.

7. Section 18 of the Land Registration Act, 2012 makes provision for establishment of boundaries while Section 19 provides how the land registrar is to go about in fixing the boundaries. Section 18 (2) divests the court of jurisdiction to deal with matters relating to boundary dispute. Section 18 (2) provides thus:

“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.”

Under Section 19 of the Land Registration Act, 2012 the land registrar is required to give notice to all affected persons and to give them a hearing before determining and fixing the boundaries.

8. In the instant matter the report dated 6th August 2015 shows both proposed interested parties were present when the land registrar and the surveyor implemented the court order. The report however appear to suggest that it was only the applicant's land parcel whose boundaries were marked. The report does not indicate whether the boundaries of land parcel **Nyaribari Chache/Keumbu/3629** were fixed. A scrutiny of the annexure **“EOM-01”** to the interested parties' application shows that land parcel 3629 was subdivided to create **parcels 3705-3710** as per the annexed mutation form in respect of **land parcel 3629**. The abstract of title (**“EOM-01”**) indicates that **parcel 3629** was closed on 6th June 2014

following the subdivision and hence **parcel 3629** did not exist as at 6th August 2015 when the land registrar’s report was made and he could therefore not mark the boundaries of a nonexistent parcel of land.

9. On the basis of the court order granted on 30th July 2014, I am satisfied the boundaries of land parcel **Nyaribari Chache/Keumbu/3147** were appropriately marked by the land registrar and in case the proprietors of land parcels **Nyaribari Chache/Keumbu/3705-3710** have any issues with regard to their parcel boundaries they would be at liberty to have the same established and fixed by the land registrar in accordance with the provisions of Sections 18 and 19 of the Land Registration Act, 2012.

10. I must observe that it was indeed not necessary for the applicant to file the initial application in order for the land registrar to do what he is required to do under the Land Registration Act, 2012. The land registrar is under a duty and obligation to act in accordance with the provisions of the Act. Section 19 (1) in part provides “...or if an interested person has made an application to the registrar, the registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.”

11. There is a growing tendency by parties in the county to file suits and or applications for the court to make an order for the land registrar to visit a disputed boundary site and to establish the boundaries. This is unnecessary as the Land Registration Act, 2012 makes provision for the land registrar to act on the application of any person in that regard and the mandate to establish and fix boundaries is vested on him and the surveyor. Parties instead of inundating the court with such unnecessary suits and/or applications should invoke the provisions of the Land Registration Act, 2012 to have boundary disputes resolved by the land registrar as the Act mandates him to do so.

12. The upshot is that I find no merit in the proposed interested parties application dated 25th September 2015 and the same is dismissed with costs to the applicant.

13. Orders accordingly.

Ruling dated, signed and delivered at Kisii this 7th day of October, 2016.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the applicant
..... for the respondent
..... for the 1st and 2nd interested parties
..... Court Assistant

J. M. MUTUNGI

JUDGE