



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
LAND AND ENVIRONMENT DIVISION
ELC CIVIL SUIT NO. 148 OF 2007

LEONARD ROIPA RORIAN PASHA PLAINTIFF

VERSUS

ELIJAH TIENDE OLE KULA..... 1ST DEFENDANT

JOSEPH NKOSHESHE TOMBO.....2ND DEFENDANT

TIMA OLE MPAASH.....3RD DEFENDANT

MRS. RAHAB NYANGENA.....4TH DEFENDANT

R U L I N G

On 7TH April 2011 Hon. Justice J. Mwera (as he then was) made an order inter alia in the following terms:-

- i. That the Kajiado District Land Registrar together with the Kajiado District Surveyor do proceed to the original land parcels **Kjiado/Kaputei North/20** and Land Parcels **Kajiado/Kaputei North NOS. 917, 721 and 705** respectively originally of **Emboloi** Group Ranch to determine and indicate the position of the uncertain or disputed boundary thereof.
- ii. That the Kajiado District Land Registrar do file their findings/decision on the dispute in this Honourable court on or before 5th day of May 2011.

These orders were challenged having been given exparte and **Hon. Justice Mwera** set the same aside on 20th September 2011 but the same orders were granted and re issued by Hon. Lady Justice Ougo on 28th October 2011 on the same terms save for the date the Land Registrar's report required to be filed. There was delay in complying with the said orders and it took the intervention of the court to get the Land Registrar Kajiado to comply with the order.

The Land Registrar, one **J. M. Wambua** filed his report on 28th May 2014 in terms of his letter dated 23rd May 2014 which annexed the report by one **I.M. Werunga** District Surveyor Kajiado County. The Land Registrar attended before the court on 22nd October 2014 for the purposes of presenting his report before the court. The Land Registrar explained that his report and that of the District Surveyor represented the position of the parcels of land on the ground. The report by the Land Registrar was to the effect that the boundaries of the parcels of land were as established by the Land Registrar, Kajiado in 1990. As per the Land Registrar the original title **Kajiado/Kaputei North/20** was 420 hectares (1,038

acres) but as per the point/marks shown by the complainant (**Leonard Roipa Rorian Pasha**) when computed by the Land Surveyor, the size is 479.48 hectares (1,185 acres) giving a difference of 59.48 hectares (147 acres). The point/marks pointed out by the respondent (**Elijah Tienda Ole Kule**) when computed by the Surveyor indicate a size of 439.08 hectares (1,085 acres) giving a difference of 19.08 hectares (47 acres) as compared with the original title. The Land Registrar's position is that the determination by the Land Registrar in 1990 which is the position represented on the ground and which agrees with the respondent's position should be respected as the valid boundary position.

The Land Registrar argues that the position held by the complainant represents too a high difference when the original title is considered whereas the position as per the ground represents a reasonable differential of 47 acres as opposed to 147 acres.

The surveyor summarized the position in regard to the three parcels having regard to the RIM thus:-

- | | |
|-----------------|----------------------|
| i. Parcel 20 | 420 Ha (1038 acres) |
| ii. Parcel 705 | 86.46 Ha (214 acres) |
| iii. Parcel 917 | 82.36 Ha (204 acres) |

From the reports it is unclear how the parties picked the points/marks that they relied upon and it is further not explained how the beacons and the co-ordinates relate and how they influence the size of the parcels of land. It is further unclear whether the RIM was prepared using the co-ordinates and if so why the variances. The report by the Surveyor states the beacon or co-ordinate "NY13" was disputed by the parties and further states that "**The co-ordinates of points NY11, NY12, NY13 and NY14 as pointed out by the Applicant matched the co-ordinates on the co-ordinate list**". **What does this mean?** The surveyor did not express himself whether or not it meant the applicant's position represented the correct position having regard to the co-ordinates which were used for the initial survey and sub-division.

The parties did not find agreement with the report by the District Land Registrar Kajiado. The Applicant in submissions filed further to the court's directions inviting comments on the report faulted the Land Registrar in relying on an adjudication by the Land Registrar in 1990 which was not made part of the report and which at any rate was challenged vide **HCCC NO. 5368 of 1990** and **Hon. Justice Githinji (as he then was)** held that the Land Registrar having made a determination on the disputed boundary did not make any note in the register to denote the boundary had been precisely defined and fixed in accordance with section 22 (1) of the Registered Land Act (now repealed). Under section 21(5) of the same Act, unless the boundaries of a parcel has been fixed and a note made on the register to that effect, the court or the Registrar may receive evidence as to its boundaries and situation in any proceedings concerning the parcel.

The applicant submits that the Land Registrar did not comply with the court order of 28th October 2011 which required him to determine and indicate the position of the uncertain or disputed boundary and in particular states that the Registrar did not appropriately deal with the evidence relating to the co-ordinates which were used in the survey of the parcels of land and especially survey of Title Number **Kajiado/Kaputei North/20** which was curved out in 1967 long before the other parcels **917, 721 and 705** which came into being in 1985. The Applicant urges the court to reject the report by the Land Registrar Kajiado but to uphold part of the District Surveyors report as relates to the positioning of the co-ordinates that were used to delineate parcel **Kajiado/Kaputei North/20**.

The 1st Respondent, **Elijah Tiende Ole Kula** in his filed submissions, reiterates that the determination by the Land Registrar conformed with the a previous determination by the Land Registrar, Kajiado carried out in 1990 and that the same represented the position on the ground. The 1st respondent however agreed the technical aspects relating to the surveyors report especially as relates to the co-ordinates referred to in his report was unclear and required explaining and it was the proposal of the 1st Respondent that the District Surveyor be accorded an opportunity to explain the technical aspects of his report. The 1st Respondent avers that the boundary dispute has been the subject of various court and Land Registrar's determinations but the Applicant has never been satisfied.

I have considered the report by the Land registrar Kajiado and the District Surveyor and the submissions by the parties hereto. The subject order pursuant to which the Land Registrar and the District Surveyor were acting was in the following terms:-

“That the Kajiado District Land Registrar with the Kajiado District Surveyor do proceed to the original land parcels Kajiado/Kaputei North/20 and Kajiado/Kaputei North NOS. 917, 721 and 705 respectively originally of Emboloi Group Ranch to determine and indicate the position of the uncertain or disputed boundary thereof”.

My undertaking of that order is that the land Registrar and the District Surveyor were required to cause an investigation to be undertaken to determine the boundaries of the specified parcels of land having regard to when the parcels of land were originally delineated. The role of the District Land Registrar was not to merely confirm what was there on the ground. It does appear from the report by the District Surveyor that the District Land Registrar may have omitted to take account of the evidence as relates to co-ordinates that may have been used to establish and fix the original boundaries. The Applicant avers that the Land Registrar did not take this evidence into account.

Under section 16 the land Registration Act, 2012 the land Registrar has power to alter the boundary Lines for any parcel and to prepare new editions.

Section 16 (1) provides:-

16.(1) The office or authority responsible for the survey of land may rectify the line or position of any boundary shown on the cadastral map based on an approved subdivision plan and such correction shall not be effected except on the instructions of the Registrar, in writing in the prescribed form, and in accordance with any law relating to subdivision of land that is for the time being in force.

(2) Notwithstanding subsection (1) any alteration made shall be made public and whenever the boundary of a parcel is altered on the cadastral map, the parcel number shall be cancelled and the parcel shall be given a new number.

Under the provisions of section 19 of the Land Registration Act NO. 3 of 2012 the Land Registrar may have the boundaries of any parcel of land fixed after giving notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries and after giving all persons who may be affected by his decision an opportunity of being heard. The court is under section 18(2) of the said Act precluded from entertaining 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 the provisions of the said section 18 of the Land Registration Act 2012. It is by reason of the previous section 21 of the Registered Land Act Cap 300 Laws of Kenya (now repealed) which section was reintroduced in a modified form in section 18 of the Land Registration Act 2012 that the court in this matter made the order for the boundaries of the suit properties to be established and fixed. The order of 28th October 2011 has to be viewed in this context.

I am not for the reasons that I have alluded to in this ruling satisfied that the Land Registrar Kajiado acted in compliance with the order of 28th October 2011 and I accordingly set aside the report by the Land Registrar dated 23rd May 2014 and filed in court on 28th May 2014. I direct that this matter be and is hereby ordered to be referred to the **Chief Land Registrar, Ministry of Land Housing and Urban Development** to appoint a Land Registrar other than **J.M. Wambua** to with the Kajiado District Surveyor proceed to the original land parcels **KAJIADO/KAPUTEI NORTH/20** and **KAJIADO/KAPUTEI NORTH NOS, 917, 721 and 705** respectively originally of **EMBOLOI GROUP RANCH** to determine and establish the position of the uncertain or disputed boundary thereof and to have the said boundaries fixed in terms of section 19 of the Land Registration Act 2012. That the Land Registrar appointed by the Chief Land Registrar and the Kajiado district Surveyor to file their joint report in court within the next 90 days from the date of this ruling.

Matter shall be mentioned in court on **14th July 2015** to confirm compliance and for further directions and/or orders.

Costs in the cause.

Ruling dated, signed and delivered this.....**27th**.....day of...**March**.....2015.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Aswani..... For the Plaintiff

Mr. Masese..... For the Defendants