



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

E.L.C MISC. APPLICATION NO. 16 OF 2015

JULIUS WAWERU MAINA APPLICANT

-VERSUS-

LAND REGISTRAR NYERI 1ST RESPONDENT

THE DISTRICT SURVEYOR NYERI 2ND RESPONDENT

RULING

1. By notice of motion dated **2nd June, 2015** and amended on **8th June 2015**, the applicant **Julius Waweru Maina**, prays that the Land Registrar and the County Surveyor Nyeri (hereinafter referred to as the respondents) be ordered or authorised to determine the actual positions of boundaries between the parcels of land known as **Land Parcel Number Muhito/Mbiuni/659; 660; 661; 961; 1520; 1521 and 1522**.

2. The application is premised on the grounds that some of the properties to be affected by the boundary fixing exercise to wit parcels Nos. **Muhito/Mbiuni/659, 661 and 961** belong to deceased persons; that the respondents require an order authorizing them to enter the three parcels herein for the purpose of determining the boundaries between those parcels of land and the applicant's parcels of land (Muhito Mbiuni/1520, 1521 and 1522) without being accused of interference with the estates of the deceased persons.

3. The application is supported by the affidavit of the applicant in which the following documents are annexed as proof of the averments contained therein:-

- i) Certificates of official search in respect of land parcel Nos.659; 661 and 961;
- ii) Copy of a letter dated 18th May, 2015 from the Chief Gakindu Location to the Lands office Nyeri confirming existence of the boundary dispute;
- iii) Receipt issued on 26th May, 2015 confirming that the applicant has paid fee for the boundary fixing exercise.

4. The application is opposed through the grounds of opposition dated **16th June, 2015**. In those grounds, counsel for the respondents contends that the orders sought cannot issue because they will affect the proprietary interests of persons who are not privy to the application; that the application is full of none disclosure of material facts and that the application is incompetent for none compliance with the provisions of **Order 1 Rule 3** of the Civil Procedure Rules.

5. In reply to the issues raised in the respondents grounds of opposition, the applicant filed the affidavit he swore on **19th June, 2015** where he explains that he filed the application based on the advice given to him by the Land Registrar, Nyeri.

6. Concerning his failure to enjoin the people who will be affected by the order, he explains that he could not do so because the estates of the persons to be affected by the order sought, have not been administered as by law required.

7. When the matter came up for hearing, the applicant urged the court to allow the application as prayed.

8. Counsel for the respondents **Ms. Masaka**, submitted that the application is unsustainable because orders sought will affect persons who are not parties to it. She urged the court to dismiss it.

9. In a rejoinder, the applicant informed the court that he had informed all his neighbours and they were in agreement with the application.

10. It is common ground that the order sought in this application will affect persons who are not parties to the suit. In fact the application seeks to circumvent the provisions of **Section 45** of the Law of Succession Act, Cap 160 Laws of Kenya, which makes it an offence for any person, unless authorized by that Act or any other written law or by a grant of representation issued under that Act, to take possession, dispose of or otherwise intermeddle with any free property of a deceased person.

11. The said Section of the Law provides as follows:-

“45. (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall –

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

12. I find the sole issue for determination in this application to be; Whether the orders sought can issue given that they affect persons who are neither parties to the application nor represented in the application.

13. Faced with a similar issue, in the case of **Philip Mukwe Wasike v. James Lusweti Mukwe & 2 others (2013) e KLR Omondi J.** stated:-

“As regards the first issue, which is capable of preliminarily determining the application, it is trite law that the rule of *audi alteram partem*, which means “hear the other side,” is an indispensable requirement of justice. It demands that the party who has to make a decision shall hear both sides, giving each an opportunity of being heard on what is urged against him. See Pashito Holdings & another v. Ndugu & 2 others where the Court of Appeal held:-

“The rule of *audi alteram partem*, which means “hear the other side,” is a rule of natural justice. It is an indispensable requirement of justice that the party who has to make a decision shall hear both sides,

giving each an opportunity of hearing what is urged against him.....The gravamen of the respondent's suit was that the Commissioner had no right to alienate public land to any person for any user other than that for which it had been reserved. The respondents could not have established a prima facie case with probability of success which is an essential legal requirement in order to be entitled to interlocutory injunction unless the Commissioner was a party to the proceedings..... The High Court should have directed that the Commissioner was a proper party without whom the relief sought against him could not be granted.”

Whereas the application by the petitioner is addressed to the 1st, 2nd and 3rd respondent it is clear that the orders sought are substantially addressed to some persons or entities who are not parties to the suit. For instance the DC Bungoma District and access to information contained in the sim cards and mobile phones. It is also notable that the petitioner has not particularly prayed for production of the evidence by the alleged third parties or for release of the said evidence to him. This aspect only plays itself out in the submissions made by the petitioner's counsel

In my view, it was incumbent upon the petitioner to enjoin, the third persons (especially the private individuals) in the application, to accord them a chance to be heard on the case levelled against them. It was also incumbent on the petitioner against to lay a basis for seeking an order against the third parties by at least leading evidence to show that he tried to obtain the said evidence from the persons and the plea was turned down or they failed to cooperate...”

14. In applying the legal principles enunciated in the case cited above, which I totally associate myself with, even though the orders sought in this application are expressed to be against the respondents, it is not the respondents who will be affected by the orders but the beneficiaries of the estates of the deceased persons named in the application. Therefore, it is the beneficiaries of those estates who ought to have been cited as respondents and not the respondents cited in the application. This is so because the respondents cited in the application have no interest whatsoever to protect in the property.

15. While I appreciate the difficulties the applicant is facing in getting the boundaries ascertained and fixed because some of the persons his properties share boundaries with are deceased, I am not satisfied that the mere fact that the estates of those persons have not been administered justifies granting the orders sought and in effect allowing the respondents to interfere with the estates of the deceased without representation or been given an opportunity to respond to any issues or questions that may be raised when the boundaries are being ascertained.

16. In view of the foregoing, I agree with counsel for the respondents that the orders sought cannot issue because they will affect the interest of persons who are not parties to the suit.

17. To legally pursue his claim, the applicant is advised to consider citing the beneficiaries of the estates of the deceased persons hereto to take letter of administration as provided for under the Probate and Administration Rules.

18. The upshot of the foregoing is that the application is fatally defective. Consequently, I dismiss it with no orders as to costs.

Dated, Signed and Delivered at Nyeri this 21st day of October, 2015.

L N WAITHAKA

JUDGE

In the presence of:

Julius Waweru Maina – Applicant

N/A for the 1st and 2nd respondent

Court assistant - Lydia