



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L MISC APPLICATION NO. 11 OF 2013

Formerly HCMA 149 OF 2011

PAULINA CHEMARICH.....APPLICANT

VS

JONAH B. KIMURTO & 5 OTHERS.....RESPONDENTS

(Application to amend; suit originated through miscellaneous Application; suit seeking to have order of Land Registrar on boundary adopted as order of court; whether such suit contemplated by law; no such contemplation; miscellaneous suit struck out but with no orders as to costs).

RULING

I have two applications before me. The first is filed by the Applicant to this Miscellaneous Cause (whom for ease of reference I will refer to as the plaintiff) and the other has been filed by the 1st Respondent to this Miscellaneous Cause (whom for ease of reference I will refer to as the defendants). The application by the plaintiff is dated 12 June 2013 whereas that filed by the 1st defendant is dated 17 June 2013. In the application dated 12 June 2013, the plaintiff seeks to be allowed the name of the 4th defendant struck out from this suit. The reason given is that the 4th defendant, Kimurto Kabomet, died on 12/12/1973 and it is conceded that the suit against him cannot survive since it was instituted after he had died. In the application of 17 June 2013, the 1st respondent is asking for this Miscellaneous Cause to be struck out. The reasons given are that the suit is unmaintainable as it was filed against a deceased person (4th defendant); that the land dispute herein was adjudicated by a tribunal based in Uasin Gishu whereas the suit land is in Elgeyo-Marakwet County; that the 1st to 3rd respondents have no locus standi to be sued since letters of administration have not been taken out.

The plaintiff instituted this suit as a Miscellaneous Cause on 15 November 2011 through a Notice of Motion. The Notice of Motion is said to be brought under the provisions of Sections 3, 149, and 159 of the Registered Land Act (CAP 300) (now repealed); Section 59 and 60 of the Evidence Act (CAP 80); and Sections 28, 29, 30, 31, 32, and 33 and Section 51 of the Civil Procedure Rules, 2010. The main prayers are as follows :-

That the order contained in the ruling/decision dated 10-5-2011 by the District Land Registrars the 5th and the 6th respondents on the boundary marking the farms in dispute namely Kabiemit/Flax Block 1 (Chepkorio)/232 in Uasin Gishu District for the applicant and Mosop/ Chepkorio/330 (Lelboinet) in Keiyo/Marakwet District for the 1st, 2nd, 3rd, and 4th respondents be and is hereby deemed to be the ruling, decision, order or decree of the High Court and enforceable as such.

That the applicant be and hereby at liberty to make an application for execution and enforcement of the Order or Decree of the High Court based on the adoption of the decision or order contained in the 5th

and 6th respondents' ruling dated 10-5-2011.

The Notice of Motion is supported by the affidavit of the plaintiff. A reading of the same reveals that there had been a boundary dispute between the two parcels of land in issue. The plaintiff owns the land parcel Kabiemit/Flax Block 1 (Chepkorio)/232 whereas the land parcel Mosop/ Chepkorio/330 (Lelboinet) is registered in the name of the 4th defendant. The plaintiff's land falls in Uasin Gishu County whereas the 4th defendant's land falls in Keiyo-Marakwet County. The dispute was referred to the Land Registrar Uasin Gishu who involved the District Land Registrar Keiyo-Marakwet District. Between the two farms is a river and a barbed wire fence. The dispute was whether the boundary is at the fence or the river. The registrar on 10 May 2011, made a decision that the proper boundary is the river. It is this decision that the plaintiff wants considered a judgment of this court.

The 1st respondent replied to the Motion though a statement of grounds of opposition. Inter alia, he stated that a land dispute tribunal cannot adjudicate over land with a title and cannot hear a dispute where a party is dead.

There was no response from the other defendants.

Mr. J.K. Kiplagat for the plaintiff, conceded that there was an error in suing the 4th defendant since he had died by the time of institution of suit. But he submitted that the error can be cured by amendment by striking out his name from the suit. The position of Mr. H.K. Koros for the 1st defendant was that the application is fatally defective for suing a dead person. He submitted that the 2nd, 3rd and 4th defendants who are sons of the 4th defendant, do not hold any letters of administration and hence have no capacity to be sued. He asked that the entire motion be struck out. Miss. L.M. Lung'u of the State Law Office for the 5th and 6th defendants was of the view that the motion can be amended.

On my part, I do not see any problem with amending the Motion to strike out the name of the 4th defendant. The issue of whether or not the 1st, 2nd and 3rd defendants have capacity to be sued is an issue that ought to be determined on merits, since from the pleadings, I can see that the case of the plaintiff is not strictly against the 4th defendant but appears to be an individual complaint of trespass against the 1st, 2nd and 3rd defendants.

However, I have a problem with the entire suit. It is my view that this suit is incurably defective by dint of the manner in which it was instituted. As I earlier stated, the application is said to be brought under the provisions of Sections 3, 149, and 159 of the Registered Land Act (RLA) (CAP 300) (now repealed); Section 59 and 60 of the Evidence Act (CAP 80); and Sections 28, 29, 30, 31, 32, and 33 and Order 51 of the Civil Procedure Rules, 2010. I have looked at Sections 3, 149 and 159 of the RLA. Section 3 is merely a definition section. It defines the various terms used in the RLA. Section 159 merely states that suits in excess of 25,000 pounds are to be heard in the High Court. Sections 149 provided as follows :-

149. *Whenever any question arises with regard to the exercise of any power or the performance of any duty conferred or imposed on him by this Act, the Registrar may state a case for the opinion of the High Court; and thereupon the High Court shall give its opinion thereon, which shall be binding upon the Registrar.*

I have looked at Sections 28, 29, 30, 31, 32, and 33 of the Civil Procedure Act. They merely deal with execution of decrees. Order 51 provides for the mode of filing applications which shall be by way of Notice of Motion.

What the plaintiff wants in this suit is for an order to adopt the decision of the Land Registrar as a judgment of this court. Section 149 of the RLA cannot apply since in that section, it is the Registrar to state a case for the opinion of the court. This application was not filed by the Registrar. Section 149 of the RLA therefore cannot apply.

The closest provision I have come across that may apply to the situation in this case is Section 21 of the RLA. It provided as follows :-

21. (1) Except where, under section 22, it is noted in the register that the boundaries of a parcel have been fixed, the registry map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.

(2) Where any uncertainty or dispute arises as to the position of any boundary, the Registrar, on the application of any interested party, shall, on such evidence as the Registrar considers relevant, determine and indicate the position of the uncertain or disputed boundary.

(3) Where the Registrar exercises the power conferred by subsection (2), he shall make a note to that effect on the registry map and in the register and shall file such plan or description as may be necessary to record his decision.

(4) No court shall entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in this section.

(5) Except where, as aforesaid, it is noted in the register that the boundaries of a parcel have been fixed, the court or the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as it or he thinks fit.

It will be seen that under Section 21(2), the Registrar could determine a boundary on application of any interested party. If he exercises these powers, he must make a note in the Registry Index Map and the register and must file such plan or description of the boundary. Under Section 21 (4) no court is to entertain a dispute unless the boundaries have been determined. Under Section 21(5), the court may receive in any proceedings concerning the parcel, evidence as to boundaries.

I have seen no provision in the law, which allows a party to file a Miscellaneous Cause, to automatically have adopted as a judgment, a decision of the registrar touching on boundaries. The parties are however free to use that determination as evidence in proceedings. If it is the case of the plaintiff that the 1st, 2nd and 3rd respondents have trespassed into her land, then she needs to file a suit for trespass, and in that suit, she can use the determination of the registrar as evidence. She cannot, in my view, file an application to have that decision adopted as a judgment of the court. This is not permissible by law. This suit is therefore incompetent.

I also wish to correct the impression created by counsel for the 1st defendant that the decision in issue was a decision of the Land Disputes Tribunal. It clearly is not; it is a decision of the Land Registrar and not of the Land Disputes Tribunal.

For the above reasons, I strike out this Notice of Motion. Costs are in the discretion of the court pursuant to the provisions of Section 27 of the Civil Procedure Act, CAP 21, Laws of Kenya. It could be that the plaintiff had a genuine claim but did not properly present it before court. I think, in the interests of justice, that each party should bear its own costs.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 6TH DAY OF FEBRUARY 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in the presence of:

Mr. J.K. Kiplagat for the applicant

N/A for Ms Chepkitway for the 1st - 4th respondents.

Miss L.M. Lung'u present for the state Law office for 5th & 6th respondents.