



**REPUBLIC OF KENYA**  
**IN THE LAND AND ENVIRONMENT COURT AT NAKURU**

**CASE NO. 252 OF 2013**

**HELLEN MURINGE KABUTHA..... PLAINTIFF**

**VERSUS**

**NYANDARUA DISTRICT LAND REGISTRAR.....1<sup>ST</sup> DEFENDANT**

**NYANDARUA DISTRICT SURVEYOR.....2<sup>ND</sup> DEFENDANT**

**HON ATTORNEY GENERAL .....3<sup>RD</sup> DEFENDANT**

**PETER RUGU GIKANGA.....4<sup>TH</sup> DEFENDANT**

**ELIZABETH WAKONYO MWANGI.....5<sup>TH</sup> DEFENDANT**

**RUTH WAITHIRA KIUNA.....6<sup>TH</sup> DEFENDANT**

**RULING**

1. The Plaintiff moved this court by way of an amended notice of motion dated 23<sup>rd</sup> May, 2013 seeking orders to restrain the defendants by way of a temporary injunction from entering, demarcating, alienating, surveying or in any other manner interfering with the applicant's use, possession and occupation of land parcels **L.R. Nyandarua/Ol Joro Orok Salient/ 14567 to 14605** ("hereinafter referred to as the suit properties").

2. The application is premised on the grounds on the face of the application and on the plaintiffs supporting affidavit sworn on **23<sup>rd</sup> May, 2013**. She depones that she is the registered owner of the suit properties (**HMK i-xxxv**); that on **15<sup>th</sup> March, 2013** she received word from the sub chief that there were surveyors who intended to carry out a survey pursuant to a court order issued on **29<sup>th</sup> November, 2012** in **Nakuru HCC No 148 of 2010** on Land parcel **Nyandarua Ol -ojororok Salient/ 1337**.

3. She further depones that she was a witness in the aforesaid case but not a party therefore she had no capacity to challenge the orders as they were not made against her and a notice of appeal had been filed in respect of that suit. It was her contention that she would suffer irreparable harm if the orders sought were not granted as the resurvey would alter the substratum, the boundaries and size of the suit properties and that she had already sold off some of the plots to third parties.

4. The application is opposed. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed a replying affidavit sworn on **6<sup>th</sup> February, 2014** by **Nathan Gichia**, the District Land Registrar, who gave a background of the disputes relating to the suit property. He deponed that the plaintiff was the registered owner of Plot No 1337

measuring approximately 8.9 hectares (NGG 1); that when a ground status was carried out in 2002, her parcel on the ground was found to be larger than the acreage indicated on her title deed. Her title was thereafter amended to read 11.07 hectares. This amendment interfered with the boundaries of **Nyandarua Ol -ojororok Salient/2114** measuring approximately 2.3 hectares (NGG2) registered in the names of **Peter Rugu Gikanga** and **Elizabeth Wakonyo Mwangi** as administrators of the estate of **Gikanga Rugu**, resulting in Nakuru **PMCC 189 of 2004** and subsequently in **Nakuru HCCC No 148 of 2010**. It was his contention, that the 1<sup>st</sup> and 2<sup>nd</sup> defendants were merely complying with orders of the court when conducting the survey whose findings were tendered in two reports dated **23<sup>rd</sup> March, 2013** and **27<sup>th</sup> March** (NGG3), the subject of this suit. Finally, he depones that the injunctive orders sought cannot issue against the 1<sup>st</sup> and 2<sup>nd</sup> defendants as the application has been overtaken by events.

5. Similarly, the 4<sup>th</sup> and 5<sup>th</sup> defendants opposed the application. The 4<sup>th</sup> defendant swore a replying affidavit on **15<sup>th</sup> July, 2013** on his own behalf and on behalf of the 5<sup>th</sup> defendant (his sister), in which he deponed that their father, Gikanga Rugu, was the registered owner of **Nyandarua Ol-ojororok Salient/2114**; that as administrators of their father's estate, after receiving grant of letters of administration in Nyahururu PMC No 59 of 2007, they instituted Nakuru HCC No 148 of 2010 against persons who had trespassed on their father's land.

6. They further deponed that the aforesaid case was heard and determined by **Emukule J.** and a decree issued wherein the plaintiffs were declared the legal owners of Nyandarua Ol-ojororok Salient/2114 and orders of eviction, ejection and demolition and removal of the defendants' houses and structures from the aforesaid land, were issued. The court further issued an order that the Director of survey and District Land Registrar, the 1<sup>st</sup> and 2<sup>nd</sup> defendants herein, do visit the aforesaid land within 120 days, carry out a survey to establish the exact area and extent of plot No. 2114, vis- a- vis plot Nos. 1337 and 1341 and file their reports in court.

7. That in compliance with the court order, the 1<sup>st</sup> and 2<sup>nd</sup> defendants visited the land in dispute and filed their reports (PRG10) which clearly revealed that the suit properties were hived off from plot no 2114, therefore the plaintiff had encroached on the aforesaid land and had on good title to pass to third parties .

8. The 6<sup>th</sup> defendant equally filed a replying affidavit on even date. She deponed that she was the registered owner of plot number 1341 which is adjacent to the suit properties; that she had earlier complained of encroachment by the 4<sup>th</sup> and 5<sup>th</sup> defendants but the issue was later resolved. It was her contention that the plaintiff was the owner of plot number 1337 and there was no dispute between them. She was therefore a stranger to the plaintiff's allegations and did not understand why she had been enjoined in the suit.

9. In response, the plaintiff filed a supplementary affidavit on 14<sup>th</sup> August, 2013 in which she explained how she had acquired the 11 hectares. She stated that she had been allocated plot number 1337 measuring 8.9 hectares but on the ground the same was measuring 11.07 hectares. Upon realising this mistake the Registrar ordered that the RIM map be amended to correspond with the ground which was duly done.

10. In reply, the 4<sup>th</sup> and 5<sup>th</sup> defendants filed a further replying affidavit on **14<sup>th</sup> October, 2013**. The 4<sup>th</sup> defendant deponed that Settlement Fund Trustees (SFT) and other Government agencies through various correspondence (PRG13) made it clear to the plaintiff that plot No. 2114, formerly plot 2772 had been allocated to Gikanga Rugu and the same was not free for allocation to the plaintiff; that by a letter dated **25<sup>th</sup> February, 1992**, SFT asked the plaintiff to return the original receipt of Kshs. 5,725.20 issued to her for purchase of plot No. 2722 for refund but she adamantly refused to return the same; that plot No. 2722 was never discharged and transferred to the plaintiff by SFT and the plaintiff had never legally acquired title to plot No. 2722.

11. On **18<sup>th</sup> December, 2013** all parties agreed that the matter be disposed of by way of written submissions. The plaintiff filed her written submissions on **17<sup>th</sup> February, 2014** while the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants filed theirs on **2<sup>nd</sup> May, 2014**. The 1<sup>st</sup> to 3<sup>rd</sup> defendants did not file any despite being

given ample time to do so.

12. Counsel for the Plaintiff submitted that the plaintiff as proprietor of the suit property was vested with absolute ownership rights of the land and should be left to enjoy all rights and privileges appertaining to a proprietor under **Sections 24 and 25 of the Land Registration Act (No 3 of 2012)**. It was their contention that the plaintiff would suffer irreparable harm and urged the court to grant the orders sought and allow the matter to proceed to full trial so that the real issues could be determined.

13. Counsel for the 4<sup>th</sup> and 5<sup>th</sup> defendants submitted that the plaintiff had not established a prima facie case. They stated that in compliance with a court order, the District Land Registrar Nyandarua and the District Surveyor Nyandarua had visited plot No. 2114 and filed their report which revealed that the plaintiff had encroached on the 4<sup>th</sup> and 5<sup>th</sup> defendant's parcel of land; that **Article 40 (6)** of the Constitution did not extend the Constitutional protection of rights to property where the same had been illegally acquired. Finally they submitted that the plaintiff would not suffer any irreparable harm as she was not affected in any way by the orders granted in Nakuru HCC No 148 of 2010.

14. I have considered the pleadings and written submissions filed by the respective parties and find the issues for determination to be as follows;

(i) Is the suit res judicata? If not,

(ii) Is the applicant entitled to the orders of injunction sought at this interlocutory stage on the facts and circumstances of this case?

(iii) costs

**Is the suit res judicata?**

15. **Section 7 of the Civil Procedure Act** provides: "No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

**Is the current suit similar to High Court Civil case No. 148 of 2010?**

16. High Court Civil suit No. 148 of 2010 was filed by the 4<sup>th</sup> and 5<sup>th</sup> defendants in the current case against persons who had purchased land from the plaintiff in the current suit. In that case, the plaintiff (in the current case) was the sole witness for the defence and did not seek to be enjoined as a party in that suit.

17. In the earlier case, the subject was Nyandarua ol-ojororok Salient/2114. In the current suit the subject are resultant subdivisions of Nyandarua Ol-ojororok Salient/ 1337. Reports by both the District Land Registrar and District Land surveyors dated **28<sup>th</sup> March, 2013** and **27<sup>th</sup> March, 2013** (NGG3) reveal that plot No. 2114 was part of Nyandarua Ol -ojororok Salient/1337. The resultant subdivisions of plot Nos. 2114 are Parcels No. 14567-14605 which are the plots in dispute in the instant suit.

18. Under the heading, Observations and findings, the District Land Registrar in his report dated **28<sup>th</sup> March, 2013** states, " **Parcels of land No. 1337,1341 and 2114 have been subdivided on the ground and there are erected several houses.**

**Parcel No. Ol joro orok Salient/ 1337 has been subdivided into parcels No. 16643-16651.**

**Parcel No. Nya/Ol joro orok Salient/ 1377 has been subdivided into parcels No. 14567-145605. From the measurements taken on the ground it was found that the resultant**

**subdivisions No. 14567-145605 emanated from Parcel No. Parcel No. ol joro orok Salient/ 2114.....”**

19. In his report dated 27<sup>th</sup> March, 2013 the District Land Surveyor states, ..... **the measurements taken on the ground reflect that plots Nya/Ol joro orok Salient/ 14567-14605 are all created from plot No Nya/Ol joro orok Salient/2114.....”**

20. These reports were filed in compliance with a court decree issued on 23<sup>rd</sup> January, 2013 by **Emukule J.** which read partly as follows; " **that an order be and is hereby issued to the Director of Survey and District Land Registrar, together to carry out within 120 days from the date hereof a survey to establish the exact area and extent of plot No. 2114, vis- a- vis plot Nos. 1337 and 1341 at Ol joro orok Salient in Nyandarua District and file their report in court detailing the proper boundaries of plot No. 2114 ( formerly plot No. 2722) and the extent (if any) of the encroachment by the defendants and Hellen Muringe Kabuthu."**

21. From the above, it is quite clear that the matters in issue in the current suit were conclusively heard and determined in Nakuru HCC No 148 of 2010. The Honourable judge in the earlier case declared the 4<sup>th</sup> and 5<sup>th</sup> defendants to be the legal owners of Nyandarua Ol - ojoro-orok Salient/2114. Attempting to address the same issues would be sitting as an appellant court to a court of concurrent jurisdiction which I cannot do. It is therefore clear in my mind that there is nothing left to be determined in both the notice of motion and this suit. I find no point in entertaining the application and the suit any longer and dismiss both under **Order 2 Rule 15(1) (d)** of the Civil Procedure Rules with costs to the defendants. Having found and held as above, I do not find it necessary to address the other issues for determination.

**Dated, signed and delivered in open Court at Nakuru this 24th day of October, 2014.**

**L N WAITHAKA**

**JUDGE,**

**PRESENT**

Mr S Mwangi holding brief for Mwangi for the applicant

N/A for the defendants

Emmanuel Juma: Court Assistant

**L N WAITHAKA**

**JUDGE**