



REPUBLIC OF KENYA



KENYA LAW
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**Kimani & 2 others v Muyanga & 4 others (Environment and Land Case
E011 of 2023) [2024] KEELC 4582 (KLR) (11 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4582 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND CASE E011 OF 2023
CA OCHIENG, J
JUNE 11, 2024**

BETWEEN

**MARTIN MUCHERU KIMANI 1ST PLAINTIFF
NICHOLAS CHEGE GATOTO 2ND PLAINTIFF
COMPANY LIMITED 3RD PLAINTIFF**

AND

**SIMON KASYOKA MUYANGA 1ST DEFENDANT
MATTHEW MUYANGA 2ND DEFENDANT
MACHAKOS COUNTY 3RD DEFENDANT
MACHAKOS COUNTY 4TH DEFENDANT
CHIEF – ATHI RIVER SUB COUNTY 5TH DEFENDANT**

RULING

1. What is before Court for determination is the Plaintiffs’/Applicants’ Notice of Motion Application dated the 30th August, 2023 where they seek the following Orders:-
 - a. Spent
 - b. That this Honourable Court be pleased to review its Order proclaimed on August 22nd, 2023 as issued by Hon. Justice M. Gicheru stating that the Applicants’ Application dated August 20th, 2023 was applied for prematurely on account of the fact that the Machakos Lands Registrar Report dated May 26th, 2023 was not a final determination hence this Honourable Court did deem it fit to issue an Order restraining the said Machakos Lands Registrar and Machakos County Survey Office from implementation of the referenced report.



- c. Spent
 - d. That this Honourable Court be pleased to issue an Order summoning the Machakos Lands Registrar and Machakos County Surveyor to appear before it urgently to confirm whether or not the Machakos Lands Registrar's Report dated May 26th, 2023 and Machakos County Survey Report dated May 23rd, 2023 are final or interim reports.
 - e. That the 1st and 2nd Respondents bear the costs of this Application jointly and severally.
2. The Application is premised on grounds on the face of it and the Supporting Affidavit of Alphonse O'Makalwalaand Paul Mutua Mweu. The Applicants' claim that the Machakos Land Registrar confirmed that the Land Registrar's Report dated the 26th May, 2023 was a final one, while the Machakos County Surveyor also confirmed that his report dated the 23rd May, 2023 is the final one. They seek a review of the Orders issued on 22nd August, 2023 to bar the implementation of the reports, pending summons to be issued to the Machakos Lands Registrar and Machakos County Surveyor to confirm whose report is final, so as to avoid miscarriage of justice. They contend that they were contacted by three neighbours who were unaware of the exercise and more importantly, the final determination. They aver that the Application for review has been filed without inordinate delay and failure by the court to issue a temporary reprieve in implementation of the above referenced reports will be rewarding the intentional fraudulent misrepresentation occasioned upon the Applicants, as conspired by the 1st and 2nd Respondents who knew there existed significant discrepancies on location and sizes of all the properties in dispute, but did not want to disclose the same to the Applicants. Further, that all the properties have either been bought from the 1st Respondent or the 2nd Respondent with the exception of Mavoko Town Block 3/97574 that was bought from Felix Muyanga who is still a sibling of the 1st and 2nd Respondents. They reiterate that the bias by the 3rd and 4th Respondents in favour of the 1st Respondent will continue to erode legitimate expectation of fair administration of the duties, owed by the said Respondents. Further, that their right to challenge the findings of the 3rd Respondent will be unfairly prejudiced and their right to quiet possession will be interrupted as they stand to loose acreage of their land.
 3. The 1st and 2nd Defendants/Respondents opposed the instant Application by filing a Replying Affidavit sworn by Rose Mueni Muyanga where she deposes that the Plaintiffs' have not shown sufficient cause to warrant review. Further, the Application does not satisfy the condition for granting orders of injunction. She contends that all parties were notified of the dates inclusive of the Applicants who were represented by their Advocates' who took part in the exercise and were at all times aware of the reports on the findings of the County Surveyor and Land Registrar respectively. Further, that the event was not tainted with any illegality as claimed. She insists that it is actually the Plaintiffs' interfering with the proprietary rights of the 1st and 2nd Defendants. She reiterates that it is the Plaintiffs' who have encroached on their property and as a consequence thereof, lost acreage. Further, they have been denied the enjoyment of quiet possession by the Plaintiffs.
 4. The 3rd and 4th Defendants/Respondents opposed the instant Application by filing a Replying Affidavit sworn by Mark Muchomba, the Land Surveyor Machakos County where he confirms that together with the Land Registrar, they visited the following parcels of land: Mavoko Town Block 3/93099, 91423, 93101, 93102, 58565, 58665, 38611, 56666 and 56667 respectively. He explains that the exercise was undertaken upon the request by the owner of parcel number Mavoko Town Block 3/93099, after which notices were issued summoning owners of the parcels of land in the affected area.
 5. He avers that land parcel numbers 3/93099, 93100, 93101, 93102 and 91423 were subdivisions of parcel number 3/4625. Further, that they confirmed that parcel number 3/4625 measured



approximately 9.82 Ha on the ground, map and in the title. He claims that, there seemed to be a mismatch in sizes of the said subdivisions of 3/4625 since the acreages in their titles did not match the acreage on the ground and on the map. He avers that some parcels occupied more land on the ground than they are supposed to, while others occupied less as captured by the Surveyor's report dated the 23rd May, 2023 including the Land Registrar's report dated the 26th May, 2023 respectively.

6. He insists that, from the exercise undertaken, if all the owners of the subdivisions of parcel number 3/4625 occupied the acreage as registered in their titles, then they would comfortably fit on the ground without disputes. Further, they confirmed that the 20 meters road in the area in question is supposed to be straight but on the ground, it was curved due to encroachment and blocked at some point. He reiterates that the implementation of the reports dated 23rd May, 2023 by the Surveyor and 26th May, 2023 by the Land Registrar, would bring a permanent solution to the boundary issues in the area. Further, that the boundaries in question are general and the gadgets used in taking its measurements do not use coordinates, hence it is not possible to supply the same to the Applicants'.
7. He reaffirms that the Lands' Officers were only executing their mandate in ascertaining boundaries and size of the said parcels and had no interest. He states that parties are supplied with reports including various documents upon application and payment of requisite fees. He further states that matters of ascertaining of boundaries and confirmation of acreage fall squarely within the mandate of the Land Registrar/Surveyor as provided for under Sections 18 and 19 of the *Land Registration Act* and indeed this court lacks the jurisdiction to entertain such matters.
8. The Application was canvassed by way of written submissions.

Analysis and Determination

9. Upon consideration of the instant Notice of Motion Application including the respective Affidavits, annexures as well as rivalling submissions, the following are the issues of determination:-
 - a. Whether the Orders of the Court issued on 22nd August, 2023 should be reviewed.
 - b. Whether Orders of interlocutory injunction should issue restraining the Defendants from implementing the 3rd and 4th Defendants' reports.
10. For the avoidance of doubt, before I proceed to make a determination of the two issues above, I wish to reproduce the Court Order issued on 22nd August, 2023 which the Plaintiffs' seek to review:-

“Upon perusal of the Notice of Motion dated 20th August, 2023, I direct as follows:

(a) Motion not allowed because the District Land Registrar has not yet determined the boundaries of the parcels in dispute. This being the case, this Court has no jurisdiction yet, by dint of section 18(2) of the *Land Registration Act*. (b) Let the Applicants raise any issues that they may have with the Land Registrar at forum taking place on 23rd August, 2023 and come to Court only when the Land Registrar has made a final decision.”

11. On review, Section 80 of the *Civil Procedure Act* provides that:-

“Any person who considers himself aggrieved— (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”



12. While Order 45 Rule 1 (1) of the Civil Procedure Rules stipulates thus:-

“Any person considering himself aggrieved— (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

13. In this instance, the Plaintiffs’ being aggrieved with the Order issued on 22nd August, 2023 seeks a review of the said Order insisting that there are two reports by the Land Registrar and Surveyor in respect to the suit land. In the case of National Bank of Kenya Ltd v. Ndungu Njau (Civil Appeal No.211 of 1996) the Court of Appeal held as follows:-

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should require no elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”

14. In the current scenario, the Plaintiffs’ have failed to demonstrate if there was any error apparent on the face of the record to warrant a review of the orders issued on 22nd August, 2023. It is trite that boundary disputes in the first instance should be dealt with by the Land Registrar and Surveyor, by dint of Sections 18 and 19 of the Land Registration Act. The Plaintiffs seem to have a challenge with the two offices exercising their mandate and by the Court directing them to let the Land Registrar deal with the issue of boundary disputes. I opine that there are defined procedures set out in case the Plaintiffs’ are aggrieved with the Land Registrar and Surveyor’s report which they need to adhere to. However, they cannot restrain the Land Registrar and Surveyor from implementing the findings of their reports on boundaries.

15. Based on the facts as presented while relying on the legal provisions I have quoted including the decision cited, I find that the Plaintiffs have failed to meet the threshold set for review and will decline to review the orders issued on 22nd August, 2023.

16. Further, in line with the principles established in the case of Giella v Cassman Brown as well as definition of a prima facie case as stated in the case of Mrao Ltd v First American Bank Limited, I find that the Plaintiffs have failed to establish a prima facie case as against the Defendants and will decline to grant orders of injunction as sought.

17. In the circumstances, I find the instant Notice of Motion Application unmerited and will dismiss it. Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 11TH DAY OF JUNE, 2024.

CHRISTINE OCHIENG



JUDGE

In the presence of:

Okeyo for Defendant/Respondent

Omakalwala for Plaintiffs/Applicants

Court Assistant – Simon/Ashley

