



M’kieri (Suing as the Legal Administrator of the Estate of the late Charles Kigeria alias Thibaru Ikiara M’kieri M’tarichia - Deceased) v Alaine & another (Environment and Land Miscellaneous Application E43 of 2022) [2023] KEELC 810 (KLR) (15 February 2023) (Ruling)

Neutral citation: [2023] KEELC 810 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E43 OF 2022
CK NZILI, J
FEBRUARY 15, 2023

BETWEEN

TERESIAH KABILU M’KIERI (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF THE LATE CHARLES KIGERIA ALIAS THIBARU IKIARA M’KIERI M’TARICHIA - DECEASED) APPLICANT

AND

CHARLES KABERIA ALAINE 1ST RESPONDENT
THE SUBCOUNTY SURVEYOR – MERU NORTH 2ND RESPONDENT

RULING

1. By an application dated 17.11.2022 the court is asked to:- grant leave to the applicant to appeal out of time against a ruling delivered by the trial court on July 20, 2022; to issue a temporary injunction suspending the 2nd respondent from conducting a survey to establish the boundaries and erect beacons over LR No’s. Njia/Cia-Mwendwa/7 and 194; to suspend the intended survey and for the OCS Kangeta Police Station to supervise the compliance of these order once granted.
2. In the supporting affidavit sworn by Teresiah Kabilu M’Kieri, she averred that she received a letter dated February 1, 2022 from the land survey or intending to visit the *locus in quo* and establish the boundaries out of court orders granted *ex parte* which the trial court declined to set aside by dismissing her application dated February 15, 2022.
3. The applicant averred that the 1st respondent had filed a Misc Application No 2 of 2019 seeking for the establishment of boundaries which was never served upon her. That the issue before the court was not actually a boundary dispute but attempts by the 1st respondent to illegally acquire her land which she has developed since 1978 and displace her from her land. That her preliminary objection was rejected yet parties ought to have litigated over the matter in a suit which the 1st respondent has not filed.



4. That unless the orders sought are granted, there will be travesty of justice an abuse of the court process and she shall be prejudiced.
5. The application was opposed by the 1st respondent through a replying affidavit sworn on December 1, 2022. The grounds are that; after he made discovery of an interference with the common boundary and encroachment, he lodged complaint with the Land Registrar Igembe who sent the 2nd respondent to visit the land on December 19, 2018 so as to re-establish the boundary but the applicant's children forcefully blocked the exercise.
6. That in the 2nd attempt visit the site on April 5, 2019, the applicant and her children forcefully stopped the exercise again.
7. That the he filed the matter before court which granted the orders for the scene visit on January 9, 2020. That all the parties were served with a notice for the scene visit only for the applicant to file an application dated January 9, 2020 seeking to suspend the exercise. The application was dismissed on June 2, 2021.
8. That afterwards another scene visit was slated for July 23, 2021. That similarly the same was stopped by the applicant. That the respondent filed an application dated November 19, 2020, where he sought for the OCPD Igembe Central Sub-county to provide security for the scene visit which orders were granted on January 12, 2022. That once again, the applicant filed an application dated February 15, 2022 seeking to stay the exercise to which the deponed opposed by a preliminary objection. That the court determined the application together with the preliminary objection on July 20., 2022 which ruling the applicant seeks for leave to appeal against.
9. With leave of court, parties were directed to file written submissions dated February 1, 2022 the 1st respondent submitted that the applicant has not met the requirements for an extension of time as stated in the case of *Nicholas Kiptoo Arap Korir Salat vs IEBC* (2014) eKLR, since there has been inordinate delay of four months which has not been explained.
10. Section 79 G and 95 of the *Civil Procedure Act* mandates the court with the power to extend time for the filing of an appeal.
11. In determining whether or not to extend time to file an appeal out of time, the court in *Nicholas Arap Korir salat vs IEBC (supra)* set the underlying principles that the court shall consider as:
 - a. Extension of time is not a right of a party, but an equitable remedy only available to a deserving party.
 - b. A party seeking for such discretion has the burden of laying a basis to the satisfaction of the court.
 - c. Whether or not to extend time is a consideration to be made on a case to case basis.
 - d. Where there is a delay, reasonable explanation has to be made to the satisfaction of the court.
 - e. Any prejudice to the opposite party must be considered.
 - f. Whether the application has been brought without undue delay.
 - g. The public interested should also be considered.
12. The order sought to be appealed against is the one dated July 20, 2022, in which the trial court was faced with a preliminary objection dated February 21, 2022 and the application dated February 15, 2022.



13. The twin issues determined were on jurisdiction to determine a boundary dispute and the *locus standi* of the interested party now the applicant in this application. The trial court determined that what was before it was a simple request for security during the exercise of statutory powers by the 2nd respondent. The trial court dismissed both the preliminary objection and the application, the latter for being *res judicata* to the application dated January 9, 2020, determined through a ruling dated June 2, 2021. The said ruling has not been attached to the affidavit in support of the application herein for the court's perusal.
14. Be that as it may, the main contention by the applicant is that she was condemned unheard by the impugned ruling and which effectively paved way for the 3rd respondent to visit the subject parcel of land reestablish the boundary and erect beacons. The applicant averred that if this happens, she will suffer irreparable damage and loss as the 1st respondent was abusing the court process to illegally acquire land she has been occupying and or possessing for long.
15. Further the applicant terms the process as a travesty of justice amounting to intermeddling with the estate of the deceased and done without a substantive suit under order 3 *civil procedure Rules*.
16. Section 18 (2) of the *Land Registration Act* provides that a court shall not entertain 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 this section.
17. The proviso to that section is that all boundaries are defined under Section 19 (3) and any determination of an uncertain boundary shall be done as stipulated in the *Survey Act* Cap 299 Laws of Kenya under section 19 to the *Land Registration Act*, the land surveyor is mandated to issue summons upon an application to the owners and occupiers of land adjourning the boundaries in question of the intention to ascertain and fix the boundaries and that after giving such notice and an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question and file a plan under Sections 20 thereof, every proprietor of land is obligated to maintain good order, the fences, hedges, stones, pillars, beacons, walls and other features that demarcate boundaries failure of which is guilty of a crime and liable to a fine not exceeding 200,000. Similarly, any interference with boundary features under Sections 21 thereof is also a criminal offence.
18. In the case of *Patrick Okefe vs Jonathan Savage* (2020) eKLR, the primary court had overruled //inter alia an objection that the court had no jurisdiction to entertain a suit over a boundary dispute. At the appeal the court held that the trial court was in order to overrule the preliminary objection since there was evidence that the land registrar had determined boundaries between the two blocks though not conclusively and therefore the provisions of Section 18 (2) *Land Registration Act* could not oust the court's jurisdiction.
19. In the case of *Mellen Mbera vs James Theuri Wambugu* (2020) eKLR, the appeal was that the primary court had failed to appreciate the provisions of section 18 of the *Land Registration Act*, since the applicant should have first sought a solution on the boundary dispute. The court rejected the ground since the same had not been raised at the trial court.
20. Similarly, in *Menkar Ltd vs Ratilal Ghela Samat Shah & 2 others* (2019) eKLR the trial court had been blamed for assuming jurisdiction contrary to Section 18(2) *Land Registration Act*.
21. A wall had been constructed along two adjoining parcels of land. The respondent had complained of an encroachment, trespass, tampering with beacons among other complaints. The court had made an order for the Land registrar to conduct a survey process to determine the boundaries and file a report. The court held that Section 18 (2) *Land Registration Act* and Section 13 of the *Environment and Land*



Act must be interpreted objectively to promote the rule of law and not to undermine it. The court cited *Amalgamated Society of Engineers vs Adelaide Steamship* (1920) 28 CLR 529, that the fundamental rule of interpretation is that a statute must be expounded according to the intent of parliament that made it by examining the language used as a whole. In an ordinary and natural sense of the language and to be obeyed as such even if it may be an inconvenience, impolitic or improbable.

22. The court found nothing wrong with the primary court having issued the order requesting the land registrar, as the custodian of the official records of land ownership to avail them in order to assist the court to decide on the boundary. The court held that under Article 159 2(d) of the [Constitution](#) was aimed at ensuring ends of justice are met.
23. Applying the foregoing reasons, the applicant takes the view that there was no substantive suit before the trial court in the first instance and that final orders were made without giving her a fair hearing.
24. Having looked at the respective responses herein, the history of the matter and the ruling sought to be appealed against out of time, the bottom line is that the trial court merely issued orders to facilitate the ends of justice to the parties so that the 2nd respondent could exercise its statutory mandate under Section 18 of the [Land Registration Act](#) and the [Survey Act](#).
25. It is only after a boundary dispute report is made that parties if aggrieved can file a substantive suit for the court's determination. No report has been made so far due to the antics of the applicant. The fear that once the survey visit occurs, that the 1st respondent will be given rights to occupy the applicants land are far fetched since there would be an opportunity to dispute the report and for the court to hear the dispute on merits. Similarly, the inordinate delay of four months has not been explained to the satisfaction of the court.
26. Drawing from the reasoning in the Nicholas Salat case (*supra*) my finding is that the application dated November 17, 2022, lacks merits. The same is dismissed with costs for avoidance of any doubt and in order for the ends of justice to be met, I direct that the scene visit to be undertaken within 2 months from the date hereof as earlier on directed by the trial court.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 15TH DAY OF FEBRUARY, 2023

In presence of:

C/A: Kananu

Miss Kiema for Kaberia for 1st respondent

Mr. Mwenda for Kieti for 1st respondent

