REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

ENVIRONMENT AND LAND COURT

HCCA NO. 15 OF 2015

STEPEHN WAKHU

JOHN MUYOBI ONDWASI ..... APPELLANTS

ABRAHAM ONDWASI

= VERSUS =

GEORGE ALFRED CHITUYI .....RESPONDENT

(An Appeal from the ruling & consequential orders dated 3rd December, 2014 of MARGARET WAMBANI Chief Magistrate at Busia in Busia Chief Magistrate Court Land Case No. 73 of 2007.)

R U L I N G

1. This appeal arose from the ruling of the lower court (Margaret Wambani, Chief Magistrate, Busia) in land case No. 73 of 2007. The ruling was delivered as a determination of an application dated 19/6/2014 filed by the Respondent in this appeal **– GEORGE ALFRED CHITUYI –** who is shown in the application as the Defendant/Applicant. The Appellants in this matter **– STEPHEN WAKHU, MUNYOBI ONDWASI and ABRAHAM ONDWASI –** are shown in the application as the Plaintiffs/Respondents.

2. In the application, the Respondent had sought only two prayers as follows:

> (a) That the honourable court be pleased to issue an order empowering the Busia District Land Surveyor and Registrar to mark the boundaries in respect of land parcel No. BUKHAYO/MALANGA/1414, 1415, 1416, 1417, 1418, 1419, 1420, 1421, 1422, 1423, 1424 and 1425 based on the acreage for each beneficiary as shown on mutation form held by the Land registry pursuant to Busia Land Registrar recommendation dated 28/8/2013.
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> (b) Costs of this application be provided for.

3. The Appellants opposed the application but in the ruling that issued, the application was allowed with costs to the Respondent. This appeal is actually a contestation of that outcome. There are three grounds of Appeal and they are as follows:

> 1) That the learned trial magistrate erred in law and fact when she delivered a ruling and/or issued an order which was contrary to the High Court order of 16/5/2003, in Busia High Court Misc. Application No. 11 of 1997.
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> 2) The learned trial magistrate erred in law and infact when she delivered a ruling and/or issued an order which was against the weight of evidence on record.
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> 3) The learned trial magistrate erred in law and fact when she in essence set aside and/or gave an order contrary to the order of 25/9/2007 in Busia Land Case No. 62 of 2007 against the known principles of law, and public policy.

4. The Appellants want this court to dismiss the application that was allowed by the lower court (prayer (a)) and condemn the Respondent (which is prayer (b)) to pay both the costs in the lower court and this appeal.

5. The appeal was canvassed by way of written submissions. The Appellants' submissions were filed on 26/3/2018. They submitted, *interalia*, that the disputants are all brothers whose father – the late Kefa Ondwasi – owned land parcel No. BUKHAYO/MALANGA/298. Before the death of the late Kefa, he subdivided the land among his sons showing each a specific portion. But a dispute is said to have arisen

concerning the boundaries shown by the deceased. The dispute gave rise to Busia HCC Misc. Application No. 11 of 1997. A consent entered into on 1/7/2003 was supposed to conclude the dispute.

6. In a nutshell, the consent was to the effect that the surveyor and the Land Registrar were to visit the land after prior notification to all the parties concerned. They were to proceed with official subdivision of the land and register the resultant parcels in accordance with the boundary features set by the deceased father of the parties. The exercise and preparations that followed in a bid to comply with the consent spawned other disputes because not everybody was satisfied.

7. At the core of the subsequent disputes is an alleged mutation form which the Respondent caused to be drawn apparently without involving all the parties. A survey seems to have been done which did not satisfy the Appellants because, according to them, it did not achieve compliance with the consent order entered into earlier. That survey seems to have been successfully contested vide land Case No. PMCC No. 62/2007 and an order was made requiring, *interalia*, **"That the District Land Surveyor to go and survey following the original boundaries planted by the late Kefa Ondwasi in presence of all the beneficiaries".** The earlier survey done was nullified because the Respondent herein, who had apparently initiated it, had not complied with the consent earlier on entered into by the parties.

8. The Respondent then filed the application under consideration in this appeal asking for an order for another survey using the same mutation form which, according to him, would be in accordance with the Land Registrar's recommendation in a report dated 28/8/2013. The lower court heard the application and allowed the application, in effect giving the order sought.

9. The Appellants have appealed because the mutation referred to in the order is essentially part of the survey exercise nullified earlier and because also the alleged Land Registrar's report dated 28/8/2013 did not endorse the use of the mutation form as alleged or implied by the Respondent.

10. But the trial court is also faulted for its apparent shortcomings in the manner it appreciated what was before it. It was pointed out that the trial court correctly pointed that an earlier order required that the survey to be done should follow the original boundaries shown by the late father of the parties. But the prayers sought in the application fundamentally negated compliance with that order because it endorsed the use of a mutation form which would lead to establishment of boundaries different from those shown by the late father of the parties. This in essence forms the basis of this appeal. The Appellants are of the view that the boundaries as shown by their late father can still be pointed out.

11. The Respondent filed his submissions on 2/5/2018. He accused the Respondents of being economical with truth. He submitted that of the eleven (11) beneficiaries of the estate of the late Kefa Ondwasi, only two paid the costs of the survey. That led to delay in the survey and the consent entered into earlier became overtaken by events because the court (Justice Sergon) heard the matter and delivered a ruling in which the Appellants' herein were the losers. All the other beneficiaries are said to have taken their title deeds. The third Appellant is also said to have taken his title deed.

12. The order that nullified the earlier survey exercise was faulted because it is a lower court order which purported to overrule a High Court decision. The High Court ruling by Sergon J was said to have finalised the issue. According to the Respondent the lower court order should be dismissed.

13. I have considered the appeal as filed, and the rival submissions brought by both sides. I have also had a look at the lower court proceedings relating to the application under focus. The Respondents submissions made reference to proceedings and ruling by the High Court (Sergon J) which seem to have neutered the consent upon which the Appellants seem to peg their hope for a resurvey. I am here referring to the consent that required that survey be done in accordance with the boundaries shown to the parties by their late father. That ruling and the proceedings giving rise to it are only mentioned in the submissions and I am not therefore able to authenticate their existence.

14. Another matter was also referred to – HCC No. 8/2008 – said to have been filed by the 1st Appellant against the Respondent in which the 1st Appellant is said to have lost. Again, this is only stated in the submissions and I cannot tell whether such proceedings exist.

15. In my view, that is the achilles heel in the Respondent's submissions. What is stated in his submissions is not verifiable from the record placed before me.

16. This kind of weakness is not manifested in the Appellants' submissions. I have had a look at the lower court ruling. The trial magistrate made her ruling and allowed the application in order to effect the decree then marked **"JO1".** That decree was as follows in the relevant part:

> (a) That George Alfred Chituyi did not follow the High Court ruling of the beneficiaries getting share of land as was planted on the ground, any activities (surveying) done on BUKHAYO/MALANGA/298 is null and void. This was a violation of the High Court ruling which is an offence.
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> (b) That the District Land Surveyor to go and survey following the original boundaries planted by the late Kefa Ondwasi in presence of all the beneficiaries.

17. I have already pointed out that at the core of this tussle is a mutation form which was evidently used in the survey carried out earlier and which limb (a) of the order/decree mentioned herein above nullified. Limb (b) of the same order/decree requires that a re-survey be done this time to follow the boundaries shown by the late father of the parties. It seems to me that the trial magistrate failed to appreciate that the order sought in the application before her required the use of the same mutation form that was used in the earlier rejected survey. It didn't dawn on her that use of that mutation form would not lead to establishment of boundaries earlier shown by the late father of the parties. Infact in all likelihood, use of that mutation form would produce the same results as those of the earlier nullified survey.

18. It is clear that the trial magistrate allowed the application intending to effect what the decree or order **("JO1")** meant to achieve but she

failed to appreciate that the order sought by the Respondent herein in that application could not achieve that end. Infact it could only produce the results of the earlier nullified survey. And I think that is why the Appellants appealed.

19. But the ruling of the lower court had another serious flaw namely: The trial magistrate accepted a mutation form used in an earlier survey already rejected. A mutation form is always an intrinsic part of any survey undertaken. Rejection of a survey therefore ipso facto means rejection of the mutation form. By allowing the application that sought use of the same mutation form, she was infact endorsing use of a document that was devoid of any legal validity.

20. The Respondent submitted that the order nullifying the survey was of no effect as there was a High Court ruling overriding it. Infact he asked that it be dismissed. This submission has its weakness. And the weakness is this: the order should have been challenged in the very proceedings in which it was made. The High Court ruling referred to should have been used in those proceedings to ensure dismissal of the order. It is an order that is still in force. It was availed here. The ruling said to override it was not availed. Infact this court does not know it. How then can it be invited to dismiss an availed order on the basis of a ruling that is not availed? But I would even venture to add that had the ruling even been availed, this appeal is not about dismissal of that order; it is about dismissal of the application allowed by the trial magistrate in the lower court.

21. In my view, the ruling of the trial magistrate set out to achieve the results that the order or decree that nullified the earlier survey and re-ordered another one set to achieve. But she failed to appreciate that the prayer sought in the application before her could not achieve those results.

22. But the order sought in the application allowed by the lower court had another problem. It seemed to suggest that the Land Registrar had recommended use of the impugned mutation form in a report dated 28/8/2013. I have read the report and it is clear to me that the Land Registrar made no such recommendation. In the report the Land Registrar is clearly shown reporting that the mutation form is disputed. The Respondent was therefore being less than honest to attribute to the Land Registrar something that he did not recommend. The prayer sought therefore rested on a false foundation and the trial court should have appreciated that in my view.

23. That is why the appeal filed by the Appellants must be found to have merits. It seeks to forestall an exercise that would probably produce results that are not satisfactory to them and/or other beneficiaries. I therefore allow the appeal. On the issue of costs, I am of the view that this is a delicate family matter. Let each side bear its own costs.

Dated, signed and delivered at Busia this 25th day of July, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

1st Appellant: Absent

2nd Appellant: Absent

3rd Appellant: Absent

Respondent: Absent

Counsel for the Appellants: Absent

Counsel for the Respondent: Present

Court Assistant: Nelson Odame