REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC APPEAL NO. 10 OF 2020

APOLLO OMUSULA MANYASI.....APPELLANT

VERSUS

KARIUKI KIRAGU .....RESPONDENT

J U D G M E N T

(Being an Appeal arising from the order and decision of Hon. J. King'ori – Chief Magistrate, Bungoma deliviered on the 14th July 2020 in Bungoma Chief Magistrate's Court, Environment And Land Court Case No. 4 of 2019)

1. APOLLO OMUSULA MANYASI (the Appellant) and **KARIUKI KIRAGU** (the Respondent) are neighbours. From the history of this dispute which goes back to the year 2003, it is high unlikely, however, that they borrow salt, sugar, cooking oil etc. from each other in the manner that our parents used to do many years ago. As children, we enjoyed running such borrowing errands for our parents. At times we would forget our briefs, decide to sleep – over and huddle around our neighbour's Television set to watch the **AUSTRALIAN SOAP OPERA *"NEIGHBOURS."*** In the process, we developed very strong and lasting bonds of friendship with our neighbours. Some of them would end up in marriages.

2. It is too late now to ask the parties herein to think about sleep – overs. However, they may consider watching ***"NEIGHBOURS"*** on **YOUTUBE** and while at it, pay some attention to the theme song which goes like this: -

> **"Neighbours. Everybody needs good neighbours. With a little understanding. You can find the perfect blend."**

3. The Appellant is the registered proprietor of the land parcel **NO EAST BUKUSU/SOUTH KANDUYI/8572** measuring 0.05 Hectares while the Respondent is the registered proprietor of the land parcel **NO EAST BUKUSU/SOUTH KANDUYI/8571** measuring 0.04 Hectares. By a plaint filed in **BUNGOMA CHIEF MAGISTRATE'S COURT** on 17th January 2019, the Appellant sought the following main relief in paragraph 10 thereof against the Respondent.

> **10: "The plaintiff's claim is for a permanent injunction restraining the defendant by himself or through his servants, agents and/or representatives from interfering with the peaceful use of the plaintiff's portion in the title herein and an order of rectification and restitution of common boundary that was destroyed by the defendant."**

The Appellant's case was that the Respondent had on several occasions and without any colour of right or justifiable cause continuously damaged, defaced or destroyed the common boundary between the two parcels of land thereby encroaching into his land and wasting it by extracting soil for making bricks. That this notwithstanding the fact that the Land Registrar had visited the scene severally and rectified the boundary by putting boundary markings and beacons which the Respondent had up – rooted.

4. The Respondent, then acting in person, filed a defence on 1st March 2019 denying that he had damaged or destroyed the common boundary and encroached into the Appellant's land as alleged. He added that having purchased his land from one **JOHN MUCHIRI MUTAHI** on 13th April 1996, the same was demarcated and a physical boundary installed after which he acquired the title thereto. He added that it is true that the Land Registrar and County Surveyor have since 2003 rectified the boundary and re – installed the beacons but it is the Appellant who is not satisfied and has been the cause of the disharmony. He denied having up – rooted the beacons and urged the Court to dismiss the Appellant's suit with costs for being baseless, ambiguous, a sham and frivolous.

5. The trial commenced on 14th July 2020 before **HON. J. KING'ORI (CHIEF MAGISTRATE)** but did not last long. The Appellant testified and said the following: -

"PW 1 states in Kiswahili

APOLLO OMUSULA MANYASI.

I live at KHAOYA VILLAGE. I am a farmer. I know the accused (sic). He is my neighbour. I have sued him in this matter and recorded my statement. This copy (shows). I pray that it be adopted alongside list of documents filed (adopted)

I am the owner of land parcel number EAST BUKUSU/ SOUTH KANDUYI/8572. This is the original title deed (shown). I produce a copy (exhibit).

The defendant's parcel is number EAST BUKUSU/SOUTH KANDUYI/8571. The boundary between the parcels has been visited by the Land Registrar several times."

At this point, the trial Magistrate took the view that this was a boundary dispute. He therefore declined jurisdiction and stated: -

"COURT

From the plaint and the last sentence in PW 1's evidence above, it is quite clear that this matter is boundary dispute between the plaintiff and the defendant who share a common boundary. Disputes are for the Land Registrar under the Act.

I therefore decline jurisdiction in this matter.

CM

14.7.2020."

That order provoked this appeal. In seeking to have it set aside, the Appellant has raised the following six (6) grounds of appeal: -

1. That the trial Magistrate erred in law and fact by suddenly declining to take the evidence of the Appellant who had already been sworn in for hearing of his case.

2. That the trial Magistrate erred in law and fact by suddenly declining to hear and take the evidence of the parties and their witnesses in this case on the basis that he had no jurisdiction to entertain the Appellant's case in which he sought an order that the Honourable Court do issue a permanent injunction against the Respondent restraining him by himself or through his servants, agents and/or representatives from interfering with the peaceful use of his land comprised in land reference number EAST BUKUSU/SOUTH KANDUYI/8572.

3. That the trial Magistrate erred in law and fact by suddenly declining to hear the Appellant's case and his witnesses in which the Appellant had sought an order of protection directing the District Surveyor and Land Registrar Bungoma to revisit the Appellant's and Respondent's titles comprised in land reference number EAST BUKUSU/SOUTH KANDUYI/8571 and 8572 for restitution and rectification of the damaged common boundary on the basis that he lacked the jurisdiction.

4. That the trial Magistrate erred in law and fact by suddenly declining to hear the Appellant's case which had already taken off and in which the Respondent had not raised any complaint on jurisdiction and admitted in his defence the jurisdiction of the said Court to hear and determine the said case.

5. That the trial Magistrate erred in law and fact and in the circumstances had jurisdiction to hear and determine the Appellant's case as provided in Article 159(d) and 160(1) of the Constitution in dispensing of justice.

6. That the trial Magistrate erred in law and fact when he was plainly wrong and biased in the interest of justice.

The Appellant therefore sought the following orders: -

a. The appeal be allowed and the orders made on 14th July 2020 be reviewed, set aside and this Honourable Court to make an order that the trial Magistrate had jurisdiction to hear the Appellant's case and the same should be listed for hearing before another Court of competent jurisdiction.

b. The Respondent to be condemned to pay the costs of this appeal.

c. Any other and further relief this Honourable Court deems fit and just to grant.

The appeal has been canvassed by way of written submissions. These have been filed by **MS CHUNGE** instructed by the firm of **ELIZABETH CHUNGE & COMPANY ADVOCATES** for the Appellant and by **MR ONYANDO** instructed by the firm of **ONYANDO & COMPANY ADVOCATES** for the Respondent.

6. I have considered the record of appeal and the submissions by Counsel.

7. Before I delve into the appeal itself, there are two important issues that I think I must address. The first one is the record of the proceedings before the trial Court.

8. There are some discrepancies between the handwritten proceedings as recorded by the trial Magistrate and the typed and certified copies. For example, in the handwritten proceedings, it is recorded thus: -

> **"PW 1 s/states in Kiswahili. My name is Apollo Omusula Manyasi. I live in Khaoya village. I am a farmer. I know the accused."**

The typed proceedings read: -

> **"PW 1 states in Kiswahili. Apollo Omusula Manyasi. I live in Khaoya village. I know the accused."**

Going by the typed proceedings, the Appellant was not sworn or affirmed before testifying. That would mean that should the handwritten proceedings get torn or defaced, the appellate Court, relying on the typed proceedings, would conclude that the Appellant was not sworn nor affirmed yet in the handwritten proceedings, it is indicated that he was infact sworn. The appellate Court would therefore be entitled to find that the Appellant's testimony is of no probative value because he was neither sworn nor affirmed. Such testimony will therefore be a mere statement. That could make a big difference between a good and bad case. Secondly, this being a civil case, there is no accused person.

9. No doubt judicial officers work under pressure. There are cause lists to go through, Judgments and rulings to be written in addition to other administrative duties and of course the Performance Management and Measurement Understanding **(PMMU)** targets to be met. Once in a while, there will be slips and omissions in our proceedings. We are all human. However, at the end of the day the record of proceedings is owned by the Judicial Officers and not by the typist. Perhaps we need to set aside a whole day just proof reading and certifying proceedings. Luckily in this case, the trial did not proceed beyond the short testimony of the Appellant which I have already captured above.

10. This appeal can, in my view, be determined on the basis of whether the trial Magistrate erred in law and fact by declining jurisdiction in the dispute before him. This is the thread that runs through all the grounds of this appeal. Jurisdiction is of course central in all judicial proceedings. It is trite law that without jurisdiction, a Court must down it's tools – **OWNERS OF MOTOR VEHICLE 'LILLIAN S' .V. CALTEX OIL KENYA LTD 1989 KLR 1**. Indeed, an issue of jurisdiction can even be raised by the Court on it's own motion. That is what the trial Magistrate did in the order subject of this appeal.

11. In making the finding that he had no jurisdiction in the dispute before him, the trial Magistrate stated that it was a boundary dispute. And although he did not cite the law, the trial Magistrate no doubt had in mind **Section 18(2)** of the **Land Registration Act** which reads: -

> **"The 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."** Emphasis mine.

It is clear from the above that **Section 18(2)** of the **Land Registration Act** was not meant to be a complete ouster of the jurisdiction of the Court in determining a dispute relating to the boundaries of registered land. The Court should only down it's tools in a case where the boundary has not yet been determined by the Land Registrar. Therefore, in a case where a party alleges that the other party has crossed or interfered with the boundary, essentially a claim in trespass, then it is the Court, rather than the Land Registrar, which is seized of jurisdiction.

12. To appreciate whether or not the trial Magistrate had jurisdiction to determine the dispute before him, this Court has to look at the pleading of the parties. This is because, it is those pleadings which determine the agenda of the Court. In paragraphs 6, 7, 9, 10 and 12 of the plaint, the Appellant pleaded as follows: -

> **6: "The plaintiff avers that the defendant on several occasions and for some time without any colour of right and justified (sic) cause against him continuously damaged or defaced or destroyed the common boundary between the two titles herein and encroached on his land where the defendant herein is wasting the same by making bricks from the soil extracted therefrom."**
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> **7: "The plaintiff avers that on the 27th May 2003, 3rd August 2006, 16th March 2007 and on 2nd August 2018 the Land Registrar visited the site and finally rectified the common boundary in question by putting boundary marking and beacons which were later on pulled out and uprooted by the defendant herein and has hence refused to come out/vacate the disputed portion."**
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> **9: "That it is the plaintiff's case that the act of the defendant of damaging defacing and or destroying the common boundary between the two titles and encroaching on the plaintiff's land and wasting the same by making bricks from the soil extracted therefrom ought to be stopped as the plaintiff owns the whole of the suit land."**
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> **10: "The plaintiff's claim is for a permanent injunction restraining the defendant by himself or through his servants, agents and or representatives from interfering with the peaceful use of the plaintiff's portion in the title herein and an order of rectification and restitution of the common boundary that was destroyed by the defendant."**
>
> **12: "This Court has jurisdiction to hear and determine this matter."**

And in response to those pleadings, the Respondent denied having up – rooted the beacons or interfered with the boundary. Most significantly, he pleaded in paragraphs 8 and 13 of his defence as follows: -

> **8 . "The defendant avers that it is true <u>the Land Registrar together with the County Land Surveyor</u> on several occasions <u>visited the two parcels since 2003, rectified boundaries, re – installed beacons</u> but because the plaintiff has all along bear unsatisfied with the said installation of the common boundary which has always been in favour of the defendant igniting him to destroy the said boundary."**

13 "Paragraph 12 of the plaint is admitted."

It is clear from the pleadings by both parties that the boundary between their neighbouring parcels of land has been rectified and re – installed several times by the Land Registrar since 2003. Indeed, among the documents filed by the Appellant in support of his case are notices summoning the parties to a determination of a boundary which notices were issued by the Land Registrar. There is also a letter dated 15th July 2020 addressed to the Appellant's Counsel asking him to seek the Court's assistance ***"<u>to survey and reinstate the boundaries</u>."*** The term re – instate is defined in **BLACK'S LAW DICTIONARY 10TH EDITION** as: -

> **"To place again in a former state or position; to restore …. "**

The same term is defined in the **CONCISE OXFORD ENGLISH DICTIONARY** as: -

> **"restore to a former position or state."**

You can only reinstate something if it was previously in that position and as both parties have pleaded, the boundary between their parcels of land have been rectified and re – installed severally. Essentially therefore, this was a case of trespass to land whereby the Appellant was complaining that the Respondent had damaged the existing boundary and encroached onto his land an allegation which the Respondent denied and instead pleaded that it is the Appellant who is un – happy with the boundary as installed. The Land Registrar is really functus officio and has discharged his responsibilities under the law. Indeed, he is listed as Appellant's witness number three (3) and the Surveyor as witness number four (4). Further, both parties admitted that the trial Court had the requisite jurisdiction to determine the dispute before it. The Respondent's Counsel has in his submissions relied on the case of **WILLIS OCHOLLA .V. MARY NDEGE 2016 eKLR** in support of the proposition that the trial Magistrate had no jurisdiction. That case does not aid the Respondent for two reasons. Firstly, in that case, the jurisdiction of the Court had been challenged through a Preliminary Objection. Secondly, in that case, there was only a recommendation that the ***"Land Registrar to visit the site and solve the boundary dispute."*** In this case, both parties concede that the trial Magistrate had the jurisdiction and further, they both confirmed that the boundary had been fixed. The finer details as to how and when the boundary had been fixed was obviously going to be the testimony of the Land Registrar and Surveyor who were listed as witnesses. The Case of **GEORGE KAMAU MACHARIA .V. DEXKA LTD 2019 eKLR** also cited by Counsel for the Respondent does not support his case either because a Preliminary Objection had been raised questioning the jurisdiction of the Court.

13. It is clear from the above that this was a claim of trespass to land whose boundaries had already been determined by the Land Registrar not once but on several occasions. The trial Magistrate was seized with the requisite jurisdiction to determine the dispute. He erred both in law and fact in declining jurisdiction to hear the case.

14. Not only did the trial Magistrate suddenly decline jurisdiction which he had, but he also failed to give reasons for that decision. It is a cardinal principle of law that any decision of a Court be it a Judgment or ruling must contain the reasons for such decision. This enables the parties to understand why the particular decision was arrived at so that any aggrieved party can decide whether there was any misdirection by the Court to warrant mounting an appeal against it. I have already referred to the decision made by the Magistrate when he declined jurisdiction. It is a brief order in which he simply said that from the plaint and the evidence of the Appellant, it was clear to him that this was a boundary dispute and therefore the preserve of the Land Registrar. That was hardly sufficient. Bearing in mind that fact that none of the parties had questioned his jurisdiction, it became necessary for the trial Magistrate to deliver a ruling with reasons as to why he believed he had no jurisdiction. This was important taking into account the fact that the issue of jurisdiction had been raised by the Court suo moto. It was therefore necessary for the parties to understand why the Court arrived at the decision which it did. That could only be done through reasons that would show the legal basis for the trial Magistrate's decision to decline jurisdiction. No reasons were given and that explains why the Appellant has assailed the trial Magistrate for having acted ***"suddenly."*** There is merit in that complaint because without reasons, a decision cannot stand scrutiny. The trial Magistrate therefore erred both in law and fact in that regard.

15. Ultimately therefore, I am satisfied that there is merit in this appeal. I accordingly allow it and make the following disposal orders: -

> **a. The appeal is allowed**
>
> **b. The orders made on 14th July 2020 are set aside and substituted with an order that the trial Magistrate had jurisdiction to hear and determine the dispute before him.**
>
> **c. As Hon J. KING'ORI – CHIEF MAGISTTRATE has since been transferred, the case be heard by HON GESORA – CHIEF MAGISTRATE.**
>
> **d. The Respondent shall meet the costs of this appeal.**

BOAZ N. OLAO.

J U D G E

16TH FEBRUARY, 2022

JUDGMENT DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 16TH DAY OF FEBRUARY 2022 BY WAY OF ELECTRONIC MAIL IN KEEPING WITH THE COVID – 19 PANDEMIC GUIDELINES AND WITH NOTICE TO THE PARTIES.

RIGHT OF APPEAL EXPLAINED.

BOAZ N. OLAO.

J U D G E

16TH FEBRUARY, 2022