



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL APPEAL NO. 133 OF 2008

SAMWEL NYAMOHANGA GISIWAWA APPELLANT

VERSUS

JAMES GATI NYANGI & ANOTHERRESPONDENT

JUDGMENT

(Being an appeal from the Ruling of the Resident Magistrate’s Court at Kehancha, Hon. J. R Ndururi in RMCC No. 45 of 2005 dated 7^h August 2008)

1. This appeal arises from the ruling and order of J. R Ndururi RM made on 7th August 2008 in **Kehancha RMCC No. 49 of 2005** (hereinafter “**the lower court**”). The appellant herein, Samuel Nyamohanga Gisiwawa (hereinafter referred to only as “the appellant”) sued the respondents herein, James Gati Nyangi and District Land Registrar, Kuria/Migori Districts (hereinafter referred to as “the respondents”) in the lower court seeking; a permanent injunction to restrain the 1st respondent from interfering with all that parcel of land known as LR No. Bukira/Bwisaboka/444 (hereinafter referred to as “Plot No. 444”) and a declaration that the demarcation of Plot No. 444 by the defendants was unlawful. The appellant also sought the costs of the suit.

2. In his plaint dated 19th August 2005, the appellant averred that he is the administrator of the estate of one, Gisiwawa Robi Manga who was one of the registered proprietors of Plot No. 444. The appellant averred that sometimes in the month of June 2005, the 1st respondent caused the 2nd respondent to visit Plot No. 444 and to proceed to demarcate the same for the purposes of allocating to the 1st respondent a portion thereof. It was the respondent’s contention that the acts that the respondents engaged in were illegal and that the same were carried out without jurisdiction with the intention of depriving the appellant of his ancestral land. It is on account of the foregoing that the appellant had sought the reliefs that I have set out hereinabove. The appellant’s suit in the lower court was defended by the 1st respondent only. In his statement of defence dated 8th September 2005, the 1st respondent contended that he is the registered proprietor of all that parcel of land known as LR No. Bukira/Bwisaboka/443 (hereinafter referred to as “Plot No. 443”) which shares a boundary with Plot No. 444.

3. The 1st respondent contended that there was a dispute over the boundary of Plot No. 443 and Plot No. 444 which dispute was caused by the appellant who had interfered with the boundary that was in place between the two parcels of land. The 1st respondent averred that with a view to have this dispute resolved, the 1st respondent lodged a complaint with the 2nd respondent against the appellant through which complaint he invited and asked the 2nd respondent to visit the two parcel of land and fix the

disputed boundary. The 1st respondent denied that the visit by the 2nd defendant to the site of the two parcels of land was aimed at allocating or giving to the 1st respondent a portion of Plot No. 444. The 1st respondent contended that the activities of the respondents that the appellant was complaining about were legal and did not in any way amount to interference with Plot No. 444.

4. From the record, the appellant's case in the lower court came up for hearing on 31st May 2006. For reasons which were not recorded, the learned resident magistrate M.K.K Serem, RM who heard the matter started the hearing with the defence case. The 1st and 2nd respondents herein gave evidence on that day and closed the defendant's case. The matter was thereafter adjourned to 5th June 2006 when the evidence of the appellant and his two witnesses was taken. After the appellant's second witness had completed his testimony, the court of its own motion ordered that the District Surveyor and Land Registrar Kuria/Migori Districts should visit Plot No. 443 and Plot No.444 for the purposes of ascertaining their boundaries after which they were to submit a detailed report to court on or before 30th June 2006. This order was made by M.K.K Serem RM. The District Land Registrar Migori/Kuria Districts and the District Surveyor filed their reports as had been ordered by the court. The two officers made a finding that the applicant had encroached on Plot No. 443 to the extent of approximately 2.65ha. (6.625 acres) and proceeded to mark the lawful boundaries of Plot No. 444 and Plot No. 443 with sisal plants.

5. The appellant applied to court to set aside the order that had directed the District Land Registrar Migori/Kuria Districts and the District Surveyor Kuria District to ascertain the boundaries of Plot No. 443 and 444. The appellant also sought orders to set aside the reports by the said officers. The appellant's application for the orders aforesaid were dismissed by J. R. Ndururi RM on 1st July 2008. On 24th July 2008, the reports that were filed by the District Land Registrar, Migori/Kuria and District Surveyor Kuria District were read to the parties by court. On the same day, the 1st respondent applied to court orally to have the said reports adopted as a judgment of the court. The appellant objected to the application on the ground that the two reports were prepared without his input in that he was not present when the two officers visited Plot No. 444 and Plot No. 443 to ascertain the boundaries of the same.

6. In a ruling delivered on 7th August 2008, J. R Ndururi RM overruled the appellant's objection and proceeded to adopt the said reports as a judgment of the court. A decree was thereafter issued on 10th September 2013. It is against this decision of J. R Ndururi RM made on 7th August 2008 that this appeal has been preferred. The appellant has raised five (5) grounds of appeal against the decision of the learned magistrate namely;

(i) That the learned trial magistrate erred in law and in fact in allowing the reports by the District Land Registrar and District Surveyor when the said reports were prepared in the appellant's absence.

(ii) The learned trial magistrate erred in law and in fact in not finding that the contents of the two reports were against the weight of evidence.

(iii) That the learned trial magistrate's decision was erroneous.

(iv) That the learned trial magistrate misapprehended and misunderstood the appellant's case and the evidence that was tendered by his witness.

(v) That the learned magistrate ignored the evidence that was tendered before him by the appellant and proceeded to enter judgment only on the basis of the reports by the District Land Registrar and District Surveyor.

7. When the appeal came up for directions on 19th November 2013, I directed that the same be heard by way of written submissions. The appellant filed his submissions on 3rd March 2014. The respondents did not file any submissions. I have considered the proceedings of the lower court, the ruling of J. R

Ndururi, RM made on 7th August 2008, the grounds of appeal filed herein by the appellant and the appellant's written submissions. I would consider the appellant's grounds of appeal together. As I have stated at the beginning of this judgment, the suit in the lower court was brought by the appellant. There was no counter-claim by any of the respondents. The appellant's complaint in the lower court was that the respondents had unlawfully entered Plot No. 444 and demarcated the same with a view to giving a portion thereof to the 1st respondent. The appellant sought a declaration that the purported demarcation of Plot No. 444 was unlawful and an injunction to restrain the 1st respondent from interfering with Plot No. 444.

8. The 1st respondent in his defence had contended that the alleged demarcation exercise on Plot No. 444 was lawful in that there was a boundary dispute between the appellant and the 1st respondent with respect to Plot No. 444 owned by the appellant and Plot No. 443 owned by the 1st respondent and that the 2nd respondent had been called upon to resolve the said dispute rather than to give the 1st respondent a portion of Plot No. 444. The appellant's suit in the lower court was heard by M.K.K Serem RM. He heard the appellant and his witnesses and the 1st respondent and his witnesses. After taking the evidence of both parties and their witnesses as aforesaid, M.K.K Serem RM of his own motion ordered the District Land Registrar, Migori/Kuria Districts and District Surveyor, Kuria District (hereinafter referred to only as "the land officers") to visit Plot No. 444 and Plot No. 443 and ascertain their boundaries. The land officers were further ordered to file their reports in court within a specified time. It is not clear to me under what provisions of the law the learned magistrate made this order. However the land officers did not submit their reports to court until 2 years later in April, 2008. When the reports were filed, the matter was placed before J. R Ndururi RM. I presume that M.K.K Serem RM who had heard the matter and had called for the report was no longer at the station.

9. From the proceedings on record, J. R Ndururi RM appears to have treated the two (2) reports by the land officers as arbitration awards. This can be seen from his decision to read the reports to the parties and subsequently on application by the 1st respondent to enter judgment in accordance with the terms of the said reports. I am in agreement with the appellant that the learned magistrate fell into grave error when he treated the said reports as arbitration awards and proceeded to enter judgment in accordance with the terms thereof and in the process excluded or failed to consider other evidence that had been tendered by the parties. As I have stated hereinabove, I do not know under what provision of the law the learned magistrate M.K.K Serem RM had called for the said reports at the stage when he did so.

10. At the material time, it was only under order 46 of the Civil Procedure Rules that the court could refer a matter to arbitration. Under that order, the reference could only be made on agreement by both parties and on application by the parties to the court. This is not what took place here. The parties herein neither agreed to refer the dispute that they had in the lower court to arbitration nor applied to the court to make an order of reference. The whole process was initiated by the court without prompting and without any reference to the parties. The product of the court's order could not therefore amount to an arbitration award under order 46 of the Civil Procedure rules on the basis of which a judgment could be entered. I am of the opinion that the court after taking the evidence from the parties and their witnesses should have proceeded to consider the said evidence in arriving at a just determination of the dispute between the parties.

11. It is my finding that there was no basis upon which the land officers reports aforesaid could have been adopted as a judgment of the court. The judgment entered by the learned magistrate on 7th August 2008 was therefore erroneous. I am in agreement with the appellant that the learned magistrate made an error in failing to consider his case and the evidence that he had tendered in proof thereof. In my view, the judgment that was rendered by the learned magistrate did not at all resolve the issues that were before him for determination namely, whether the entry into Plot No. 444 by the respondents in the year 2005 and the demarcation of the same with a view to curving out a portion thereof for the 1st respondent was lawful. The land officers' reports that were adopted by the learned magistrate as a judgment of the court did not all touch on this issue. The decree appearing at page 4 of the supplementary record of appeal leaves no doubt that the suit in the lower court was not determined.

12. For the foregoing reasons, I find merit in the appeal before me. The appellant's appeal is hereby allowed. The ruling of the learned magistrate J. R Ndururi RM made on 7th August 2008 and the decree that followed there from are hereby set aside. The Deputy Registrar is directed to return the court file for Kehancha RMCC No. 49 of 2005, Samwel Nyamohanga Gisiwawa –vs- James Gati Nyangi & Another that was brought to this court for the purpose of this appeal to Kehancha law court so that the parties herein can take directions on how to proceed with the said case which is part heard. The appellant shall have the costs of this appeal.

Delivered, signed and dated at KISII this 31st of October, 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Sagwe for the Appellant

N/A for the Respondents

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE