



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 819 OF 2013

ISABELLA WANJIRU MWANGI PLAINTIFF

VERSUS

KIAMA KANYINGI DEFENDANT

JUDGMENT

By her plaint filed herein on 3rd December 2013, the plaintiff who is the proprietor of land parcel No. KIINE/RUIRU/242 and which borders the defendant's parcel No. KIINE/RUIRU/260 sought orders that the defendant be ordered to allow the District Surveyor to measure and put boundary features between the two parcels of land. It is the plaintiff's pleadings that the two parcels of land do not have boundary features and the defendant has refused or neglected to co-operate or allow the District Surveyor to put in the features. That gave rise to this suit.

Though served with the plaint and summons herein on 3rd March 2014, the defendant did not enter appearance nor file defence and on 7th May 2014, interlocutory judgment was entered against him and the matter was listed for formal proof first on 3rd November 2014 when it did not proceed and then on 9th December 2014 when it proceeded for hearing. The record further shows that the firm of Igati Mwai Advocate entered appearance on behalf of the defendant and were represented on 3rd November 2014 when today's date was taken by consent.

The plaintiff who was quite advanced in age and, at my request, produced her Identity card showing her year of birth as 1940 testified that she is the proprietor of the parcel of land No. KIINE/RUIRU/242 which neighbours the defendant's parcel No. KIINE/RUIRU/260. She did not have any exhibits in Court but urged me to use the documents annexed to her plaint. She testified that she would want the boundary between her land and the defendant's land identified so that she can sub-divide her land among her children since her husband died.

Among the documents that were attached to her plaint is a copy of the certificate of search showing that she is the proprietor of parcel No. KIINE/RUIRU/242 and a copy of the proceedings conducted by the District Land Registrar Kirinyaga on 28th October 2013 regarding the boundary between the said two properties.

I have considered the plaintiff's un-contraverted evidence as well as the documents filed together with her plaint.

It is not in dispute that the plaintiff is the registered proprietor of land parcel No. KIINE/RUIRU/242 which neighbours the defendant's parcel No. KIINE/RUIRU/260. It is also clear from the proceedings before the District Land Registrar Kerugoya dated 28th October 2013 that the plaintiff and the defendant's

wife did appear before the said Registrar seeking to have the boundary between the two parcels of land established. After hearing the parties, the Land Registrar C.M. KIRONJI made the following ruling:-

“Since the claimant is claiming a portion of land, this office cannot be able to handle such a case because it is not within our jurisdiction”.

The claimant in the proceedings before the said Registrar was the plaintiff herein while the defendant was represented by his wife Wangari. It is not clear why the defendant was not personally present during those proceedings before the Registrar.

It is also not clear if the Registrar in the above proceedings proceeded under **Section 19 of the Land Registration Act** which empowers him to affix the boundaries after hearing all the parties named in the register. According to the ruling above, the plaintiff was claiming a portion of the land. I have looked at the statement that the plaintiff gave during the hearing before the Registrar. The record shows that she stated as follows during the proceedings:-

“My name is Isabela Wanjiru and I am the wife of late Mwangi Ngage. I filed succession in respect of land parcel number KIINE/RUIRU/242 with the aim of subdividing it among my children.

I applied for consent to subdivide the said land into three equal portions of one and half acres and consent was issued to me. I engaged a surveyor who came to do the subdivision and did not do the job. When I asked the reason why, I was told that the land was found to be small on the ground. It is then that I decided to register a boundary dispute in the Land Registrar’s office”.

On behalf of the defendant, his wife responded to the above by saying that she was not aware about any problem with the boundary. Before making the ruling aforesaid, the Registrar made the following comments:-

“The existing boundary is visible and is defined by the farming style and it does not have any marking features like mikungugu or kariaria etc.

Section 19 of the Land Registration Act empowers the Registrar upon application by any interested party, to ***“ascertain and fix boundaries”***. **Section 20** of the same Act also requires every proprietor to maintain in good order any fence, hedges stones, pillars, beacons, walls and other features that demarcate the boundaries. It is a criminal offence punishable with upto two (2) years imprisonment or a fine not exceeding Ksh. 200,000/= or both for anybody who removes or otherwise impairs any boundary feature or any part therefore – **Section 21 (1) of the Land Registration Act**. The law makes it mandatory for the Registrar to fix a boundary once an application is made to him. **Section 19 (2) of the Land Registration Act** reads as follows:-

“The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel” emphasis mine.

Similar provisions are found under the repealed **Registered Land Act** under which both land parcels subject of this case are registered. A boundary is not defined by ***“farming style”*** as the Registrar has indicated in his report. Clearly, the law imposes a duty on the Registrar to determine the boundary once an application is made. That is what the plaintiff sought when she went to the Registrar and that is what she seeks from this Court. She would like this Court to order the defendant to allow the District Surveyor to measure and put in the boundary features between the land parcel No. KIINE/RUIRU/242 and 260.

Upon hearing the plaintiff’s un-contraverted evidence, I am satisfied that she is entitled to the orders

sought in her plaint. I accordingly enter judgment for her as prayed with no order as to costs.

B.N. OLAO

JUDGE

19TH DECEMBER, 2014

19/12/2014

Before

B.N. Olao – Judge

Mwangi – CC

Plaintiff – present

Defendant – absent

COURT: judgment delivered in open Court this 19th day of December, 2014

Plaintiff present

Defendant absent

Right of appeal explained.

B.N. OLAO

JUDGE

19TH DECEMBER, 2014