



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 622 of 2007

CECILIA WANJIRU KIMWERE. APPLICANT

VERSUS

THE HON. THE ATTORNEY GENERAL. 1ST RESPONDENT

JOHN GATHARA WACHUKA. 2ND RESPONDENT

R U L I N G

This appeal dated 19th June, 2007 was filed in June 2007. The grounds of appeal include one seeking a resurvey of boundaries between L.R. No. Dagoretti/Riruta 2437 and L.R. No. Dagoretti/Riruta/2438. A boundary dispute had been heard by the Nairobi District Land Registrar who then on 26th June, 2002 determined the boundary between the above two parcels of land. The said determination provoked an appeal to this court against the Attorney-General who had been made the Respondent because the determination of the boundary was determined by the District Land Registrar, a public officer.

On 11th June, 2010, the Attorney General and the Appellant herein, filed and entered a consent order allowing a resurvey and where necessary a refixing of the boundaries between the two parcels of land because both parties conceded that the boundary was firstly, based on wrongly drawn plans or secondly, the mutation plans upon which the boundary was to be based had not received the consent of the owners of both pieces of land.

Then by a Notice of Motion dated 8th February, 2011 this application now before the court was filed. It seeks: -

a) That a resurvey be carried out in the presence of all interested parties, to determine the boundary between L.R. No. Dagoretti/Riruta/2437 and 2438.

b) That the survey be done vertically and not horizontally as was earlier done by the Land Registrar.

The Respondents put in their replying affidavits and later their written submissions. They also appeared and presented their cases orally.

I have perused the materials presented by both sides. It is clear that both sides seek that a fresh survey be done because the last District Land Registrar's and the Surveyor's determination of the present boundary, is conceded to be gravely erroneous and unfair. While there was a feeling by one side that the mutation form plan drawn by the surveyor was drawn without the consent of both parties, there was on the other hand, a demand that the boundary be drawn vertically across the land to give both sides a direct wider full

front access to the main road.

I also note from the facts and material on record that the pending appeal will automatically be resolved if there is a fair and just resolution of this application.

In my opinion, based on the material on record from both sides, and in view of the fact that both parcels of land came into being by an earlier subdivision of L.R. No. Dagoretti/Riruta/1185, a subdivision which would be fair and just, would be one that results into both beneficiaries of the subdivision ending with an equal or sufficiently broad access to the common main road instead of using more land to create a side road out of Muthiora Road to serve the two parcels of land. Such vertical subdivision will also almost equally present a similar frontage to both parcels of land on the opposite lower side of the land.

I have on the other hand, observed that the mutation (exhibit 13) was not consented to nor signed by both disputing parties to give the surveyor the power to fix an horizontal instead of a vertical boundary. Nor did both the Land Registrar and Surveyor give reason why they adopted an horizontal division when it was clear, even to both sides that it would not result to a fair or just division. It is no wonder, therefore, that the subdivision plan ended up with a result which was not acceptable to either side who then sought a resurvey under this appeal and application.

The Appellant at one stage earlier, expressed the view that this application seeking a resurvey of the boundary vertically, instead of horizontally was originally done, should not be allowed by this court. And yet the Appellant at the same time concedes in these arguments that the issue which originally as referred to the District Land Registrar was the issue of fixing a boundary between the two parcels of land in accordance with a mutation map and subdivision map which later were allegedly not followed by the surveyor resulting to this appeal.

It is however, the view of this court, that the fixing of a land boundary under Section 21-22 of the Registered Land Act, Cap 300 of the laws of Kenya is appealable to this court. It is the further view of this court that where such appeal has been preferred, as this one was, this court has jurisdiction to make any orders that are just and fair to resolve the issues that are the basis of the dispute between the parties. A suggestion by the Appellant that this court lacks jurisdiction to make orders that can alter a boundary from being horizontal to being vertical, is not correct and is hereby rejected.

The end result accordingly, is that there will be a resurvey of the boundary which is hereby ordered to be vertical to give both pieces of land equal frontage (access) both to the main road on the upper side and to the river on the lower side. Orders accordingly.

Dated and delivered at Nairobi this 8th day of March 2013.

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JUDGE