



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI**

Civil Appeal 19 of 2008

**ROBINSON MWANGI NJUGUNA.....APPELLANT
Versus
NELSON GACHIHI GICHIMU.....RESPONDENT**

***(From original judgment of the Senior Resident Magistrate's Court
at Kigumo in SRMCC. No.24 of 2005 by S.M. MOKUA – SRM)***

J U D G M E N T

By way of plaint dated 14th February, 2005 and filed in the Senior Resident Magistrate's Court at Kigumo on 11th March, 2005 Nelson Gachihi Gichimu hereinafter referred to as "*the respondent*" sought as against Robinson Mwangi Njuguna, hereinafter referred to as "*the appellant*", the following orders:-

"(a) That land parcel No.LOC.2/GACHARAGE/3 be partitioned in relation to road No.E519 so that plaintiff gets 105.3 meters (sic) and defendant to get 131.7 meters (sic) of the side adjacent to the road.
(b) The executive officer to sign all documents to effect the partitioning in case defendant defaults to do so.

(c) Costs of the suit.

(d) Any other or better relief the Honourable Court deems fit to grant.

The undisputed facts of the case were that the appellant and respondent are joint owners of land parcel Loc.2/Gacharage/3 hereinafter referred to as "*the suit premises*". They own the same in the ratio of 5/9 and 4/9 respectively. They decided to have the suit premises subdivided so that each may have his own portion separately registered in his name. For that purpose they applied for the consent to the transaction from Kigumo land control board which consent was duly given. Soon thereafter differences arose among them. That difference eventually triggered this suit. The difference was how the layout on the ground for each person's portion was to be. They both approached a surveyor who surveyed the suit premises and filled mutation forms and drew a sketch awarding portion A to the respondent and portion B to the appellant. The two portions had their frontage facing the main road. The respondent was happy with that decision. However the appellant was not. He wished to have the whole of his portion fronting the main road and the respondent's portion to face a proposed road of access to be erected.

The learned magistrate having carefully analysed and evaluated the evidence tendered and on record concluded thus:

"In a nutshell the plaintiff has proved his case on a balance of probability. That is the parties should have frontage on the main road and the proportion of what each is entitled to. The mutation that the defence tendered to rely on was challenged and on a balance of probability it cannot be said to be a basis for partitioning the land herein. The plaintiff had legitimate reasons of disagreeing with the defendant's arrangement. Therefore the defence and counter claim by the defendant is dismissed with costs. The plaintiff's suit is allowed with costs."

The appellant was dissatisfied with the said judgment and decree and hence preferred this appeal

through Messrs S.K. Njuguna & Co. Advocates. He advanced 5 grounds of appeal to wit:

1. That the learned Senior Resident Magistrate misdirected himself when he stated that the issue was “*whether the plaintiff should have his frontage on the market access road or the main road*”.
2. That the learned Senior Resident Magistrate erred in law when he made a finding that the mutation executed by the parties could not be the basis for partitioning the land therein.
3. That the learned Senior Resident Magistrate erred in fact in failing to appreciate that when both parties signed page 2 of the mutation form that is the form they wanted their respective portions to appear on the grounds.
4. That the learned Senior Resident Magistrate erred in law and in fact in failing to order that the subdivision of the disputed piece of land be conducted in accordance with and as near as possible to, the parties wishes as shown in the mutation form executed by both parties herein.
5. That the learned Senior Resident Magistrate erred in fact in by failing to consider that DW2 did not follow the instructions on the mutation forms signed by both parties who were the registered owner of the piece of land to be sub-divided, as he was obliged to give effect to and to subdivide the piece of land as per the signed mutation form.

When the appeal came up for hearing on 28th September, 2009, Mr. Njuguna and Mr. Kingori holding brief for Mr. Gacheru, learned counsel agreed to canvass the appeal by way of written submissions. Those submissions were subsequently filed and exchanged. I have carefully read and considered them.

As a first appellate court, I am required to subject the evidence tendered to fresh and exhaustive evaluation so as to reach my own decision as to whether the decision of the trial court can stand the test of time.

The only issue in contention during the hearing of the dispute in the trial court was the portion of the main road that each should have. Whereas the appellant wanted the subdivision of his portion to be fronted by the main road entirely, the respondent on the other hand wanted each one of them to have a portion of the main road as well as a road of access proposed. However each one of them would remain on the side of the suit premises he had been occupying since they bought the land in the 1970's.

There is undisputed and unchallenged evidence that both parties appeared before the District Surveyor and paid subdivision fees. Whereupon mutation form on how the suit premises was to be subdivided was drawn and both signed it. The respondent however contended that there was no line in the mutation form showing how the suit premises was to be subdivided. The appellant and surveyor (DW2) on the other hand testified that indeed there was such a line. Surely, it cannot be a valid mutation form without a line showing the position of the portions of land which were to result after the subdivision. That is the essence of mutation form and or survey. As correctly submitted by Mr. Njuguna, the respondent was not telling the truth when he claimed that there was no line when he signed the mutation form. What is the essence of a mutation form? According to *section 19(1)* of the Registered Land Act, mutation form are written instructions of the Registrar to the surveyor instructing him to correct the line or position of any boundary with the agreement of both parties. Such agreement is evidenced by both parties signing the form. It is at this stage that the surveyor draws a sketch that shows the general form of the agreed boundary. By signing the mutation form therefore, the parties herein confirmed that they had no quarrel with the form of partitioning and the positioning of the boundary as proposed by the Land Registrar. Accordingly both parties were bound by that decision. None of them can be allowed to resile from it now. In my judgment the learned magistrate erred when he held that “the mutation that the defence tendered to rely on was challenged and on balance of probability it cannot be said to be a basis for partitioning the land herein...” Parties had signed the mutation form that had been drawn by the District Surveyor and the Land Registrar had countersigned the mutation form and marked on it that the parties had agreed “to partition the parcel as shown in the sketch below.” The said sketch shows a line separating the appellant's intended portion from the respondents.

The respondent in his evidence testified that “...the surveyor may have prepared the mutation form... I remember the mutation form I signed did not have a line showing the sharing...” By this statement, I do not think that the respondent comes out as a candid witness. There is no doubt at all that

the respondent and appellant appeared before the Land Registrar and the surveyor. There is also no doubt at all that they both endorsed the mutation by signing. There would have been no reason for the surveyor to subsequently include a line in the mutation form that the respondent was not aware of. To what benefit would the surveyor have undertaken such an exercise? I cannot think of any. The surveyor (DW2) in his evidence stated that both parties appended their signatures in the presence of the Land Registrar. This was an independent witness. As correctly stated by the learned magistrate, this witness “had the benefit of going to the suit land and for that reason his evidence is quite crucial and being a technical man in that filed (matters pertaining to land), I take his evidence to be of great value for a fair determination herein....” Having so held then why did the learned magistrate again make a quick about turn and hold that the mutation cannot be said to be a basis for partitioning the land herein? I cannot fathom the reason(s).

For the above reasons I would allow the appeal. The judgment and decree of the lower court is set aside. In substitution thereof I make an order dismissing the respondent’s suit and at the same time enter judgment in favour of the appellant on the counterclaim. I make no order as to costs in this appeal as well as the suit in the trial court and on the counterclaim in view of the special relationship between the parties herein with regard to the suit premises.

Dated and delivered at Nyeri this 21st day of January, 2010.

M.S.A. MAKHANDIA
JUDGE