REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

Civil Appeal 113 of 2007

SAMWEL ONGERI ONTIRI ………………APPELLANT

VERSUS

THE CHAIRMAN B.O.G. NYATIEKO SEC. SCHOOL

THE SECRETARY B.O.G. NYATIEKO SEC. SCHOOL.

THE CHAIRMAN GETWANYANSI

PRIMARY SCHOOL…………………………………RESPONDENTS

JUDGMENT

(Being an appeal from the ruling and order of S.R.Wewa, RM, on 1st September, 2006 in original Kisii CMCC No. 199 of 2003).

In a suit commenced by way of a plaint dated 4th March, 2003 and filed in the chief magistrates court at Kisii, the appellant then as a plaintiff sought against the respondents then as defendants an order of eviction and in the alternative that, he be paid by way of compensation the market value of a portion of his land known as **Central Kitutu/Mwamanwa/520**, hereinafter “***the suit premises***”. The appellant had in the same breath sought a permanent injunction restraining the respondents, their agents, servants, employees and or personal representatives from entering, cultivating, occupying and or in any way interfering with the suit premises.

The suit was informed by the fact that the 3rd respondent who was the registered proprietor of the adjourning parcel of land known as **Central Kitutu/Mwamanwa/1026** had invited the 1st and 2nd respondents to occupy a portion of the same. In the year 1980, the respondents however trespassed and unlawfully or illegally entered into the appellant’s suit premises aforesaid and acquired two and half acres of the same. Since then they had continued to illegally encroach on, enlarge, extend and with impunity occupy the appellant’s suit premises aforesaid. Accordingly, his use, occupation and enjoyment of the entire suit premises had been encumbered and obstructed by the respondents’ trespass and occupation thereof. Despite demand and Notice of Intention to sue having been duly made, the respondents had neglected, failed and or refused to respect the appellant’s claim, hence making this suit inevitable.

The appellant’s suit was met with a joint defence by the respondent dated 27th March, 2003 and filed in court on 28th March, 2003.

They denied trespassing on or illegally occupying part of the suit premises belonging to the appellant as claimed or at all. They went on to aver that the land in their occupation being **Central Kitutu/Mwamanwa/1026** is separated from the suit premises by a road. In the alternative they pleaded that they had right to the same by prescription. They also averred that the suit was time barred by virtue of the Public Authorities Limitation Act. Finally, they pleaded that the suit did not lie against them for want of compliance with section 13A of the Government proceedings Act.

However before the suit could be heard interpartes and or merit, the parties agreed on a consent dated 10th February, 2006. It was in terms:- "…..***Upon hearing counsel for both parties it is hereby ordered by consent of both parties that both parties do appoint surveyors to visit the suit land and file their report within 30 days. The case to be mentioned on 23rd February, 2006"***. This consent order was duly acted upon. The appellant appointed Geomatic Services whereas the respondent were represented by the District surveyor. By a letter dated 26th January, 2006 addressed to court and copied to the parties, the District surveyor, Kisii/Gucha Districts forwarded his report to the court. It was a joint report as it was signed by the District surveyor, Geomatic Services and Gusii county Council surveyor. In the main the report was in these terms;-

1. ***Parcel No. 520 belongs to Samwel Ongeri Ontiri-see official search attached.***
2. ***Parcel No. 1026 is owned by Gusii county council but possessed by Nyatieko Primary and Secondary schools***
3. ***Parcel Numbers 520 and 1026 are separated on the map C.Kitutu/Mwamanwa/sheet No. 5 by a 6 meter road as per the time of land adjudication. Sometime later in the 1980s this road of access was shifted slightly to the East by 14 meters on the southern end of parcel number 1026 and went straight to the old road junction and straight on to the new road passing below parcel number 1026.***
4. ***The effect of the shift in (3) above is such that an acreage of 0.09ha belonging to parcel number 520 is encompassed between the old road and the new road herein shaded in green ink. Out of which the secondary school uses 0.04ha which is above a proposed road which leads into the primary school.***
5. ***Mzee Samwel Ongeri ontiri is claiming 1.37ha(3.4ares) of land which according to the map used belongs to the school compound herein marked red. There is a homestead on part of the claimed land which is approximately 0.075ha.***
6. ***The school hall through which Mr. Ongeri claims the road of access which separates his parcel and the school parcel is 72m from the said road.(See map attached).***

Following the filing of the report, the respondents by an application dated 28th June, 2006 and filed in court the following day, sought to have the court enter judgment according to the "**award**" by the District surveyor and adopted by court on 26th April, 2006. That application was resisted by the appellant on the grounds that there was no award capable of being adopted as a judgment of the court since there were no arbitration proceedings. In a ruling delivered on 1st September, 2006, the learned magistrate held thus;

"On the 26th April, 2006 following the consent dated 10th February, 2006 the award was adopted by the court.

I do had (sic) that a consent arode(sic) has a contradiction(sic) effect and can only be set aside. On those grounds which would justify the setting aside of a contract.

Unless the conduct of parties can be ground (sic) to have been fraudulent a (sic) mistaken or one which would be annulled on the ground of misrepresentative (sic) the compromise between him and the opponent must remain in place.

The respondent's assertion that there is no award to be adopted since the measurements were done in the absence of the parties is actually his own in house matter since the parties did appoint the surveyor (sic) of their choice whose signature is appended on the findings. There is nothing which renders the signature invalid. I do allow the application with costs to the applicant".

It is this ruling that riggered this appeal. In an 8 point memorandum of appeal filed in this court through **Messrs Maroro & Omariba Associates**, the appellant faulted the said ruling on the grounds that:-

1. ***The learned magistrate erred in law in failing to take into account the fact that she did not have jurisdiction to hear and determine the matter in the first place.***

2. ***The learned magistrate misdirected herself and erred in law when she adopted the District Surveyor's report as the judgment of the court, without taking into account the submissions by the plaintiff's counsel.***

3. ***The learned magistrate misdirected her mind and erred in law and in fact in failing to appreciate that the consent order that was the basis of the appointment of surveyors and their resultant report was merely to guide the court and parties and on the direction that their suit would take and not a final verdict of the court.***

4. ***The learned magistrate erred in law in adopting the District surveyor's report as the judgment of the court not withstanding the issues raised by the appellant to the effect that the purported arbitration by the said surveyors was done in total disregard to the principles of natural justice in that the appellant was not accorded an opportunity to be heard.***

5. ***The learned magistrate erred in law and fact by failing to address herself to the issue of whether or not the survey was done properly over the suit parcels.***

6. ***The learned magistrate erred both in law and in fact in adopting as a judgment of the court the District Surveyor's Report without according an opportunity to the parties to confirm whether the same reflected the actual potion on the ground.***

7. ***The learned magistrate erred both in law and infact by granting orders, which were never sought by any of the parties.***

8. ***The learned magistrate erred in law and in fact in not taking into account the fact that the acreage of the suit parcel numbers Central Kitutu/Mwamanwa/1026 and 520 were never determined by the said surveyor's Report, hence making it difficult to know whether or not there is a party guilt of trespass upon the other's parcel.***

When the appeal came up for hearing before me on 3rd May, 2010, the respondents were absent though the appellant was present. Being satisfied that the respondents had been served with the hearing Notice of the appeal in good time going by the affidavit of service on record, I allowed the appellant to prosecute the appeal, the absence of the respondents notwithstanding. **Mr. Maroro**, learned counsel for the appellant chose to prosecute the appeal by way of written submissions. I have since read and considered them albeit carefully.

The issue for determination in this appeal and which ought also to have been the issue in the subordinate court with regard to the application dated 28th June, 2006 was whether the surveyor's report and not "***award***" as stated in the said application was capable of being adopted as a judgment of the court. In my view the surveyor's report could only have been an award capable of being adopted as

a judgment of the court if it was as a result of arbitration proceedings under order XLV of the Civil Procedure rules. Much as the application for the adoption of the report as a judgment of the court was expressed to have been brought under order XLV 17(1) and (2) of the Civil procedure rules, these provisions of the law were wrongly invoked as there were no arbitral proceedings as known in law. The provisions cited in support of the application contemplates arbitration proceedings where parties themselves appoint an arbitrator or the court does the appointing on its own motion. In this case the consent order is very clear. Neither the District surveyor nor Geomatic services were appointed as joint arbitrators. It would appear that their appointment and brief was purely to visit the suit premises and make some findings on the ground that would later inform the court's subsequent decision. In other words these surveyors were to give their professional advice and or findings to enable the parties and the court to know how to proceed with the case thereafter. Indeed a careful reading of the report merely shows the observations made by the the surveyors when they visited the suit premises. It cannot by any stretch of imagination therefore pass for an award. To my mind an award makes a definitive finding and is in the nature of a judgment where issues are identified, a decision is made on the same and reasons given for such decision(s). The report of the surveyors falls far too short of that expectation and therefore was incapable of being adopted as a judgment of the court.

Further even if we were to assume that indeed the report was an award, it would be illegal and incapable of being acted upon as a stranger was involved and indeed apprended his signature to the same. That stranger was also one, **Robert**, Gusii county council surveyor. The consent order appointing the surveyors made no reference at all to and indeed did not include any surveyor from Gusii county Council as a joint co-surveyor with the District Surveyor and Geomatic Services.

In any event, arbitration proceedings involve parties being heard on their evidence. In other words before an award is made, both parties to the dispute must be accorded a hearing. From the record, it is quite apparent that the surveyors did not receive any evidence on the issue in dispute. An award is a finding or decision made following informal proceedings with regard to the dispute between the parties. This being the case, it is necessary that parties to the disputes not only participate in the proceedings but also be accorded a hearing. This did not happen in the instant case. In effect therefore there were no arbitration proceedings and if there were, then they were a sham and at best compromised as correctly submitted by counsel for the appellant.

In my view it was wrong for the learned magistrate to have acceded to the request of the respondents to adopt the report as a judgment. That report should merely have formed part of the evidence since it did not resolve or completely adjudicate on the issue in controversy. The prayers in the plaintiff included an order for eviction, alternatively that the respondents be ordered to pay the appellants the market value of the land allegedly in their occupation. Finally there was the prayer for a permanent injunction. The report by the surveyors and which was adopted by the learned magistrate as a judgment of the court did not at all address all or any of the above issues. So that even with the adoption of the report those issues remain unresolved. As it is now it is not clear whether there is encroachment and if so by whom. If the parties intended to have the surveyors' report as a final judgment of the court, they could have expressly indicated so and made an elaborate consent order encompassing all the aforesaid issues. The appellant's suit was clearly not heard on merits.

The foregoing notwithstanding, is the resultant decree capable of enforcement and or execution? I do not think so. I have looked at the decree extracted in the original record of the trial court. It is a replica of the District surveyor's report. Such a decree is incapable of execution. Parties expect when they come to court to have a trial and hereafter an order or decree that they can leave with. This is not the case here. This is a decree in vain. Courts do not issue orders and or decrees in vain.

Finally and as correctly submitted by **Mr. Maroro**, the appellant had sought as against the respondents prayers set out in the plaint. The adoption of the report in effect granted the respondents the suit premises which order they had not sought in their pleadings. One would expect that the best legal option that the learned magistrate should have taken was dismiss the entire suit with costs if she was minded to find that the appellant's suit had not been proved to the required standard, but not to grant to the respondents what they had not asked for.

In the result I allow the appeal and set aside the ruling delivered on 1st September, 2006 with all the consequential orders and substitute therefor with an order dismissing the application with costs. I further make the order that the suit proceeds to hearing on merit before any magistrate of competent jurisdiction other than S.R.Wewa who presided over the initial trial. The appellant shall have the costs of this appeal too.

JUDGMENT Dated, Signed and Delivered at Kisii this 30th June, 2010.

ASIKE-MAKHANDIA

JUDGE.