



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**OF KISII**

**Civil Appeal 44 of 2007**

**CHRISTOPHER ODHIAMBO RUSANA ..... APPELLANT**

**VERSUS**

**NATIONAL CEREALS AND PRODUCE BOARD ..... RESPONDENT**

**JUDGMENT**

The appellant filed a suit against the respondent before the Senior Principal Magistrate's court at Migori, hereinafter referred to as the "trial court."

In his plaint, the appellant stated that he is the registered proprietor of a parcel of land known as **Suna East/Wasweta I/12371** whereas the respondent is the registered proprietor of a parcel of land next to his and known as **Suna East/Wasweta I/702**. The appellant alleged that he purchased his parcel land in 1999 and was duly registered as the proprietor thereof on 25<sup>th</sup> June, 2001. According to his title deeds the land measures 1.29 hectares. Sometimes before the year 1999, the respondent fenced its parcel of land using concrete poles and chainlink wire and thereafter erected therein four residential quarters. Sometimes after acquisition of his parcel of land, the appellant realized that the respondent had encroached onto his land. On 21<sup>st</sup> February, 2005 the District Surveyor and the District Land Registrar visited the land and inspected the boundaries and prepared a report which showed that the respondent had encroached onto the appellant's land by approximately 0.20 of a hectare. The appellant requested the respondent to rectify the boundary but the latter refused to do so. The appellant urged the trial court to make a declaration that he was entitled to the portion measuring 0.20 hectares as aforesaid and further order the respondent to rectify the boundary. In the alternative, the appellant prayed for an eviction order against the respondent from the portion of his land as aforesaid. The appellant also prayed for mesne profits at the rate of Kshs. 20,000/= per month from 22<sup>nd</sup> February, 2005 until the date of vacation.

The respondent filed the statement of defence and denied that it had encroached onto the appellant's parcel of

land as alleged. The respondent also denied that the trial court had jurisdiction to handle the appellant's claim as it was founded on trespass to land.

During the hearing, the appellant testified that he was one of the tenants in the respondent's houses, paying a monthly rent of Kshs. 4000/=. When he wanted to develop his parcel of land he contacted a surveyor to demarcate the boundary between the two parcels of land and that is when he discovered that the respondent had trespassed onto his land. He alleged that the house he was occupying was on his land. He called the area District Land Registrar and Surveyor, PW1 and PW2 respectively. The two witnesses produced a report dated 21<sup>st</sup> February 2005 which showed that the respondent had encroached onto his land by approximately 0.20 hectares.

The respondent called one **Patrick M. Karanja, DW1**, a Senior Legal Officer in its employment. He testified that sometimes in 2004 the respondent received a letter from the appellant's advocates demanding that the respondent vacates the disputed parcel of land. The respondent denied the appellant's allegation. DW1 further stated that the respondent's parcel of land was allocated to it in 1973 by the local town council and the same was fenced thereafter and a title deed issued in 1989. The land measures 1.8 hectares. The witness further stated that PW2 and PW3 conducted the survey exercise aforesaid in the absence of the respondent's representative.

The respondent also called one **Stephen Odongo Ambani, DW2**, a Land Surveyor. He was at the time practicing in Nairobi with Highland Surveyors. He told the court that determination of boundaries through Physical Index Diagrams (PID) is cheap but not always accurate and a more accurate method is by taking aerial photographs. The witness further stated that the respondent engaged their company to survey its parcel of land and it was established that it measures 1.4 hectares and not 1.8 hectares as shown in the title deed. In his view, the boundaries ought to remain as they had been on the ground since the boundaries as shown by the P.I.D are not exact.

In its judgment, the trial court referred to **section 21 (2)** of the **Registered Land Act** which ousts the jurisdiction of any court from entertaining any action relating to a dispute as to the boundaries of a registered land unless the boundaries have been determined as provided in that section. He said that even though the District Land Registrar went to the two parcels of land and purported to have determined the boundary, the exercise was not properly conducted. The District Land Registrar had testified that the respondent had encroached onto the appellant's land by 0.20 hectares (about 30 metres) but when the court visited the land with PW2 and PW3, an area covering about 20.4 metres along a road that fronts the two parcels of land was found to be no **"man's land."** In other words there was an area between the two parcels of land that had not been demarcated and which belonged to neither of the parties. The report by PW2 and PW3 did not capture that portion of land. In its view therefore, it could not be said that the Land Registrar had accurately defined the boundaries between the two parcels of land. The court held that it had no jurisdiction to entertain the action and dismissed the suit with costs to the respondent.

The appellant was aggrieved by the said judgment and preferred an appeal to this court. I need not set out the

seven grounds of appeal that were raised by J.S. Okoth & Company, Advocates for the appellant.

In his submissions, Mr. Okoth mainly attacked the trial court's finding that it lacked jurisdiction and stated that the learned trial magistrate misdirected himself in arriving at that conclusion. He further faulted the learned trial magistrate for introducing the issue of the 20.4 metres parcel of land that he described as **"no man's land"** in between the two parcels of land since none of the witnesses had raised the issue. The proceedings do not also show that any such finding was made when the court moved to the land in dispute.

Mr. Siganga for the respondent supported the trial court's judgment. He stated that the Land Registrar failed to comply with the mandatory requirement of **section 21 (3)** of the **Registered Land Act**. He further pointed out that **Order XX Rule 5 A** of the **Civil Procedure Rules** requires that where there is a prayer for a judgment the grant of which would result in some alteration of the title of land registered under any written law, a certified copy of the title should be produced to the court before any such judgment is delivered. The appellant did not produce a certified copy of the title, counsel submitted.

I have carefully considered all the evidence on record as well as the written submissions that were filed by counsel.

The two parcels of land herein were registered pursuant to the provisions of the **Registered Land Act Cap. 300** of the **Laws of Kenya**. It is important to note that under the Act, except where the boundaries of a parcel of land have been fixed, the registry map and any filed plan are deemed to indicate the approximate boundaries and the approximate situation only of any given parcel of land, see **section 21 (1)** of the **Act**. **Sub section (2)** thereof provides as hereunder:

**"Where any uncertainty or dispute arises as to the position of any boundary, the Registrar, on the application of any interested party, shall, on such evidence as the Registrar considers relevant, determine and indicate the position of the uncertain of disputed boundary."**

After the Registrar has done so, he is required to make a note to that effect on the registry map and in the register. He is further required to file such plan or description as may be necessary to record his decision, see **sub section (3)** of the aforesaid section.

The learned trial magistrate cited the provisions of **sub section (4)** of the **Act** in holding that the court lacked jurisdiction to entertain the appellant's suit. That sub section states as follows:

**"(4) No court shall entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in this section."**

Although the District Land Registrar purported to have determined the boundary between the appellant and the

respondent's respective parcels of land, the record does not show whether the registrar complied with the mandatory provisions of **section 21 (3)** of the **Act** by making any note on the registry map and in the register and by filing such plan or description as was necessary. Without such action having been taken it cannot be said that the Registrar had determined the boundaries as provided under **section 21**. He may have done so, all I am saying is that if that was done, such evidence was not shown to the court. Without such evidence, it cannot be said that there had been a proper determination of the boundary by the Registrar.

The record shows that the trial court together with the parties and/or their representatives visited the disputed portion of land on 10<sup>th</sup> May, 2006. However, there is no indication as to what transpired on the said date. Any observations made by a court during such a visit are very important and ought to be part of the proceedings. Without such proceedings this court is unable to determine the accuracy or otherwise of the trial court's assertion that there exists a portion of land measuring 20.4 metres along the road that was found to be no man's land and which possibly could have affected the report that was made by PW2 and PW3.

In **ODD JOBS –VS- MUBIA** [1970] EA 476, the Court of Appeal held that a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue had been left to the court for its decision. However, this does not appear to have been the case herein. Nowhere is it indicated that there was any evidence adduced by any party about the “**no man's land**” as it was put by the learned trial magistrate. If such evidence came out when the court moved to the **locus quo**, that kind of evidence is no doubt very important and it could have altered the nature of the appellant's case all together. The learned trial magistrate erred in failing to record the proceedings of the site visit.

In view of what I have stated hereinabove as to whether the Registrar complied with the provisions of **section 21 (3)** of the **Registered Land Act** and in view of the fact that the learned trial magistrate failed to record the proceedings of 10<sup>th</sup> May, 2006, I am constrained to allow this appeal and in exercise of this court's power as provided under **section 78** of the **Civil Procedure Act**, I order a retrial before a court of competent jurisdiction. It is expected that before the retrial, the area District Land Registrar shall fully comply with the provisions of **section 21 (2) and (3)** of the **Registered Land Act**. In so doing he has to involve all the parties and/or their representatives. Each party shall bear its own costs.

**DATED, SIGNED AND DELIVERED AT KISII THIS 4<sup>TH</sup> DAY OF DECEMBER, 2009.**

**D. MUSINGA  
JUDGE.**

**4/12/2009**

Before D. Musinga, J.

Mobisa – cc

Mr. Otieno HB for G.S. Okoth for the Appellant.

N/A for the Respondent.

**Court:** Judgment delivered in open court on 4<sup>th</sup> December, 2009.

**D. MUSINGA  
JUDGE.**