

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Civil Case 8 of 1998

WANGECHI KINGORI PLAINTIFF

versus

STEPHEN WANGONDU KININI DEFENDANT

RULING

When this matter came up in court for hearing on 12th February 2007 the court ordered the parties to comply with Section 21 RLA before proceeding with the hearing. The court in its ruling of that day had the following to say in part:-

“The court to-day notes that this is a civil suit filed on 15th January, 1998 and, that from the pleadings, this is a boundary dispute, though the parties or one of them may not be accepting that fact, as the report by the District Land Registrar file in this court on 30th June 2005 confirms.”

The plaintiff has brought before court a Notice of Motion dated 12th October, 2007 which seeks the review of the orders of 12th February 2007. In the affidavit in support, the Plaintiff deponed that the boundary between her and the Defendant had been determined by the Land Registrar, Nyeri District. After that determination each party was given their own title for their respective portion of land. That subsequently the Defendant committed acts of trespass by putting another fence on the Plaintiff's land. In so doing it is alleged the Defendant damaged crops and fencing posts of the Plaintiff. The Plaintiff concluded in that affidavit by saying that her claim lies in trespass. The defendant opposed the application on the basis that the same did not comply with **Order XLIV Rule 1(a)** of the Civil Procedure Rules. The defendant argued that the plaintiff had not shown the error on the record and had failed to annex documents to support her depositions.

It should be stated that the order sought to be reviewed has been extracted. The Plaintiff by her Paragraph 4 of the plaint averred as follows:-

“ The plaintiff further avers that there has been since 1989 a protracted boundary dispute between the plaintiff and the defendant over their two adjacent parcels of land but the two parties have each registered as proprietors of their respective parcels and the boundary determined by the district land registrar and the parties have been issued with their respective title deeds.”

As can be seen from that paragraph the plaintiff clearly stated that the boundary between her and the defendant had been resolved by the district land registrar and titles issued to each one of them. The ruling which the plaintiff seeks to review of 12th February 2007 as can be seen hereinbefore in this ruling, stated that the case was of boundary dispute. Order XLIV rule 1(a) provides that the court can review an order on account of mistake or error apparent on the face of the record. I am of the view that the ruling the subject of the review has an error apparent from the record since at the time when the ruling was delivered the judge had not received any evidence but ruled on the basis of the pleadings before him. Those pleadings as I have quoted from the plaint show that the claim was not one of boundary but rather of trespass. It is therefore clear that an error was made in finding the contrary. The Defendant's arguments that the Plaintiff's application does not fall within the ambits of Order XLIV Rule 1 (a) is therefore rejected for the reason stated here.

Accordingly the Notice of Motion dated 12th February, 2007 is granted in terms of prayer 1 and the costs of that application are awarded to the Plaintiff in any event.

DATED AND DELIVERED THIS 27TH DAY OF FEBRUARY, 2008.

MARY KASANGO

KASANGO