



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

Civil Case 267 of 1996

FRANCIS ORIOSA ORANGO PLAINTIFF

VERSUS

JOSEPH MATO NGOKO

AMBROSE BWOMA BORUMA DEFENDANTS

RULING

Sometimes in 1996, the plaintiff filed this suit against the defendants claiming that they had trespassed into his parcel of land known as NYARIBARI CHACHE/B/B/BOBURIA/1991. He further alleged that they had removed, destroyed and/or defaced the boundary features and/or the fence between his aforesaid parcel of land and parcels of land number NYARIBARI CHACHE/B/B/BOBURIA/1989 which belongs to the first defendant. He sought a declaration that the defendants had trespassed into his property, general damages for removal of the common boundary, mesne profits and a permanent injunction to restrain the defendants from interfering with his parcel of land. Between 1996 and 2007, the matter was severally mentioned before a number of judges and some interim orders made regarding fixing of the boundary between the two parcels of land. From my perusal of the file, counsel for all the parties are in agreement that this is a boundary dispute between the plaintiff and the defendants.

On 15th May, 2007, the following orders were orders were made by consent.

“(a) The matter in dispute herein be and is hereby referred to the District Land Registrar Kisii and the District Surveyor Kisii to visit the locus quo for purposes of establishing and fixing the boundaries between LR NO. NYARIBARI CHACHE/B/B/189 and LR NO. NYARIBARI CHACHE/B/B/1990.

(b) Each party to be at liberty to have/engage a private Surveyor to accompany the District Land Registrar Kisii and the District Surveyor Kisii.

(c) The District Land Registrar and District Surveyor, Kisii, respectively, do compile and file their Report within the next 30 days.

(d) Costs of the District Land Registrar Kisii and the District Surveyor Kisii to be shared equally by the parties.

(e) Costs in the cause.

(f) The matter be mentioned on the 28th day of June, 2007.”

Following the said consent orders, the District Land Registrar, Kisii/Gucha Districts and the District Surveyor went to the site of the boundary dispute. They were accompanied by both parties, the area Chief and Assistant Chief. The exercise was also witnessed by many local residents. The plaintiff had also engaged the services of a private surveyor, M/S. Olweny & Associates Ltd.

The Land Registrar established that there was no visible existing boundary between the parcels of land. Under the powers conferred upon the said officer by the provisions of Section 21(2) of the Registered Land Act, the Land Registrar directed the District Surveyor to mark and re-establish the boundary on the ground according to the actual acreage of the respective parcels of land as shown in the land register. It was also noted that the plaintiff's temporary house was partially standing on the first defendant's land. The Land Registrar directed its removal within thirty days, failing which the defendant could seek eviction orders from the court.

When the parties and their advocates appeared before this court on 12th March, 2008, the court ordered that copies of the Land Registrar's report that had been filed on 23rd November, 2007 be supplied to them so that they could study it and make their representations on the same. Thereafter the court was to make its determination on the matter, based on the report.

On 22nd April, 2008 the advocates for the parties appeared before this court for mention of the matter. They made brief submissions on the Land Registrar's report.

Mr. Momanyi for the plaintiff submitted that the report was not conclusive because the Land Registrar had given some recommendations. He further stated that his client had also appointed a Private Surveyor who had prepared his report, which was in the court file. He added that the Land Registrar's report was not an award, it was only a document meant to assist the court in reaching a just finding. He urged the court to fix a hearing date for the case so that the Land Registrar and the Surveyors could testify and produce their reports.

On the other hand, Mr. Oguttu for the defendants submitted that the Land Registrar's report had dealt with all the issues in dispute that had been raised in the plaint. The case was purely a boundary dispute and it had been established that the plaintiff had encroached into the first defendant's land. A hearing would therefore serve no purpose, he added.

He further submitted that the report had been filed pursuant to a consent and it was therefore an award that ought to be adopted by this court. Moreover, this court had no jurisdiction to entertain the suit as it related to a boundary dispute.

I have considered the above submissions. I have also perused the plaint and the defence. It is clear that this is a boundary dispute. In paragraph 7 of the plaint, the plaintiff alleged that the first defendant had excised out of his land a portion measuring approximately 5 metres by 82 metres while the second defendant had curved out of the plaintiff's land a portion measuring approximately 5 metres by 20 metres.

In paragraph 10 of the plaint, the plaintiff stated that he wanted the land boundaries to be restored to their original position as they existed before 1993.

I have noted documents in the court file which clearly show that this same boundary dispute was first referred to the District Land Registrar, Kisii, by the plaintiff sometimes in 1993. The boundary dispute was heard on 30th April, 1993. The District Land Registrar established that it was the plaintiff who had encroached into the first defendant's land. The Registrar went ahead to fix a new common boundary by planting Mauritius thorns. He directed any aggrieved party to file an appeal against his decision to the High Court within a period of thirty days from 18th August, 1994 when he made the decision.

From the statement of defence that was filed by the first defendant, it appears as though the plaintiff filed High Court Civil Case No.661 of 1994 in respect of the same dispute. It is not clear how that matter was decided.

Following the filing of this suit and prior to recording the consent of 15th May, 2007, the exercise of establishing the boundary in dispute had been undertaken by six other land registrars. This is a fact that was well known to counsel and parties. My interpretation of the consent is that it was intended that the dispute be referred to the District Land Registrar, Kisii, and the District Surveyor, Kisii, for the very last time. They went there and re-established the boundary. The District Land Registrar's report dated 8th June, 2007 is clear about what was done.

Parties cannot litigate indefinitely. Litigation must come to an end at some point. In my view, it was not intended that the court was going to hear and determine the matter after the filing of the report by the Land Registrar. The consent order does not state so. It is trite law that a court cannot interfere with a consent order except in such circumstances as would justify varying or rescinding a contract, see FLORA WASIKE VS WAMBOKO [1982-88) KAR 625.

My view of the matter is that the report by Mr. J. O. Owuor, District Land Registrar, Kisii/Gucha Districts, is like an arbitrator's award which ought to be and which I hereby adopt as a judgment of this court.

Regarding the jurisdiction of this court to hear and determine a boundary dispute in respect of a property whose title is issued under the provisions of the Registered Land Act, Section 21 (2) of the Act provides as follows:

“(2) 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 or disputed boundary.”

Subsection (4) provides:

(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.”

My understanding of subsection (4) above is that court jurisdiction is only ousted where the disputed boundary has not been determined by the Land Registrar as provided by subsection (2). In this case, since the Registrar had already determined the boundary in dispute in 1994 before the suit was filed in 1996, the court has jurisdiction to deal with the dispute. That notwithstanding, this court holds that this suit be and is hereby determined in terms of the Land Registrar's report as stated earlier. The plaintiff shall bear the costs of the suit.

DATED, SIGNED and DELIVERED at KISII this 16th day of May, 2008.

D. MUSINGA

JUDGE

Delivered in the open court in the presence of Mr. Momanyi for the plaintiff

Mr. Ogutu for the first defendant

D. MUSINGA

JUDGE