



REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL CASE NO. 272 OF 1991

SAMUEL WANJAU PLAINTIFF

VERSUS

THE ATTORNEY GENERAL)

THE LAND REGISTRAR MURANG'A)

JAMES KIMANI MWANGI) DEFENDANTS

J U D G M E N T

By a plaint dated 18th December 1991 and filed in court on the same day, **Mr. Samuel Wanjau** hereinafter referred to as "*the Plaintiff*" sued the Attorney General and the Land Registrar, Murang'a and **James Kimani Mwangi** hereinafter referred to as "*the 1st, 2nd and 3rd defendants*" respectively claiming:-

“(a) A permanent injunction restraining the 2nd defendant from interfering with common boundary between land parcel Nos. Loc. 2/Kinyona/724 and Loc. 2/Kinyona/459.

(b) A declaration that the known and existing common boundary between Land parcel Nos. Loc. 2/Kinyona/724 and Loc. 2/Kinyona/459 is the proper and official boundary between the two parcels of land.

(c) A declaration that the river situated inside land parcel No. Loc. 2/Kinyona/724 does not form the common boundary between parcel No. 724 and parcel No. 459.

(d) A declaration that he intended amendment of the R.I.M. and or the official map is null and void.

(e) Costs o this suit and interest thereon at court rates.

The suit was informed by the following facts; that the Plaintiff is the registered owner of land parcel **Loc. 2/Kinyona/724** which shares a common boundary with land parcel **Loc. 2/Kinyona/459** registered in the name of **James Kimani Mwangi**, the 3rd defendant. Between the years 1990 and 1991, the 2nd defendant threatened to alter the existing physical and official boundary between the two parcels of land without the plaintiff's consent. In furtherance of the said threat the 2nd defendant ordered that R.I.M. be amended so as to make a river properly inside the Plaintiff's land to be the official common boundary. As a result of

the 2nd defendant's actions, the Plaintiff's stood to lose a portion of his land measuring 1.5 acres that is full of mature tea bushes to the 3rd defendant, hence the suit.

Served with the plaint, the 3rd defendant was first to react by filing a defence. In his defence he stated that the two parcels of land share a common boundary which was the stream flowing between the 2 parcels of land. That the 2nd defendant's decision to maintain the river as the common boundary was arrived at after full, detailed and exhaustive hearing of the dispute. Therefore the 2nd defendant's decision to have the R.I.M. amended was proper and justified following his adjudication of the boundary dispute. By way of counterclaim the 3rd defendant stated that in or about December 1986, the Plaintiff unlawfully and without any reasonable cause annexed a portion of his land parcel aforesaid by extending the common boundary from the said stream into the 3rd defendant's land and in the process he appropriated 1.3 acres of the 3rd defendant's land. The 2nd defendant's decision to have the map amended was to save the 3rd defendant from the unfair and unjustified loss of his 1.3 acres. He therefore prayed for an order that the R.I.M. be amended as ordered by the 2nd defendant, a declaration that a stream passing between the said two parcels of land be the lawful boundary and the Plaintiff do quit and vacate the 3rd Defendant's portion of land measuring 1.3 acres or thereabouts forthwith.

Through the Attorney General, the 1st and 2nd Defendants filed a defence. They denied the averments by the Plaintiff. In particular they stated that there existed a boundary dispute between the two parcels of land which the 2nd defendant heard and determined according to the evidence adduced before him.

Thereafter the suit was set down for hearing before **Okwengu J.** The Plaintiff testified that he was the registered proprietor of land parcel **Loc. 2/Kinyona/724** with a total acreage of 2.43 hectares. The 3rd defendant was his neighbour and registered proprietor of land parcel **Loc. 2/Kinyona/459** measuring 4.86 hectares. The Plaintiff bought his land from one, **Chege Kirega** in 1978. The 3rd Defendant too bought his land from one, **Reuben Mutonya** in 1968. The Plaintiff did not occupy his land immediately he bought it. He only came to occupy it in 1985 having fenced it. The 3rd Defendant too has never settled on his parcel of land. The Plaintiff established the boundary when he bought his parcel of land. However their developed a boundary dispute between him and the 3rd Defendant. The dispute was arbitrated upon by the 2nd defendant. The 2nd defendant then prepared mutation forms creating a boundary using the river that cut across the Plaintiff's and 3rd Defendant's respective parcels of land. According to the Plaintiff, the river was not actually the boundary between the Plaintiff's land and that of the 3rd defendant. As a result of the ruling by the 2nd Defendant, the Plaintiff's land had been reduced by 0.6 acres, whereas the 3rd Defendant had gained an extra 0.7 acres. Cross-examined by **Mr. Kimani**, learned counsel for the 3rd Defendant, he stated that he wanted the decision of the 2nd defendant set aside. He was not present when the 2nd defendant conducted the hearing. He conceded though that he went together with the 2nd defendant, surveyor and elders to the land in dispute. In his view the correct boundary between the two parcels of land is the grind line. The 2nd defendant's ruling show the acreage after change of boundary as 5.670 of his land and 12.07 for the defendant's land. He bought the land in 1978 and the 3rd defendant bought his in 1968. There was no dispute then because there were marked boundaries. That there was a permanent stream on the ground. Before he fenced his land in 1980 there was a hedge.

When the case next came up for hearing **Okwengu J** had left the station. Parties thereafter agreed to have me hear the case from where **Okwengu J** had left. The Plaintiff called **Jessee Kamau Ndirangu** as a witness. He testified that in 1978 the Plaintiff purchased a parcel of land from **Chege Kirega**. He was tasked with fencing the same. In 1989, he came to learn that there was a boundary dispute. He was summoned by the Chief and other elders. They visited the land and a map was produced showing the boundary. The 3rd defendant was dissatisfied with the findings of the Chief. He was however given 7 days by the Chief to produce another map. He was unable to do so. It was then that the Chief decided that the Plaintiff retains the parcel of land with boundaries as marked by him.

Cross-examined by **Mr. Mayova**, learned Senior State Counsel appearing for the 1st and 2nd defendants, he stated that he was not present when the Plaintiff bought the land from **Chege Kirega**. He fenced the land in accordance with Plaintiffs instructions. He only knew the boundary as was shown to him by the Plaintiff. He did not know where the Plaintiff got the map from.

Cross-examined by **Mr. Kimani**, the witness stated that he fenced the land according to the map. There had been a fence previously which he followed. He was not present when **Chege** showed the Plaintiff the land. He was also not aware of the meeting on the land presided over by the 2nd defendant to determine the boundary. Between the Plaintiff and 3rd Defendant, he did not know who first bought their respective parcels of land. There was a small river between the Plaintiff's and 3rd Defendant's parcels of land. However that river is not a boundary. With that the Plaintiff closed his case.

The 1st Defendant testified that he was the Murang'a North and South District Land Registrar. Sometimes in 1990 a boundary dispute involving land parcels **Loc. 2/Kinyona /459** and **724** respectively was reported. The 3rd defendant was the complainant. A determination was made that the District Surveyor picks a stream forming common boundary between the parties and have the map amended accordingly. This was because all the witnesses who testified indicated that the river had been the common boundary. The acreage of the two parcels of land were calculated by the surveyor. **Loc. 2/Kinyona/459** was found to be 12.006 acres as compared to the registered area which was 12.0 acres. **Loc. 2/Kinyona/724** was found to be 5.670 acres against the registered acreage of 6.0 acres. These acreages are approximately correct meaning therefore that the boundary placed by the Land Registrar was correct. The Plaintiff was relying on a map which is not an authority on boundary disputes or on general boundaries. Once the Registrar has determined the boundary, the aggrieved party within 30 days can appeal to the Chief Land Registrar. If again a party is aggrieved by the decision of the Chief Land Registrar, he may then move to the High Court by way of appeal. The Plaintiff never took those steps. Accordingly the suit ought to be dismissed. He complained that the orders sought against him in the suit if granted, would amount to stopping him from discharging his mandate under the Registered Land Act.

Cross-examined by **Mr. Njuguna**, learned counsel for the Plaintiff, the 2nd Defendant stated that he did not handle the matter personally as he was not then the District Land Registrar, Murang'a. However according to the records in his possession, the dispute arose in 1985 when the Plaintiff put a fence across the 2 parcels of land. According to the records the boundary that they observed was a river. That was even the evidence of the original owners of the two parcels of land and who sold them to the Plaintiff and 3rd Defendant respectively. The Plaintiff participated in the proceedings before the Land Registrar. The acreage of the 3rd defendant's parcel was not increased because as per the records it is supposed to be 12 acres. On the ground it is 12.006 acres which is till 12 acres. These acreages are not absolute but approximate. In his opinion the boundary was properly picked.

Cross-examined by **Mr. Kimani**, the 2nd defendant said that he had a copy of the proceedings of the district land registrar. Though the Plaintiff was present he never called witnesses. During the picking of the boundary, the Plaintiff was absent though he was the one who had suggested the date. His absence did not affect the decision on the ground. **John Chege** testified and he is the one who sold the land to the Plaintiff. He said that he knew the boundary to be the stream.

Mr. Kinyua Gitonga, the District Surveyor, Murang'a was called as witness. He had a map in respect of the two parcels of land. In 1991, the District Land Registrar determined the boundary dispute. The river between the two parcels of land forms the boundary. The maps produced have a caveat to the users that it is not an authority on boundaries. He confirmed the decision of the District Land Registrar to be correct.

Cross-examined by **Mr. Kimani**, the witness maintained that a map was not an authority for boundaries. Boundary disputes are resolved on the basis of evidence from neighbours and people who knew about the boundary. The District land Registrar heard the evidence and made a decision that the river was the common boundary. Grid length cannot be a basis for a boundary. It only assists in the direction of the map. That marked the close of the 1st and 2nd defendants' case.

The 3rd defendant testified as follows:- That he was the registered proprietor of land parcel **Loc. 2/Kinyona /459** which measures 12 acres. He bought the same in 1968 from one, **Reuben Mutonya** for Kshs.6000/=. He was shown the boundary by the previous owner. There was a daughter of the previous owner in occupation of the land at the time he bought it. Between his land and the Plaintiff's, the river is the boundary feature. In December, 1986, he received information that a portion of his land measuring approximately 1½ acres had been annexed by the Plaintiff. He reported the dispute to the local chief. The chief arbitrated on the issue and formed an opinion that the dispute could only be resolved by the District Land Registrar and Surveyor. On 26th February 1991 the District land registrar visited the area. His decision was that the 3rd Defendant's complaint was genuine. The river on the map had been omitted but was there on the ground. He directed that R.I.M. be amended accordingly. It was then that the Plaintiff filed the instant suit. He therefore prayed for the suit to be dismissed with costs and judgment entered in terms of the counterclaim with costs as well.

Cross-examined by **Mr. Njuguna**, the 3rd Defendant stated that he saw the land before he bought it. It had physical boundaries. There had never been a dispute between the original owners of the two parcels of land. He had no dispute with the Plaintiff until he fenced a portion of his land. The Plaintiff was present during the hearing of the dispute before the district land registrar. He maintained that the river was the boundary.

Cross-examined by **Ms Munyi**, Provincial litigation counsel, the 3rd defendant maintained that there was right of appeal within 30 days to the chief land Registrar by the Plaintiff. The Plaintiff never exercised that option. Accordingly the suit was premature and ought to be dismissed.

The 3rd defendant called **Martha Wanjiku** as a witness. She was daughter of the vendor from whom he had purchased the land. She knew the boundary of the land to be the river. That has always been the boundary to the best of her knowledge. With that the 3rd Defendant closed his case.

Thereafter parties agreed to file and exchange written submissions. This was subsequently done. I have carefully read and considered the said submissions. However it should be noted that the 1st and 2nd Defendants did not file their written submissions as **Ms Munyi** felt that the dispute was really between the Plaintiff and 3rd Defendant.

What are the issues for determination in this suit? To my mind they are essentially three, where is the boundary between the two respective parcels of land, the fate of the 3rd Defendant's counterclaim and costs. The Plaintiff's case is that he is the registered proprietor of land parcel **Loc. 2/Kinyona/724** whereas the 3rd Defendant is the registered proprietor of land parcel **Loc. 2/Kinyona/459**. He bought his land way back in 1978 from one, **Chege Kirega**. The 3rd Defendant however bought his in 1968 from one, **Reuben Mutonya**. The two parcels share a common boundary. It is the location of the said boundary that triggered this suit. Whereas the Plaintiff maintains that the common boundary is the normal ordinary boundary going by the grind line the 3rd defendant maintains that the common boundary between the two parcels of land is the river flowing in between. In support of his case, the Plaintiff tendered in evidence the Registry Index Map (R.I.M.) which did not indicate however such river as the boundary. Indeed the R.I.M. had no such river. However it is common ground that such maps are not authorities on boundaries. Both the District Land Registrar (DW1) and the District land Surveyor (PW2) said as much. That fact was not disputed nor discounted by the Plaintiff in cross-examination of those witnesses. Indeed section 21(1) of the Registered land Act is to the effect that unless the boundaries of a parcel of land has been fixed as provided for under section 22 of the said act, R.I.M. shall be deemed to indicate only the approximate position and situation of the parcel of land. As correctly submitted by **Mr. Kimani**, it means therefore that when and where there is a dispute as to the position and location of a boundary as in this case, unless the same is a fixed boundary, one has to go beyond the R.I.M in solving the dispute. That is exactly what the District land Registrar did in resolving this boundary dispute. Under the Registered Land Act, the District Land Registrar has jurisdiction to entertain disputes relating to boundaries. The Plaintiff has claimed that in resolving the dispute, the District land Registrar, the District Surveyor colluded with the 3rd defendant. Other than making such blanket accusations no evidence was

led in support of the allegations at all. The allegations thus remain what they are, mere allegations.

Invoking his jurisdiction under the Registered land Act, the District land Registrar in the company of the District Surveyor together with the Plaintiff and 3rd defendant went to the ground. They took evidence of key witnesses including the Plaintiff, 3rd defendant and **Chege Kirega**, the person who had sold the land to the Plaintiff. In the proceedings before the District land Registrar, **Mr. Kirega** categorically stated **“..... I sold my whole parcel No. 724 of 6 acres to Samuel Wanjau in 1977. I showed him the extent of my boundaries including the stream. I have never had a dispute with Reuben Mutonya and even Kimani after he bought it. I disagree with the boundary Wanjau is claiming to be the correct one and over the correct one is the stream....”** This is the evidence of the person who sold the Plaintiff his land. He places the boundary on the river. Yet the Plaintiff claims that that is not the case. Between the Plaintiff and **Mr. Chege**, who is best placed to know the boundary between the two parcels of land? I think **Mr. Chege** does. Having sold and transferred the land to the Plaintiff, he had no further interest in the land as would have pushed him to falsely testify against the Plaintiff and in favour of the 3rd Defendant. In the same proceedings the Plaintiff is recorded as saying **“..... Since I bought the land I was not shown the boundaries**” If he was not shown the boundaries, on what basis then should he be claiming that the boundary is on the basis of grind line and the R.I.M. From these proceedings it is clear that the common boundary is actually the river going by the testimony of the witnesses who testified. The Plaintiff testified as well. However he never called a single witness in support of his claim.

Going through the testimony of the Plaintiff as recorded by **Okwengu J**, I get the impression that the Plaintiff was not happy with the decision of the District Land Registrar. He stated as follows on the issue **“..... The Land Registrar made a ruling contained in Exh. 6. There was however no proper hearing apart from our showing the boundaries. I was not present when witnesses were alleged to have testified. I am therefore urging the court to declare the ruling of the Land Registrar null and void....”** Section 21(2) of the Registered Land Act gives the District Land Registrar Power to adjudicate and determine uncertain or disputed boundary. An aggrieved party has a right of appeal to the chief land Registrar within 30 days. Thereafter an aggrieved party from the decision of the chief land registrar may within the same period of time move to this court by way of appeal. The Plaintiff did not avail himself of that mechanism. He did not appeal to the chief land Registrar as required. Nor has he come to this court by way of an appeal from the decision of the Chief land Registrar. The Plaintiff having submitted himself to the jurisdiction conferred by the Registered Land Act, it behoved him to adhere to the appellate provisions in the said Act. He had no right to commence the instant proceedings therefor. The suit is therefore misconceived and bad in law. In any event, since the Plaintiff is seeking to quash the decision of the District land Registrar, he should have commenced this suit by way of judicial Review application and not by way of plaint.

Having heard the evidence, the district land registrar requested the District land Surveyor to compute the sizes of the two parcels of land. He did so and the sizes concided to the approximate sizes on the ground. Thereafter he ordered that the river between was the right boundary between the 2 parcels of land and ordered that R.I.M. be amended to reflect the river as the boundary on the map. Going by the evidence tendered, I think that the District Land Registrar was right in arriving at the said decision.

During the hearing of the case in this court, the Plaintiff called one witness in his support. However the evidence of this witness was of little value as he was merely asked by the Plaintiff to fence his parcel of land. He was not present when the Plaintiff bought the land and he also fenced the land in accordance with the Plaintiff's instructions so that even if the Plaintiff misled him as regards the boundary, he had no way of knowing the actual boundary.

On the other hand the testimonies of DW1, DW2 and DW4 seem to lend credence to the 3rd Defendant's testimony that the river has always been the boundary. I find the testimony of these witnesses believable. I cannot however say the same of the Plaintiff. He claims that there was no proper hearing of the case before the District land Registrar, yet the record is clear that he testified. All in all I find that the river between the two parcels of land is correct boundary as held by the District land Registrar.

What then becomes the fate of the 3rd Defendant's counterclaim? It should succeed. In the counterclaim, the 3rd Defendant states that the land Registrar decision to have the R.I.M amended was to save him from the unfair and unjustified loss of his 1.3 acres to the Plaintiff. The amendment of the R.I.M would strictly conform to the proper acreage of the two parcels of land as computed on the ground. The district land Registrar testified the amendment of the R.I.M will not affect the acreages of the parcels of land on the ground. Boundaries and acreages are mere approximation. Nothing would change on the ground contrary to what the Plaintiff claims that the intention of the defendants is to decrease the acreage of the Plaintiff's land from 6 acres to 5.67 acres.

The result of all the foregoing is that I find no merit in the Plaintiff's suit. Accordingly it is dismissed with costs to the Defendant. The 3rd Defendant shall also have judgment in his favour on the counterclaim as prayed with costs as well.

Dated and delivered at Nyeri this 17th day of September 2008

M. S. A. MAKHANDIA

JUDGE