REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI
Civil Appeal 139 of 1993

FRANCIS MWANGI

MIRIITHI NGARI

SAMUEL MUCHIRI ……...
…….APPELLANTS

Versus

MURIITHI GACHEWA……RESPONDENT

(From the judgment of Resident Magistrate E. N. Maina) in the Senior

Resident Magistrate's court at Kerugoya Civil Case No. 2 of 1992)

JUDGEMENT

The Appellants filed this suit praying for orders against the Respondent in the Senior Resident Magistrate's Court Kerugoya that

"That Defendant be restrained from interfering with the land parcel no. Mutira/Kirunda/743, 744 and 745."

To my mind, that prayer is vague but to the parties the prayer seems to have created no problem understanding it and the Respondent was able, in his written defence after praying for the dismissal of the Appellant's suit, to set out his counter claim asking the court to compel the Appellants comply with the order and rulings of the district Land Registrar and to pay damages for their refusal to have the boundary adjusted.

The position is that while the Appellants are the registered proprietors, under the Registered Land Act (Cap300) of the above mentioned parcel of land, each person having a parcel alone and the three portions having resulted from sub-division of their deceased brothers original parcel of land No. 342, the Respondent was the registered proprietor of adjoining parcel of land Mutira/Kirunda/381. There arose a boundary dispute between the Appellants on the one hand and the respondent on the other where the issue was whether the common boundary between 342 and 381 was a road of access which happened in a manner tending to separate the two parcels. While the Appellants claimed the road was the boundary, the Respondent did not agree as according to him, the road of access passed wholly through his parcel of land No. 381 and that therefore part of that land was on the Appellants' side of the road.

Following that disagreement the Respondent filed a boundary dispute case before the District Land Registrar who subsequently visited the disputed boundary, heard the parties and their respective witnesses and determined the boundary dispute in favour of the Respondent – under section 21 (2) of the Registered Land Act.

The Appellants were aggrieved with that decision, and although the District Land Registrar had given them 30days within which to appeal to the Chief Land Registrar, when they tried to appeal the Chief Land Registrar advised them to take their grievances to a court of law. Following that advice, the appellants filed Civil Case No. 2 of 1992 in the Senior Resident Magistrate's as already stated but they also lost the case to Respondent and that prompted the filing of this appeal in this court.

After hearing the parties, Mr. Kahiga, Advocate representing the Appellants and Mr. Ndirangu advocate representing Respondent in the light of the evidence on record and both learned counsel having referred me to the case of Muraguri – v-Rukenya (193) KLR 1, I have anxious time writing this judgement.

In Muraguri—Rukenya, the Court of Appeal held that the subordinate court had no power to alter the boundary fixed by the Land Registrar and that the attempt to-do so was without legal sanction. It was further held that the boundary fixed by the Registrar was the boundary the parties were to recognise and it was not to be interfered with. It was said (obiter) that only the Land Registrar could determine a boundary as per the provisions of the Registered Land Act and it was only the high Court that could entertain a challenge to the boundary per section 149 of the Registered Land Act.

Although Mr. Kahiga is the one who brought that case authority and told the court he was relying on that authority, from his submission it is difficult to see how he relied on that authority since his argument is that the learned magistrate in this matter ought not to have accepted the decision of the District Land Registrar. Mr. Njuguna, on the other hand, supported the decision of the trial magistrate and his position in relations to Muraguri-v- Rukenya is therefore clear.

Muraguri-v-Rukenya is a relevant authority in the instant appeal but the parties failed to appreciate one important aspect of this appeal. Going to a court of law to seek justice without being prepared to take all the relevant and important evidence before the court. Law Courts, at lease in Kenya, are manned by natural human beings. They will not ordinarily know what a case is all about unless and until they are given or shown the relevant evidence by the parties and their witnesses keeping relevant evidence aware from the court therefore prejudices the court of justice especially so if the evidence kept away is crucial in the case.

Muraguri-v-Rukenya was a straightforward case. The Land Registrar had visited the "locus in quo" with a surveyor, taken relevant evidence, investigated the boundary on the ground and finally marked it not only on the Registry Index Map which they relied on, but also on the ground. That was the boundary the trial magistrate came to interfere with when one party in that case claimed that was a wrong boundary and convinced the magistrate t correct the boundary. It seems as if the Land Registrar went and gave evidence before the magistrate.

In the instant appeal, there is no dispute the Land Registrar visited the "Locus in quo", heard evidence and determined the boundary dispute. I have not seen evidence that the Land Registrar was accompanied by a surveyor. Yet although the Registered Land Act does not make provisions for a surveyor to accompanying the Land Registrar on such visits, the services of a surveyor are essential to enable the Land Registrar arrive at a good decision. For instance, ordinarily a land registrar is not a trained surveyor, yet he has to use survey maps during the process to settle boundary dispute. Normally services from the Government District Surveyor's office would easily be available.

In this matter the Land registrar who seems to have gone to the "locus in quo" without a survey our held the view that the Registry Index map, which is the map mentioned in and reconised by the Registered Land act was o authority for locating boundaries between land registered under the Registered Land Act. Although the act requires the maintenance and usage of such maps by the director of Surveys and the Land Registrar, and the Land Registrar who handled the boundary dispute herein must have had his land

Registry's Registry Index Map safer under custody somewhere, he ignored use of that map. The Appellants had a copy of that map and showed it to the court, but the good Land Registrar used what he called the original map, which is not provided for in the Registered Land Act. I was told the Respondent produced that map.

True section 21 (1) of the Registered Land Act says that

"**Except where, under section 22, it is noted in the register that the boundaries of a parcel have been fixed, the registry map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel."**

But that does not defeat and remove the purpose for which those maps are prepared as can be seen for example, in section 18 to 21 of the Registered Land Act. Those maps ought not be ignored when boundaries to land registered under the Registered Land Act are being located although this is not to say that other evidence like demarcation maps, oral evidence, court judgments should not, in addition, be used. The Registry Index Map is not authority yes, but that is not to say that the demarcation map becomes the authority.

Since such a peculiar situation was created in this suit, it became incumbent upon the parties in my view, to call the District Land Registrar, the District Surveyor or someone senior than him from the Director of Survey's Office and, if available, Land Demarcation or consolidation or Adjudication officers who used the Demarcation map and later caused the now discredited Registry Index Map to be produced, to appear before the trial magistrate and give evidence to enable the court have better and sufficient evidence to enhance the administration of justice. Those were the people concerned and involved. They know why the two maps are different both factually and professionally and would have enabled the court know better the correct position.

As things are, the Court relied on written evidence of the Land Registrar who was not a professional Surveyor and was not involved in the work of land demarcation in Mutira/Kirunda area and above all, the evidence from an officer who was not available in the trial court to be tested through cross-examination to justify for example why he decided to discredit the Registry Index Map and favoured the demarcation map and why, in the circumstances, the registry Index Map is not being replaced, in the Registered land Ac, by the Demarcation Map.

I would have had time to say more both on Muraguri-v- Rukenya and general on the instant appeal but I think what I have said is sufficient to dispose of the appeal.

I would have thought of a retrial but bearing in mind that this is an old case and that the failure to call important witnesses is balanced on the parties themselves who up to date do not need those witnesses, I hold that on the basis of the evidence which was before the learned Resident Magistrate, his decision was justified and I entertain no good reason to interfere with that decision.

Accordingly, this appeal is hereby dismissed with costs to the Respondent.

Date this 15th day of June, 2006.

J. M.KHAMONI

JUDGE