



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU

Civil Appeal 28 of 2002

M'NAITURI M'TUARUCHIU.....1ST APPELLANT

PETER KARONGO.....2ND APPELLANT

VERSUS

MURIUNGI M'ITHIARU.....RESPONDENT

(From the decree and order of N. H. Oundu, Resident Magistrate,

in Meru CMCC No.142 of 2001)

J U D G M E N T

The respondent had filed a plaint dated 9.3.01, in Meru Chief Magistrates court stating that he was the registered owner of L.R. No.635, Njia-cia Mwendwa Adjudication Section and that his land bordered with parcels No.588 and 2456 of the same Adjudication Section, belonging to the appellant's respectively. The respondent further averred that the defendants through the Land Adjudication Officers, interfered with the existing boundaries separating the three pieces of land. He prayed against the defendants for an order of court directing them to allow the Meru North Land Adjudication Officers to visit the three pieces of land aforementioned and refix them as were in existence before 21.9.2000. In his evidence to prove his claim later, the plaintiff testified that several years before 21.9.2000, all the three parties had been shown their boundaries but on the said 21.9.2000 a Land Adjudication Officer entered his piece of land No.635 aforesaid and changed its boundaries giving the defendants part of his land. That since he did not accept the new boundary and that since the Adjudication Officers have failed to rectify the new boundaries to the position they were before the said date, he filed the suit in the lower court so that the court would make orders that the boundaries fixed on 21.9.2000, be removed and those existing before then be reinstated. He also stated in his evidence that the Land Adjudication Officer of the District and Section, granted his consent to this case being filed in the lower court. He said the consent was annexed to the plaint at the top of which also the granting of the consent was pleaded.

The defendants who had filed their joint defence dated 5.4.2001, also gave evidence in court through the 2nd defendant. In their written defence the defendants averred that the boundaries existing between parcel No.635 on the one hand, with parcel Nos. 588 and 2456 on the other hand, were lawfully fixed by the Land Adjudication Officer on 21.9.2000 and, that such are the correct boundaries. During the hearing, the 2nd defendant gave evidence for himself and on behalf of the 1st defendant. He repeated that the existing disputed boundaries were fixed by the deputy District Land Adjudication Officer on 21.9.2000 upon the defendant's complaints. That his brother, the 1st defendant/appellant had filed an objection by sending a letter of complaint in 1982 but that the Adjudication Officers did not fix the boundaries until 21.9.2000. The 2nd respondent had also testified that between 1982 and 2000, the parties lived without

boundaries between them. He admitted that during the process of refixing the boundaries, some of the respondent/plaintiff's land indeed fell to the 2nd appellant's side but this was compensated by his own land also falling on the respondent's side. He also agreed that if the court ordered that the Land Adjudication Officers should recheck the boundaries, he would have no object to their adjusting the same provided the court found that it was necessary for the ends of justice.

The honorable trial Magistrate found that before the 21.9.2000 when the present boundaries were fixed, there existed earlier boundaries. He further found that the Deputy Adjudication Officer who fixed the 21.9.2000 boundaries, disregarded the earlier boundaries when fixing the fresh ones and failed to make a full report as to why he found it necessary to disregard earlier boundaries. The honorable Magistrate also found as a matter of fact that the old boundaries were known by the parties who observed them until 21.9.2000 when the new ones were fixed. He also found that the objection that existed in 1982 was between a parcel No.653 and 588, between the two defendants who later agreed between them to exchange parts of their lands to enable the 2nd respondent have $\frac{1}{2}$ an acre to build a homestead. It would appear also that the subdivision of parcel No.588 produced the new parcel No.2456 which the first appellant gave 2nd appellant to build a home. The honorable Magistrate also found that the agreement between the 1st and 2nd defendant to exchange part of their land, did not in any way involve the plaintiff/respondent, although the new demarcation of 21.9.2000 did adversely affect the respondent. The respondent the trial Magistrate felt, apparently was not given a hearing in the matter which on the face of it clearly did not concern him except where part of his boundaries were altered in the purported implementation of the 1st and 2nd appellants exchange of land. The honourable Magistrate accordingly came to the conclusion that the Land Adjudication Officer who fixed the boundaries that affected the respondent adversely in an objection in which the respondent was not a party, went beyond his lawful authority which therefore he ruled as an illegality which he could not leave standing. Nor could he countenance the argument raised by the Deputy Land Adjudication Officer that the respondent had been overtaken by events and had therefore no remedy in law.

This court has carefully considered the evidence on the record and the submissions advanced by both sides. It is common ground that on 21.9.2000 the Deputy Land Adjudication Officer fixed the boundaries now in dispute in this case and that the effect of refixing the boundaries, was to place part of the respondent's land in the hands of the 2nd appellant. Whether the same act ended placing part of the respondent's land on the side of the appellant's hands, in my view, is not the issue to be decided presently.

It is also the lower court's opinion from the record that the respondent was originally not party to the agreement and process between the appellants of exchanging parts of their own land to enable the 2nd appellant get a place to put up a home. And finally, it was the said court's view that DW2, Benjamin Karemu, the Deputy District Land Adjudication Officer, used an objection filed by the 1st appellant with the Land Adjudication Office seeking adjustment to effect the exchange of the land given to the 2nd appellant aforementioned, to refix the fresh boundaries that ended with the encroachment on the respondent land in a matter in which he was not a party.

I have examined all the above conclusions by the lower court. I have come to the decision that there is evidence on the record in support of his conclusions. Indeed the evidence of the District Land Adjudication Officer who gave evidence as PW2, as well suggests that he did not accept the act of refixing the boundary on 21.9.2000 by his Deputy, noting the fact that such an act was by law and practice required to be accompanied with a report explaining and justifying the change of the boundaries. Such a report however, was according to the Officer, missing. The insinuation from his evidence was that the 21.9.2000 fixing of the boundary was suspect and that had he not been prevented by the law, the District Land Adjudication Officer could have ordered for a fresh fixing of the boundaries. I accordingly understood the Officer to say that for his lack of legal power to make such order, he had decided to grant to the respondent consent to file a case in the court which would then decide whether the adjudication officer should or should refix the boundaries in dispute. The conclusions arrived by the trial court appear reasonable and are based on evidence on the record. I find no reasons and the appellants have not provided any such good reasons, to interfere with the trial courts conclusions, based on the evidence, especially since the court was better placed to observe the witnesses who testified before it. I therefore find that the respondent was not party to the agreement made between the 1st and 2nd appellant and the

objection later filed in the Land Adjudication Office to effect the agreement. When the Deputy Land Registrar went to the land to effect the said agreement, he in my view, had no business to encroach upon the respondent's land who was not party to it. Further more, I do accept the fact that the respondent was not given sufficient or any opportunity to defend himself or to be heard. The result of all this is that the act of refixing the boundary by the Deputy Land Adjudication Officer on 21.9.2000 was outside his legal scope and was illegal and therefore without validity. It should not therefore indeed be left to stand, as was found the trial Magistrate.

The appellants felt that the trial court was wrong to refuse them an adjournment to enable them to produce an original copy of the map drawn by the Deputy Land Adjudication Office after he refixed the boundaries on 21.9.2000. The appellants had sought an adjournment to produce the map when the court indicated doubts on whether or not a sketch traced for the case by the Deputy Land Adjudication Officer was valid for production. It was, in my view, upon the appellants to indicate their intention to appeal against the ruling refusing an adjournment. I have examined the record. The appellants did not raise a word about the rejection of adjournment. Nor indeed did they appeal against the refusal. The question then is whether such an issue can be allowed to be a ground of appeal outside the 30 days allowed for appeal. It is my finding that they cannot be so allowed. Moreover the issue whether or not the original map was not produced or not had very little bearing to the main issues deciding this case. The result of the case would not in my understanding be different even if the original copy of the map were produced. And on the point, it was upon the lower court's discretion whether it would or not grant adjournment. While I am aware that such discretion needed to be exercised judicially, there is no indication or evidence on the evidence record, and the appellant demonstrated none, that the lower court failed to exercise the discretion judicially. The court appears to have appreciated the fact that the original copy of the map intended to be produced was no different from the traced copy produced by the respondent. He was also of the view that the appellants failed to give sufficient reasons to justify the adjournment sought. There is therefore in my finding, no reasonable grounds upon which this court can interfere with a wide discretion of the lower court which would appear to have been properly exercised.

Under the above circumstances can it be said that the appellants were prevented from closing their case merely because the court refused to grant them an adjournment discussed above? The record does not indicate whether or not the defendant closed the case. But after the ruling refusing adjournment, the court fixed a date for submissions by the counsel representing the parties. The appellant's counsel did not raise objection or indicate that they were not ready to close their case. On 20.3.2002 when the parties were supposed to submit but had not been served with the respondent's submission, they sought more time to receive the submission but again said nothing about not having closed their defence. The conclusion which appeals to this court therefore is that the appellants closed their defence and that they were not prevented from closing their case in the normal way. It follows therefore that the order of court to submit was not in any way premature as claimed by the appellants.

I have also considered whether the trial court digressed from the evidence before it and took into account extraneous or irrelevant evidence. I see no irrelevant evidence taken into account. In particular the map evidence was not irrelevant. It shows the fresh boundaries fixed on 21.9.2000 by DW2, the Deputy Land Adjudication Officer. This case in my understanding, was all about the said boundaries. I cannot therefore consider such evidence irrelevant or extraneous.

The appellants also argued that the lower court had no jurisdiction to entertain the case since it arose from a piece of land situated in an adjudication Section as provided under Section 30 of the Land Adjudication Act Cap 284. However, this issue was not raised by the appellants in their defence or during the hearing. Instead they admitted the lower court's jurisdiction. In any case the respondents evidence was to the effect that he filed the case with the consent of the District Land Adjudication Officer who himself as well testified so. Such evidence was not disputed or questioned. The fact that the consent could not be found in the record is strange but there is however overwhelming evidence that the consent was given and that it was annexed to the plaint.

Considering all the evidence on the record this court finds that the judgment of the lower court was based on overwhelming evidence and any argument otherwise is not credible.

For the above grounds this appeal is found without merit and must therefore fail. It is dismissed with costs to the respondent. The District Land Adjudication Officer and the Land Demarcation Officer of the District in which the pieces of land are situated(Meru North) are hereby ordered to restore the boundaries related to the parcels of land known as No.635, 588 and 2456 in *NJIA – CIA MWENDWA*, to the position those boundaries were just before 21.10.2000. Orders are made accordingly.

DATED AND DELIVERED AT MERU THIS 21ST DAY OF SEPTEMBER,2005

D. A. ONYANCHA

JUDGE