



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MERU**

**CIVIL APPEAL 98 OF 1997**

**FRANCIS MURIUKI M'IBERE.....APPELLANT  
VERSUS  
MAUNGO NJURUITHA.....RESPONDENT**

***(Appeal from the decree and order of D.K.Gichuki  
In Meru CMCC No.342 of 1996)***

**JUDGMENT**

The appellant herein was the defendant in the lower court, while the respondent was the plaintiff. The respondent filed his claim in the lower court through a plaint filed in that court on 3.5.96 although it was dated the day before. His plaint averred that he the respondent/plaintiff was the registered owner of the parcel of land known as L.R.No. Abogeta/Upper Kithangari/531. That the defendant's father then deceased, was the registered owner of L.R. No.Abogeta/Upper Kithangari/130 and that the two pieces of land were separated by a road of access. The plaintiff's claim was for a permanent injunction restraining the defendant, his family, servants or agents from trespassing into the plaintiff's land aforesaid. He also alleged that the defendant, who occupied L. R. No.Abogeta/Upper Kithangari/130, had wrongfully and unlawfully occupied party of the plaintiff's land measuring 1.4 acres from which land the respondent wanted the appellant restrained from occupying by a permanent injunction.

The defendant had entered a defence. He admitted that L.R.No.Abogeta/Upper Kithangari/531 was indeed registered in the name of the plaintiff. He admitted that the piece of land in dispute measuring 1.4 acres was registered as part of L.R. No.Abogeta/Upper-Kithangari/531 and that it is across the road of access between the two pieces of land. He however averred that the same did not belong to the plaintiff but belonged to the defendant through his deceased father who was the registered owner. He then counter-claimed the piece of land which he was then occupying and measuring 1.4 acres. He sought orders of court directed at the Land Registrar to rectify the boundaries of the two pieces of land aforementioned, in accordance with the land demarcation and Adjudication documents or records so that the disputed 1.4 acres be made part and parcel of L.R NO.Abogeta/Upper Kithangari/130.

Before the hearing of the case, both parties consented on 31.7.1996 that the case be sent to the District Land Registrar and the District Surveyor who would visit the disputed piece of land and take measurements to determine the owner of it. The said order reads as follows: -

***“Mr.Kibera:-***

***By consent we have agreed that the case be referred to Land Registrar, Meru in***

***conjunction with District Land Surveyor to visit the land parcel No.Abogeta/Upper Kithangari/531 and Abogeta/Upper Kithangari/130 and determine the Owner of the disputed parcel of land which is being claimed by both parties After this determination, Land Registrar do file his report with sketch thereof indicating the position of the lands and ownership of the disputed land report be filed in court on or before 2.10.96.***

**ORDER**

***Consent orders entered as prayed. On 2.10.96 report be filed in court on or before then”***

The record thereafter shows that on 2.10.96 the District Land Registrar's report had not been filed but had been filed by 9.10.96 when the parties were allowed to study in until 16.10.96. On 16.10.96 Mr. Riungu for the defendant approved the report which was in his favour but Mr. Kibera for the plaintiff rejected it. He sought that the case proceeds for full hearing. Mr. Riungu did not object to the case going for hearing and the court having stood over the case generally to allow for a fresh hearing date to be taken, indicated to the parties that they can call the District Land Registrar as a witness. The case finally proceeded to a hearing on 3.2.97 when the District Land Registrar gave his evidence. Before then the case had been mentioned several times when for one reason or another the hearing could not take off. However, it is important to note that on the date when the plaintiff rejected the District Land Registrars report, which was 16.10.96 and until the case was finalized, the defendant did not at any stage suggest that the Land Registrar and Land Surveyor had handled the case as arbitrators under Order 45 of the Civil Procedure Rules. He did not either at anytime regard the Land Registrar's report an award of court. He did not even suggest that the Land Registrar's report should be recorded by court as an award which could be liable for challenging under O.45 aforesaid. Furthermore, a careful or even casual reading of the order referring the matter to the Land Registrar and Land Surveyor did not in any way indicate that the reference was under O.45 aforesaid. It does not therefore surprise anyone that when the report was filed and then rejected by the plaintiff, it did not draw any or negative reaction from the defendant or his counsel, which might be remotely related to O.45 of the Civil Procedure Rules. Order 45 aforesaid is expressly applicable where the parties concerned or interested in a matter before court, agree that the matter be referred to arbitration, in which case, they will so apply for an order of reference. The order of reference will contain clear terms, stating the arbitrator, the period of time within which award will be filed in court, the exact issues to be decided by the arbitrator and the power and authority of the arbitrator in relation to the issue referred to it. If the award is not filed within the time prescribed in the reference the same must by consent of all the parties concerned be expressly extended to save the validity of the award to be finally filed. It is therefore clear to my mind that a reference under O.45 of Civil Procedure Rules cannot happen accidentally or inadvertently. It is a deliberate process undertaken for bona fide purpose of settling the issues of reference quickly and effectively by the arbitrators who are always appointed for their special knowledge or experience or position in relation to the issue in question.

I have with the above points in mind carefully considered the matter before the court and in particular the reference of the issues made by the lower court to the Land Registrar and the Land Surveyor on 31.7.1996. I have come to the conclusion and I am satisfied that the reference was not an arbitration under Order 45 of the Civil Procedure Rules. I am also satisfied that the report filed just after 9.10.1996 and rejected by the plaintiff on 16.10.96 was not an award under the same order 45 aforesaid. The report did not therefore call to be treated as an award under Rule 15 of Order 45 aforesaid. I also for the same reasons find that the honourable trial Magistrate was not obliged to enter a possible judgment based on the said report under the said Order 45. Under these

circumstances, the Honourable trial Magistrate correctly considered the said Land Registrar's report as untested evidence and was entitled to invite either party to call him as a witness who could be cross-examined, as he indeed finally was.

Having come to the conclusions I have, above, the only other ground of appeal remaining to be resolved is ground 4 in the memorandum of appeal. It opines that the honourable trial Magistrate erred in deciding the case for the plaintiff against the weight of evidence. Mr. Mwanzia for the appellant did not, under this ground, point out to any particular evidence. He did not point to any contradictions or conflicts in evidence. He did not either point out to any lack of evidence on the part of the plaintiff's testimony.

On the other hand, I have carefully considered the evidence on the record and have perused the judgment of the honorable Magistrate. I see little in it which would deserve criticism. The plaintiff's evidence proved that the land L. R. No. Abogeta/Upper Kithangari/531, is properly registered in the Plaintiff's name. The land in dispute is admittedly part and parcel of it and is separated by a road from the land belonging to the defendant although registered in defendant's father's name. The registration is first registration which under S.143 of the Registered Land Act, Cap 300, is not amenable to change or alteration or rectification which is what the defendant sought herein. No rights or encumbrances are registered over the Plaintiff/Respondents title. The honourable trial Magistrate, in my view, considered all the factors and evidence that were before him and arrived at a fair and just decision.

Before making final remarks, I find it necessary to refer to one last ground of appeal argued by the appellant. He said that the trial Magistrate should have dismissed the plaintiff/respondent's case because he had no jurisdiction to hear it, the case being a trespass case whose jurisdiction is with the tribunal under Land Disputes Act. He said that this was a trespass dispute under S.3 (1) of the said Act. I have carefully considered this argument although it was not a ground of appeal. The defendant ought to have raised this issue in his written defence which he did not. He should have as well raised it during the submission during the hearing, which he did not. In fact his written defence admitted the lower court's jurisdiction expressly. Raising the issue at this belated hour therefore is not only unfair and unequitable play, but is also clearly, an afterthought.

On the other hand the evidence clearly shows that the defendant/appellant was trying to seize a piece of land on the other side of the road of access which belonged to the plaintiff. There is no common boundary between L.R No.Abogeta/Upper Kithangari/531 and L.R No.Abogeta/Upper Kithangari/130. The piece of land in dispute though part of L. R. No.Abogeta/Upper Kithangari/531, was independently fenced. Indeed the defendant/Appellant, in his para.5 of the defence denied that the piece of land in dispute is part of the plaintiff's land, although he was claiming it. I accordingly find that this was not a trespass case which should be governed under S.3 (1) of the Land Disputes Act.

For the various reasons and grounds as resolved herein above, this appeal is found unmeritorious. It is dismissed with costs to the respondent both here and the court below.

Orders accordingly.

Dated and delivered at Meru this 15th Day of September, 2005

**D. A. ONYANCHA,**  
**JUDGE**