



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU
CIVIL APPEAL NO. 37 OF 2003

RUKARIA ABWITHIA 1ST
APPELLANT

JULIUS KINOTI JEREMY 2ND
APPELLANT

M'MWARANIA M'TWAMWARI 3RD
APPELLANT

PAUL KITHINJI M'NKANATA 4TH
APPELLANT

JOSEPH KARIA M'TWAMWARI 5TH
APPELLANT

VERSUS

FRANCIS Z. MWOBORIA NJAU RESPONDENT

(Being an appeal from the ruling and orders of the Honourable

Mr. Njeru Ithiga, SPM, dated 1.4.2003 in Meru

CMCC LDT case No. 16 of 2002)

JUDGMENT OF THE COURT

The appellants were the claimants in Meru Central Land Disputes Tribunal Case No. 16 of 2002. The respondent was the objector therein. A boundary dispute having arisen among the parties, they applied to the District Land Registrar to have their respective boundaries sorted out. The appellants alleged in their application that the boundaries to their respective parcels had been shifted after the first demarcation.

On receipt of the application, the District Land Registrar did not approve the same but instead referred the dispute to the District Land Disputes Tribunal. The reference was made on 5.10.2001. The boundary dispute was heard by the District Land Disputes Tribunal. The panel of elders found that the boundaries on the ground had been interfered with and concluded that the various parcels of land whose boundaries were in dispute should be measured again according to the particulars on the green cards in the following measurements:-

- L.P. No. Nkuene /Nkumari/311 for Paul Kithinji Nkanata – 1.21Ha.
- L.P. No. Nkuene/Nkumari/1312 for Francis Mwobobia – 0.69 Ha.
- L.P. No. Nkuene/Nkumari/1148 for Joseph Kaaria M'Twamwari – 0.7Ha.
- L.P. No. Nkuene/Nkumari/1156 for Rukaria Abwithia – 0.6 Ha.
- L.P. No. Nkuene/Nkumari/178 for Julius Kinoti – 0.6 Ha.
- L.P. No. Nkune/Nkumari/183 for M'Mwarania M'Twamwari – 1.0 Ha.

Consequent upon that award, the appellants, through their advocates, Mwenda Mwarania & Co. Advocates filed an application by way of chamber summons on 20.5.2002 for confirmation of that award as judgment of the court. The award had earlier been read in court on 4.4.2002.

On 21.6.2002, the parties appeared before the Senior Principal Magistrate Meru Mr. W. Muiruri and agreed by consent to allow the application dated 20.5.2002 upon the following terms:-

1. The award of the tribunal/panel of elders read in court on 4.4.2002 be and is hereby confirmed as judgment of the court.
2. The District Land Registrar and/or District Surveyor, Meru Central District do re-survey and remark the boundaries of the parcels in dispute as per the registered areas and the award as follows:-
 - (i) L.R. NKUENE/NKUMARI/1311 – 1.21 Ha.
 - (ii) L.R. NKUENE/NKUMARI/1312 - 0.69 Ha.
 - (iii) L.R. NKUENE/NKUMARI/1148 - 0.7 Ha.
 - (iv) L.R. NKUENE/NKUMARI/1156 - 0.6 Ha.
 - (v) L.R. NKUENE/NKUMARI/178 - 0.6 Ha.
 - (vi) L.R. NKUENE/NKUMARI/183 - 1.0 Ha.
3. The District Surveyor do ascertain the persons currently occupying the more (sic) than their rightful share per order NO. 2 above hence encroaching on others share of land and file a report in court within 60 days of this order.
4. The District Surveyors costs in the interim be met by the claimants pending the filing of the report to ascertain who among the parties is entitled to a refund plus costs.
5. Parties be at liberty to accompany the District Surveyor to the suit premises but at own costs.
6. Members of the tribunal be at liberty to attend resurveying and refixing of the boundaries but at own costs. This consent order was duly approved by the court and sent to the District Surveyor Meru Central District for compliance. The order that was served upon the District Surveyor was duly indorsed with a Notice of Penal consequences.

As it transpired later from the District Surveyors report dated 7/8/2002 which was filed in court on 1/10/2002, the District Surveyor did not comply with the order as recorded. Nonetheless the suit premises were visited on 31/7/2002. The reasons given for non-compliance with the order were: -

- (1) That the boundary dispute had never been determined by the District Land Registrar before it went

to court as required by Section 21 (4) of the Registered Land Act.

(2) Neither the register nor the registry map can be used to alter the boundaries that exist on the ground in a general boundary system. Rather, the boundaries on the ground are used to rectify the register and the registry map. RLA section 142 (1) (c) provides for such rectification while section 21(1) indicates that the registry map is not an authority on general boundaries.

According to the measurements that were taken by the District Surveyor consequent upon the consent order of 21.6.2002, the various suit premises were found to be of the following measurements:-

- L.P. No. Nkuene/Nkumari/178 – 0.6 Ha.
- L.P. No. Nkuene/Nkumari/183 – 1.0 Ha.
- L.P. No. Nkuene/Nkumari/1148 – 0.53 Ha.
- L.P. No. Nkuene/Nkumari/1156 – 0.51 Ha.
- L.P. No. Nkuene/Nkumari/1311 – 1.21 Ha.
- L.P. No. Nkuene/Nkumari/1312 – 1.21 Ha.

The three parcels of land that were found to have problems or discrepancies between the measurements on the ground and details on the registry map were L.P. NKUENE/NKUMARI/1148 which measured 0.53Ha. instead of 0.7Ha shown on the map. Parcel number 1156 which measured 0.51Ha. instead of 0.6ha shown on the registry map and finally parcel number 1312 which measured 1.21Ha. instead of the 0.69Ha. shown on the registry map.

From the reading of the consent order which the District Land Surveyor was complying with and especially order number (2) thereof, the boundaries of the parcels were to be remarked and refixed in accordance with that order. The boundaries had therefore to be remarked and refixed to give Nkuene/Nkumari/1312 an acreage of 0.69 Ha; 1148 was to be remarked and refixed at 0.7Ha. and parcel 1156 was to be remarked and refixed at 0.6Ha. instead of the 0.51Ha. shown on the ground.

When the matter came up for mention on 17/2/2003, Mr. Mwenda Mwarania for the appellants (claimants then) told the court that since the District Land Surveyor had not remarked and refixed the boundaries as agreed by the parties, it followed that he had not complied with the order. Mr. Mwarania urged the court to send the matter back to the Surveyor for compliance.

Instead both the District Land Surveyor and District Land Registrar were put in the witness box. They were duly cross-examined on their report dated 7/8/2002. From that evidence, it came out clearly that the first reason of the report dated 7/8/2002 was not correct because the boundary dispute had actually been referred to the District Land Registrar. The dispute was not admitted to hearing by the District Land Registrar but was instead referred to the District Land Disputes Tribunal. This was on 5/10/2001.

In his ruling dated 1/4/2003, which ruling gave rise to this appeal, the learned trial Magistrate concluded that the District Land Surveyor's Report dated 7/8/2002 could not be faulted. The reason he gave was that the report was prepared by an expert. He relied on the provision of Section 142(1)c) of the RLA which provides as follows: -

“142(1) The Registrar may rectify the register or any instrument presented for registration in the following cases –

- (a)
- (b)

(c) where upon re-survey, a dimension or area shown in the register is found to be incorrect, but in such case the Registrar shall first give notice to all persons appearing by the register to be interested, or affected of his intention so to rectify”.

The appellants have appealed. There are seven grounds of appeal in the Memorandum of Appeal. The gist of the grounds of appeal is that the learned trial Magistrate erred in holding that the District Land Surveyor was justified in failing to comply with the consent orders dated 21/6/2002. Further that the learned trial Magistrate erred in law in granting orders that had not been sought by any of the parties to the suit namely an order for rectification of the registers.

Finally, among other complaints, it is contended that the learned trial Magistrate erred in law in failing to be guided by the expert evidence of the District Land Registrar to the effect that boundaries can sometimes be altered after hearing of a boundary dispute.

As a first court of Appeal, I have carefully considered the appellants’ claim. I have examined all the pleadings and all the consent orders entered into by all the parties. I have also considered the verbal reports given by both the District Land Surveyor and the District Land Registrar upon which they were cross-examined by counsel, for both sides. After such reconsideration and re-evaluation, I have come to the conclusion that the learned trial Magistrate erred in law by purporting to set aside a consent order without the consent of the parties. The consent order was clear in its terms. The parties to the claim acknowledged that there were discrepancies in the measurements on the ground. As a result, they mandated the District Land Surveyor to ascertain the persons who were then currently occupying more than their rightful share as per the accepted shares as per the second limb of the consent order of 21/6/2002. The Objector/Respondent whose land measured far more on the ground than his true agreed acreage, was also a party to the said consent.

In the case of FLORA WASIKE V DESTIMO WAMBOKO [1988] KLR 429, the Court of Appeal held that “a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting aside a contract, or if certain conditions remain to be fulfilled which are not carried out”. A consent judgment may also be set aside if it can be proved that the decree is invalid abinitio and should be rescinded or that there exist circumstances to warrant varying the decree.

After carefully considering the circumstances of this case, I find that there are no grounds which would justify the setting aside of the consent order of the parties as recorded in court on 21/6/2002.

At the hearing of this appeal, the appeal was not contested. Mr. Mwarania contended on behalf of the appellants that the learned trial Magistrate over-relied on the provisions of Section 142(1)(2) of the RLA when Section 142(1)(b) was also relevant. Section 142(1)(b) provides as follows: -

“142(1) The Registrar may rectify the register or nay instrument presented for registration in the following cases –

(a)

(b) in any case and at any time with the consent of all persons interested

(c)

The court is of the view that Mr. Mwarania is right on this point. All the parties to this claim including the Respondent, agreed that the register be rectified. That meant that land parcels Nkuene/Nkumari/1148 and 1156 were to be rectified in terms of the consent order of 21/6/2002. This would also mean that fresh boundaries on the ground had to be fixed, affecting not only those two parcels but also parcel number Nkuene/Nkumari/1312 belonging to the Respondent.

It is also worthy of note, and as contended by Mr. Mwarania that the consent orders of 21/6/2002 have not been challenged by any party. There has been no application for review or setting aside of the orders by

any of the parties. The learned trial Magistrate was therefore wrong in proceeding to grant orders that had not been applied for. There is also evidence on record by the District Land Registrar that in cases of anomalies like in the present case, the boundaries can be altered. The portion occupied by the Respondent is far in excess of the acreage shown on the register. It is this anomaly that has also resulted in the reduction of the actual ground acreage for parcels 1148 and 1156. If the learned trial Magistrate had addressed his mind to the provisions of Section 143(1) of the RLA, he would have found that there was definitely a mistake in this case. An order for rectification of the registers in respect of parcels 1148 and 1156, and re-fixing of boundaries for those parcels and parcel 1312 as per the second limb of the consent order of 21/6/2002 was therefore possible. There is also evidence on record to show that the registry map is not authority on general boundaries.

In the result, I do allow this appeal. The ruling and order of the learned Senior Principal Magistrate, Mr. Njeru Ithiga, dated 1/4/2003 are set aside. The District Land Surveyor Meru Central is by this Judgment sent back to the suit parcels of land to be accompanied by the Executive Officer of this court to fully implement the orders of the court at his own expense. The District Land Surveyor to file a report in the Chief Magistrate's Court within 60 days from the date of this judgment.

Costs of this appeal shall be paid to the appellants. Costs of proceedings before the lower court and before the Tribunal will be costs in the cause.

Orders accordingly.

Dated and delivered at Meru this 30th day of November 2005.

RUTH N. SITATI

J U D G E

30.11.05