

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 166 OF 2002

MWANGI CHEGE.....APPELLANT

VERSUS

EUNICE NJOKI RUGA.....1ST

RESPONDENT

KAMAU KARUGA RUGA.....2ND RESPONDENT

JUDGMENT

The Respondents, in this Appeal Eunice Njoki Ruga and Kamau Karugu Ruga filed suit before the Senior Principal's Magistrate's Court, Naivasha against the Appellant, Mwangi Chege and S. M. Nguturi seeking the orders of the Court to permanently restrain the Appellant and his co-defendant in the lower Court, Mr. S. M. Nguturi from interfering with the Respondent's ownership of *parcel number Nyandarua/South Kinangop/299 and 300*. In their Complaint, the Respondents averred that there was no dispute between them and the Appellant that would require the intervention of the Land Registrar, Nyandarua, Mr S. M. Nguturi. Contemporaneous with filing the suit, the Respondents made an application for temporary injunction to restrain the two from entering, surveying, sub-dividing or arbitrating upon any alleged dispute between the Appellant and the Respondent pending the hearing and determination of the suit filed. The Defendants were duly served. The 1st Defendant entered appearance. At the hearing of the application for the temporary injunction, the Appellant raised a preliminary objection to the Plaintiff's suit. The said preliminary objection was to the effect that the Senior Principal Magistrate's Court lacked jurisdiction to hear the dispute before it. After hearing the preliminary objection, the Learned Resident Magistrate dismissed the preliminary objection and ruled that the said Court had jurisdiction to hear and determine the dispute between the parties. Being dissatisfied with the dismissal of the said preliminary objection raised by the lower Court, the Appellant has appealed to this Court against the said dismissal.

In his Memorandum of Appeal, the Appellant raised two grounds of Appeal, namely that the trial Magistrate failed to appreciate the pleadings of the Respondents as pleaded in the Complaint dated the 13th of August 2002. The Appellant was further aggrieved that the trial Magistrate had failed to appreciate the provisions of the law as laid down in Sections 3A, 3, 4 and 5 of the Civil Procedure Act and Sections **3, 4, 18(5), 19(1) & (2), 20, 21(1)(2), (3) (4), 22(1) & 2, 149 and 150 of the Registered Lands Act**. The Appellant prayed that the Appeal be allowed and the suit filed by the Respondents in the Lower Court be struck out.

In his submission before Court, Mr Mburu, Learned Counsel for the Appellant submitted that the Senior Principal Magistrate's Court, Naivasha did not have jurisdiction to hear and determine the suit filed by the Respondents before the said Court. The Appellant submitted as the dispute between the Appellant and the Respondent related to boundaries of land registered under the Registered Land Act. The Appellant further submitted that the Land Registrar had made a decision to visit the suit lands and have the said parcels of land resurveyed. The Respondents were not satisfied with the decision of the Land Registrar and moved to the Senior Principal Magistrate's Court, Naivasha and obtained orders restraining the 2nd Defendant, the Land Registrar from performing his statutory duties. The Appellant submitted that it is only the Land Registrar who had powers in law to determine disputes related to boundaries to land registered under **the Registered Land Act**. The Appellant further submitted that **Section 21(4) of the Registered Land Act** barred any Court from entertaining any land dispute involving

boundaries. The Appellant argued that the trial Magistrate was therefore wrong in disallowing the preliminary objection raised and further by ruling that the Senior Principal Magistrate's Court had jurisdiction to hear and determine the dispute.

Mr Njuguna, Learned Counsel for the Respondents opposed the Appeal. He submitted that the Appeal was based on a misconception and misunderstanding of the facts of the case. The Respondents, while admitting the fact that the Land Registrar had powers to arbitrate boundary disputes, submitted that in their case the Land Registrar was acting ultra vires his powers. The Respondents submitted that the dispute relating to the boundaries between the parcels of land owned by the Appellant and that owned by the Respondents had been determined by the then Land Registrar, Nyandarua before the 2nd Defendant took office as the Land Registrar at Nyandarua. The said former Land Registrar had ruled that the District Surveyor would resurvey the parcels of land in question and establish the areas on the ground in accordance with the registered plans. The Respondents further submitted that for the new Land Registrar to make a decision to re-arbitrate the dispute was not in the interest of justice. Learned Counsel for the Respondents submitted that the Senior Principal Magistrate's Court had jurisdiction to prevent the abuse of the due process of the law. The Respondents further submitted that they went to the Court to protect their title to land. The Respondents prayed for the Appeal to be dismissed and an order be made that the suit in the Senior Principal Magistrate's Court do proceed to hearing.

I have considered the submissions made by the Counsel for the Appellant and Counsel for the Respondents. I have also read the pleadings filed by the parties to this Appeal and the proceedings before the trial Magistrate's Court. The issue for determination by this Court is whether the Senior Principal Magistrate's Court, Naivasha had jurisdiction to hear the land dispute between the Appellant and the Respondents. This being a first Appeal, this Court is mandated to look at the submissions made before the trial Magistrate's Court, re-evaluate it and reach its own independent decision. The first Appellate Court is therefore required to re-hear the case and reach its own conclusion (**See Selle –versus- Associated Motor Boat Co [1968] E. A. 123**).

According to the submission made by the Appellant, both in the lower Court and before this Court, the dispute between the Appellant and the Respondents related to boundaries of land registered under the Registered Lands Act (Cap 300 Laws of Kenya). The Appellant submits that the Senior Principal Magistrate's Court, Naivasha did not have jurisdiction to hear and determine such a dispute. The Appellant further argued that the right to hear and determine boundary disputes of land registered under the Registered Land Act was solely the preserve of the Land Registrar. The Respondents do not dispute fact. In their Submission before Court, the Respondents argue that indeed the dispute between the Appellant and the Respondent had been referred to, heard and determined by the Land Registrar, Nyandarua. The Respondents further submitted that what had remained was the implementation of the decision by the Land Registrar. The Respondents submitted that when the 2nd Defendant, who is the new Land Registrar Nyandarua came to office he again wanted to re-arbitrate the dispute between the Appellant and the Respondents. The Respondents have argued that the decision by the 2nd Defendant to re-arbitrate the dispute was ultra vires his powers. The Respondents further submitted that they decided to go to Court because the new Land Registrar was purporting to act on the powers given to him under the Registered Land Act, when in actual fact there was no dispute pending between the Appellant and the Respondent.

I have considered the arguments made on the matters in dispute. It is not denied by both parties that it is only the Land Registrar who has power to determine boundary disputes as provided by **Section 21, 22, 23 and 24 of the Registered Land Act. Section 21(4)** of the said Act specifically prohibits disputes relating to boundaries to land registered under the said Act being referred to Courts before the boundaries are determined by the Land Registrar. In the instant case, A complaint had been made to the Land Registrar, Nyandarua. The Land Registrar heard the dispute and made a determination. A determination was made to the effect that the District Surveyor was to go to the parcels of land in dispute, survey the same to conform with the registered plan of the area. The Appellant in this case did not appeal against the decision of the said Land Registrar. He waited for the new Land Registrar to assume office and made another complaint. The new Land Registrar (the 2nd Defendant in the civil case in the lower Court) without first establishing if the matter in dispute had been heard by his predecessor proceeded to

order a new hearing. This decision by the said Land Registrar is what prompted the Respondents to go to Court.

It is the finding of this Court that the submission by the Respondents that the said Land Registrar acted ultra vires his powers has merit. The said Land Registrar could not purport to arbitrate over an issue which a decision had already been rendered by his predecessor acting within the power granted to him by the Registered Land Act. The Respondents were therefore within their right to seek the intervention of the Courts of Law. Section 21(4) of the Registered Land Act provides that:

“No Court shall entertain any action or other proceedings relating to a dispute as to the boundaries of Registered Land unless the boundaries have been determined as provided under this Section.”

In the instant case, the Land Registrar had already made a determination on the boundary dispute between the Appellant and the Respondents. The Senior Principal Magistrate’s Court was therefore not barred from hearing the case before it. The Respondents contended that there was no dispute pending between themselves and the Appellant. In my considered view they were right. The Respondents had every right to seek the intervention of the Court where the 2nd Defendant in the suit in the lower Court was obviously acting outside his powers. The Learned Resident Magistrate was right in disallowing the preliminary objection.

The dispute before the Court was not land boundary dispute but rather the abuse of the process of the law by the Appellant and the 2nd Defendant in the suit before the lower Court. The Senior Principal Magistrate’s Court therefore had jurisdiction to hear and determine the matters in dispute.

In the premises therefore, this Appeal lacks merit. The same is dismissed with costs to the Respondents. The hearing of the case before the Senior Principal Magistrate, Naivasha shall proceed to hearing and determination on merits.

DATED at NAKURU this 2nd day of November 2004.

L. KIMARU

AG. JUDGE