



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO 267 OF 1997

GATI KAGO APPELLANT

VERSUS

STEPHEN NJOROGE KIGOCHI RESPONDENT

JUDGMENT

This appeal originates from the Originating Summons filed by the Respondent against the Appellant in which the Respondent sought, in the main, the following order:

“1. THAT this Honourable Court (i.e the lower court) deem it fit to order the definition (sic) and determination of the precise (sic) on the ground position of the boundary between land parcels number Gatamaiyu/Kamuchege/129 and Gatamaiyu Kamuchege/281.

2. THAT the said order be served on the Land Registrar Kiambu to be effected.”

At some point the record of the lower court disappeared and had to be reconstructed. It is, therefore, difficult to comprehend what steps had been taken in the interim but what is clear is that at some point the matter appears to have been referred to the Land Registrar by consent of the parties who filed an award favourable to the Respondent to the effect that the Appellant had encroached on 0.79 acres of the Respondent’s land.

Armed with the award of the Land Registrar the Respondent filed in the lower court an application dated 28th May, 1997 in which he sought the following orders:

“1. THAT ... (the court) deem it fit to order the Respondent (now Appellant) to be evicted from all that portion of parcel No Gatamaiyu/Kamuchege/129 that he occupies illegally

2. THAT the ... (Appellant) do remove any graves of his relatives and developm ents on the illegally occupied portion

3. THAT the ... (Appellant) do pay the Applicant (now Respondent) such damages as will be determined to have been caused by his trespass

4. (Costs)”.

The lower court acceded to that application and issued the orders prayed for in favour of the Respondent. The Appellant was aggrieved by the decision of the lower court hence this appeal.

The Appellant's appeal is based of 5 grounds as follows:

- 1. THAT the learned Magistrate erred in law and fact in entertaining the matter in which the court had no jurisdiction in view of the provisions of Section 21 of the Registered Land Act**
- 2. THAT the learned Magistrate erred in law in failing to hold that only the Land Registrar had jurisdiction to hear and determine a boundary dispute**
- 3. THAT the learned Magistrate erred in law in failing to hold that the application dated 28 th May, 1997 was improperly before the court as the Respondent should file (sic) a substantive suit by way of a *Plaint***
- 4. THAT the learned Magistrate erred in law and in fact in holding that this was not a case of eviction and went ahead to order that the Appellant be evicted from the suit premises**
- 5. THAT the learned Magistrate misapprehended the law thus arriving at a decision which was unlawful and unjust.”**

Miss Njuguna for the Appellant did not argue those grounds in any particular sequence but that did not affect my consideration of the appeal in anyway especially since the grounds raised were fairly few and were closely related. The main thrust of Miss Njuguna's argument was that the lower court had no jurisdiction to hear the matter as Section 21 (4) of the Registered Land Act expressly ousted the court's jurisdiction to hear disputes in relation to boundaries to registered land. She cited the case of *Narok County Council vs T rans Mara County Council and Another Kisumu Civil Appeal No 25 of 2000* which lays down the proposition that the courts cannot arrogate to themselves to do what a statute has expressly assigned to a different person or authority but that the court can intervene by judicial review to compel the thing to be done by the person or authority on whom the duty is placed and or to ensure that its thing is done according to law.

Although Miss Njuguna's argument is attractive and strongly persuasive, I am unable to accept it. It is true that Section 21 (4) of the Registered Land Act excludes the jurisdiction of our courts from matters relating to disputes on boundaries to registered land unless those boundaries had been determined under the Section. In the case before me, one may be tempted to decide, based on a casual perusal of the Originating Summons in the lower court, that the Respondent was inviting the court to go against the provisions of the Registered Land Act but in fact it is just a matter of improper use of words in that pleading. It appears that what the Respondent sought was an order that the dispute between them be referred to the Land Registrar for a decision. It is no wonder therefore that the parties then consented to refer the dispute to arbitration before the Registrar who then gave his decision. In the result, the court and the parties complied with the Registered Land Act and the dispute between the parties on boundaries was in fact solved by the Registrar. So, in this case, unlike in the *Narok County Council* case the court did not usurp the authority of another person or authority. It was after the Land Registrar had made his decision that the court moved in to effect the same and that is perfectly in sync with the provisions of Section 21 of the Registered Land Act.

On this conclusion, the case of *Fitzwanga vs Environment Disaster Research Foundation (2002) 1 KLR* is not relevant to this case. As the main objection was based on the question of jurisdiction of the lower court, I would have stopped there but I am compelled to delve into another point which was raised by Miss Njuguna.

The point referred to the manner in which the Magistrate delivered himself. At some point, the Magistrate said that the court was not concerned with eviction but by allowing the Respondent's application the effect was that the Appellant was to be (and was in fact) evicted. This must have been caused by confusion in the mind of the Magistrate but the same did not result in any serious miscarriage of justice in the circumstances of this case. That ground cannot, therefore, be the sole basis upon which this court will interfere with an otherwise just decision.

In the result, I find no merit in the appeal and I dismiss it with costs to the Respondent.

Dated and delivered at Nairobi this 8th day of December, 2004.

ALNASHIR VISRAM

JUDGE