



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MALINDI

CIVIL APPEAL NO. 7 OF 2019

IN THE MATTER OF PLOT NO. GEDE/MIJOMBONI/1583

BETWEEN

GLADYS MUTHONI MUNG'URA.....APPELLANT

VERSUS

JULIUS NGARI NJAGI.....RESPONDENT

JUDGMENT

BACKGROUND

1. This is an Appeal from the Ruling of the Land Registrar Kilifi dated 3rd May 2019 in regard to a boundary dispute in respect of Land Portions Number Gede/Mijomboni/1583 and Gede/Mijomboni/1582.

2. The Ruling arose from an application by Gladys Muthoni Mung'ura (the Appellant herein) dated 23rd January 2019 wherein according to the Report, she sought to have the road serving her Plot No. Gede/Mijombani/1583 excised by the Land Registrar, Kilifi. Having conducted a site visit to the ground, the Land Registrar made certain observations before making a finding that:

- 1. The road on the Map does not exist on the ground;**
- 2. There is a road on the ground that is not on the map;**
- 3. The Chief, neighbours and Community would like the road on the ground adopted;**
- 4. Plot No. 1583 has encroached on the existing road by approximately 0.5 m ; and**
- 5. The Plot sizes on the ground are smaller than on the titles and the Map.**

3. The Land Registrar then concluded as follows:

‘The area has common boundaries that can be amended. The road on the ground should be adopted by a Change of common boundary on the Map.

Way Forward

All parties bordering the existing road should make an application through the area Chief to the Surveyor- Malindi to have the common boundaries changed to adopt the existing road. The affected parties are at liberty to appeal this decision to the High Court of Kenya within 90 days of the date herein.”

4. Aggrieved by that determination, the Appellant lodged the Memorandum of Appeal herein dated 1st August 2019 faulting the Land Registrar’s decision on the ground that:

- 1. The Appellant who is the owner of a Portion of land known as Gede/Mijomboni /1583, by her letter written through her**

advocate on the 23rd January 2019, reported a boundary dispute between her and her neighbor and owner of Portion Number Gede/Mijombani/1582 and requested the Registrar to fix the boundaries of the said lands. The Learned Registrar erred in law and fact by failing to have the boundaries of the said portions fixed.

2. That the Learned Registrar erred in law and fact when she failed to find that the road existing on the map having been surrendered to the government at the time of the approval of the sub division scheme was a public thoroughfare that could not be converted to the private use of the respondent and she therefore came to the wrong conclusion.

3. That the Learned Registrar having found that the areas on the ground did not correspond with the areas on the map and the titles erred by failing to direct the rectification of the boundaries so as to ensure that the areas on the ground correspond with the areas on the map and the titles.

4. That the Learned Registrar erred in law and fact by directing that the Plot Number Gede/Mijombani/59, a portion of land belonging to a deceased person be interfered with without the involvement of a person competently authorized to deal with the estate of the deceased and therefore came to the wrong conclusion.

5. For those reasons, the Appellant urges this Court to allow the appeal and to direct that the boundaries between Land Portions Number Gede/Mijombani/1583 and Gede/Mijombani/1582 be fixed as provided by the law.

6. Julius Ngari (the Respondent herein) did not dispute the Record of Appeal as filed and the parties agreed to dispose of the Appeal by way of written submissions. I have perused and considered the Record as filed, the rival submissions of the Learned Advocates for the parties as well as the authorities to which I was referred.

7. The duties of a first appellate Court such as this one were settled by the Court of Appeal in *Okeno –vs- Republic (1972) EA 32* where the Learned Judges of Appeal opined as follows: -

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya –vs- Republic (1957) EA 336) and the Appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion”

8. Re-stating that position in *Gitobu Imanyara & 2 Others –vs- Attorney General (2016) eKLR*, the Court of Appeal stated that:-

“(An) appeal to this Court from a trial by the High Court is by way of a re-trial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”

9. In the matter before me, the Appellant avers that by a letter dated 23rd January 2019, she reported a boundary dispute between herself as the proprietor of all that parcel of land known as Gede/Mijombani/1583, and her neighbor the Respondent herein who is the proprietor of a Portion of land known as Gede/Mijombani/1582. The Appellant asserts that by the said letter, she requested the Land Registrar Kilifi County to fix the boundaries of the said lands.

10. By this Appeal, the Appellant accuses the said Registrar of failing to have the boundaries of the said parcels of land fixed and to take appropriate steps to rectify certain anomalies said to be existing on the ground in relation to the two properties.

11. The Respondents in their submissions however deny that the matter that was before the Land Registrar was a dispute as to where the boundary lies between the said two parcels of land. Instead, it is their case that what went before the Learned Land Registrar was an application to the Registrar to excise a road to serve the Appellants parcel of land.

12. I have gone through the Record of Appeal as filed herein. Unfortunately, I was unable to find the letter dated 23rd January 2019 said to have been written on the Appellant’s behalf by her Advocates on record. It was however noteworthy that in the preliminary remarks on the impugned Report dated 3rd May 2019, the Land Registrar states as follows on the section headed “Background”.

“The site visit was done on 5th April 2019 after an application by Gladys Muthoni the title holder of the Plot No. Gede/Mijombani/1583 dated 23rd January 2019 to excise the road serving her plot.”

13. After recording the coram on those who participated in the site visit, the Land Registrar records as follows before arriving at her findings as above stated in her brief Report:

“Methodology

The parties present circumnavigated Plot Nos 1583, 1546, 1545 and 1544, the road on the Map and the existing road on the ground. The Surveyor picked points and prepared his Report.

Observations

The area is well developed with several permanent private dwelling houses. Plot Nos 1582, 1583, 1546, 1545 and 1544 were sub-divided from one plot. The subsequent plots were then sold to several people including the complainant who have developed their plots. The seller (Julius Ngala) of the sub divided plots own Plot No. 1582.

According to the Map, the road serving the subdivided plot was to be in the middle of the property (see Surveyor's Report). However, on ground, Julius Ngala advised the purchasers of Plot Nos 1583, 1546, 1545 and 1544 to build their properties facing Plot No. 59.

There is an existing road between Plot Nos. 1037, 1583, 1546, 1545 and 1544 on one side and Plot No. 59 on the other side that is used by the whole community but does not appear on the Map. This road is marked by beacons and sisal at intervals.

The area Chief and Village elders confirmed that Julius Ngala (Plot No. 1582) and Charo Ziro of Plot No. 59 who is now deceased each agreed to surrender 3.5 feet each to serve as a Public road. This road was however not adopted on the Map when adjudication was being done. The community and neighbours present insist that they would like the road adopted as an official road.

It is upon this understanding that the houses built face the existing road on the ground and not the road shown on the Map."

14. Arising from the contents of the said Report and in the absence of the letter dated 23rd January 2019, it was difficult to dispute the Respondent's contention that what was before the Land Registrar was not a boundary dispute as contemplated under Sections 18(1) and 19(1) of the Land Registration Act No. 3 of 2012.

15. I say so because according to the Registrar's Report which is the only official record we have herein of the proceedings, all that the Appellant had requested for was for the Registrar to excise the road serving her Plot. From a reading of that Report, it is evident that while the said road appeared on the official Map of the area, the same did not exist on the ground and hence the Appellant's application.

16. As it turned out, neither the Official Map nor the Surveyor's Report referred to in the Report were made part of the Record of Appeal before me. Instead the Appellant has annexed a field diagram dated 29th March 2018 and a Survey Report by one Okoth W.O dated 8th April 2019. That field diagram is not mentioned anywhere in the Learned Registrar's Report and the Surveyor who prepared the Report dated 8th April 2019 is clearly not one of those who are recorded to be in attendance during the site visit. This Court was therefore unable to consider and or rely on the same as the basis to discount the findings of the Land Registrar.

17. As was stated in *Peters –vs- Sunday Post Ltd (1958) EA 424*:

"Whilst an appellate Court has jurisdiction to review the evidence to determine whether the conclusions of the trial Judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial Judge failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate Court will not hesitate so to decide."

18. In the instant matter, I did not think the Registrar could be faulted for failing to proceed to ascertain and fix the boundaries of the two parcels of land as provided under Section 19(1) of the Land Registration Act where that was not the application before her. Similarly, I did not think the Registrar could be faulted for failing to rectify the acreage of the parcels of land in the affected area as provided under Section 79(1) (c) of the Land Registration Act where there was no application for rectification.

19. Clearly the material placed before this Court in regard to the dispute that went before the Land Registrar was quite scanty and insufficient. In the circumstances, I did not find any basis for this Court to exercise its powers as provided to compel the fixing of the boundaries and or a rectification of the register in regard to the two parcels of land.

20. In the end, the Appeal fails. The Respondent shall have the costs of the Appeal.

Dated, signed and delivered at Malindi this 19th day of February, 2021.

J.O. OLOLA

JUDGE