REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 42 OF 2000

MATUTHU MAITHYA ……………………………………APPELLANT

VERSUS

MUTINDA MWAIKWA ………………………………..RESPONDENT

JUDGMENT

In a suit filed in the court of the Principal Magistrate Kitui on 16th June 1998 the respondent sought a permanent injunction to issue against the appellant to restrain him from interfering with the former's land across the common board plus costs of the suit.

The two parties neighbour one another. The respondent, however, complained that the appellant had crossed a common boundary onto his land and cut down trees on an area measuring five acres; hence the above suit. He was supported by one (1) witness, Mutembei Mwaika, in his claim.

The appellant, on the other hand, disputed this claim but said the respondent had no land in that area and that he had not crossed the boundary which was fixed by the elders.

The matter was heard by the Resident Magistrate, (K.O. Ogola) on 8th September, 1999, 6th October 1999 and 15th December, 1999.

He delivered his judgment on 29th December, 1999 in which he issued the injunction as sought in the plaint with costs.

An appeal was lodged against this judgment on 28th January 2000 in a memorandum of appeal which listed 6 grounds of appeal, because the said judgment was against the weight of evidence or that the court had no jurisdiction to entertain this suit it being one on a boundary dispute; or that the court ignored or proceeded with the case contrary to the provisions of the Land Disputes Tribunal Act; that the court ignored the provisions of the Land Adjudication Act and/or that the judgment did not take into account the defence evidence.

The appeal was heard by this court on 23rd September 2002 and though the hearing date was fixed by counsel for the appellant who issued and served a hearing notice upon the respondent's counsel, neither the counsel nor the respondent in person appeared to contest the appeal.

Counsel for the appellant proposed the appeal and submitted that as the dispute between the parties was over a boundary between their parcels of land, the court had no jurisdiction and that it should have been dealt with in accordance with Section 3 of the Land Disputes Tribunal Act No. 18 of 1990 and that the lower court should not have usurped the functions of the Land Disputes Tribunal; hence its judgment was null and void.

He submitted that the prayer in the plaint was not inconformity with the judgment and/or decree and that the defence and its evidence were not evaluated and considered.

He prayed for the appeal to be allowed with costs.

These are the submissions I have heard and recorded in this appeal for consideration and decision.

When a party comes to court and complains of his neighbour having crossed over a boundary between their parcels of land and occupied and/or settled on some piece of land as big as 5 acres, it is very difficult to ascertain where the bottom line between a boundary or land dispute is.

Paragraph 3 of the plaint was to the effect that in or about July 1997 the defendant had, without the plaintiff's consent encroached upon the plaintiff's land at Ngiluni and caused damage by cutting down many trees in an area measuring 5 acres.

And paragraph 4 thereof stated that the defendant had no reasonable excuse as the common boundary had already been established in the presence of area elders to the satisfaction of both parties.

Then in paragraph 5 of the plaint the plaintiff was seeking a permanent injunction restraining the defendant from cutting down trees or interfering in the plaintiff's land in any way.

Prayer (a) of the plaint was however, for

"a permanent injunction from interfering with

the plaintiff's land across their common border."

In consideration of these paragraphs in the plaint, what would a reasonable court think of?

I am dwelling on the plaint because in his evidence he said almost nothing about a boundary dispute apart from saying

"I share a boundary with the defendant"

and praying at the end of his evidence;

"I am asking the d efendant be permanently restrained

from interfering with the land forming the common boundary."

From this evidence counsel for the appellant believes this was a boundary dispute which should have been deliberated upon by the Land Disputes Tribunal and not by the magistrate's court.

What actually the respondent was saying was that before the appellant crossed over to his land to cut down trees on 5 acres there of he had destroyed a common boundary between their neighbouring parcels of land and that if he had not done this, he would not have crossed over to the respondents said land to cause this damage.

Looked at in this perspective, this was a dispute to be deliberated upon by the divisional Land Dispute's Tribunal under the provisions of Section 3 of the Land Disputes Tribunal Act No. 18 of 1990 and not by the magistrate's court as it happened.

This is an area under Land Adjudication and the plaintiff obtained consent from the Land Adjudication Officer Mwingi District as required by Section 30 of the Land Adjudication Act Chapter 284 Laws of Kenya; hence ground 4 of the Memorandum of appeal was not actually correct.

If the area was registered under the Registered Land Act Cahpter 300 Laws of Kenya perhaps I would have said the provisions of Section 21 of the Act would have applied other than Section 3 of the Land Disputes Tribunal Act.

That the evidence of the appellant was or was not ignored is neither here nor there given that this appeal has succeeded on the point of law.

I allow this appeal and set aside the lower courts order with costs to the appellant.

Delivered and dated this 26th day of September, 2002.

D.K.S. AGANYANYA

JUDGE