



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

E.L.C.A NO. 19 OF 2019

LEDERO GROUP RANCH.....APPELLANT

VERSUS

NAUNERI GROUP RANCH.....RESPONDENT

JUDGMENT

A. INTRODUCTION

1. This is an appeal against the decision of the District Land Registrar (C.M. AYIENDA) dated 14th November, 2019 purporting to determine a boundary dispute between the parcels belonging to Ledero Group Ranch on the one hand and Nauneri Group Ranch on the other. By the said decision, the Land Registrar (*the Registrar*) determined that the boundary separating the two ranches was the Maralal-Kisima road and not the river which the Appellant rooted for.
2. The material on record indicates that there has been a long standing boundary dispute between the two groups ranches. It would appear that the Respondent has always maintained that the boundary between the two ranches was the main road known as Maralal – Kisima road whereas the Appellant maintained that the legitimate boundary was a nearby river. The significance of the boundary appears that if the road be the boundary then the Respondent would have a bigger parcel of land whereas if the river be the rightful boundary then the Appellant's land would be bigger.
3. The material on record indicates that it is the Appellant who first reported the boundary dispute to the Registrar in 2015 or thereabouts. It would appear that the parties were summoned for a hearing in which they called some witnesses on or about 28th July 2015. In a report dated 15/9/2015 the Registrar then in office was unable to resolve the boundary dispute and advised the parties to ask the court to harmonize the two gazette notices which set up the two group ranches. There is no indication if the said report was ever delivered to the parties or published.
4. However, it would appear that on or about 14th November, 2019, the Registrar ultimately made a determination on the boundary dispute by deciding that the boundary separating the two group ranches was the Maralal-Kisima road and not the river. The net effect of the determination was that the Appellant lost some portion of land whereas by the same margin the Respondent gained some land.

B. THE GROUNDS OF APPEAL

5. Being aggrieved by the said determination, the Appellant filed a memorandum of appeal dated 28th November, 2019 which was amended on 12th October, 2020 raising the following 13 grounds of appeal:
 - a) *That the District Land Registrar misdirected himself in finding out that there was an overlap over Nauneri Group Ranch*
 - b) *That the District Land Registrar erred in failing to appreciate that there will be an encroachment over the Appellant's parcel of land if the Maralal -Kisima road is the boundary.*
 - c) *That the said District Land Registrar did not adjudicate the dispute impartially and was influenced by extraneous matters hence the erroneous decision.*
 - d) *That the said District Land Registrar erred in fact and in law by failing to make an unconditional finding in favour of the Appellant.*
 - e) *That the District Land Registrar erred in failing to evaluate and analyze the evidence in support of the Appellant's case*

f) That the District Land Registrar erred in fact and in law in failing to conduct an independent interrogation of the dispute by relying completely on the findings and proceedings of the former District Land Registrar (P.M. MENGI) of 15th September, 2015. This is a procedure that is clearly illegal as it is unknown in law.

g) That the District Land Registrar erred in not appreciating that there was already a determination of the matter by **MR. P.M. MENGI - District Land Registrar** – on 15th September, 2015 and his actions of purporting to reconsider the same dispute were completely irregular.

h) That the District Land Registrar erred in law and in fact in failing to call up the parties in order to interrogate their testimony vis-a-vis the evidence and lifting the witness statements of the parties from the Report prepared earlier by the District Land Registrar dated 15th September, 2015 and using them to make a finding.

i) That more so the District Land Registrar erred in law and especially with regards to his authority accorded by Section 14 and 18 of the Land Registration Act by failing to interrogate the dispute personally in order to establish the truth from the testimony and evidence of the parties and instead circumventing the scope of his duty by lifting the finding of an earlier report and using the inconclusive report to purport to establish a conclusive finding.

j) That the District Land Registrar erred in law and in fact in failing to employ the dictates of the Fair Administrative Action Act which compel an administrator (District Land Registrar) to accord affected persons with an opportunity to attend proceedings in person or in the company of an expert of his choice, to be heard and an opportunity to cross examine persons who gave adverse evidence against them.

k) That the District Land Registrar failed to appreciate that the dispute had previously been adjudicated over and a decree made by the former District Land Registrar (**Mr. P.M. MENGI**).

l) That the District Land Registrar erred in law and in failing to involve the office or authority responsible for the survey of land to ascertain the boundaries of the two adverse parcels of land with the attendance and presence of the two disputants and thereby arrived at a finding that does not bear any scientific survey methodology and thereby erring in his decision.

m) That the District Land Registrar failed in not appreciating that he had no jurisdiction to make a determination of the matter it being an ownership dispute.

6. The appellant consequently sought the following reliefs:

a) That the appeal be allowed.

b) That the Registrar's decision dated 14th November, 2019 and all consequential orders be set aside.

c) That the Registrar be ordered to revisit the dispute in compliance with **Section 14 and 87 of the Land Registration Act**.

d) That the Appellant be awarded costs of the appeal.

C. DIRECTIONS ON SUBMISSIONS

7. When the appeal was listed for directions on 21st September, 2020 it was directed that the same shall be canvassed through written submissions. The parties were granted 14 days to file and exchange their respective submissions. However, the record shows that the Appellant filed its submissions on 21st October, 2020 whereas the Respondent filed its submissions on 20th January, 2021

D. ISSUES FOR DETERMINATION

8. Although the Appellant raised 13 grounds in its amended memo of appeal, its advocates summarized them into the following 5 issues:

a) Whether there was strict adherence to procedure in the determination of the dispute.

b) Whether the Registrar followed the rules of natural justice and dictates of the law.

c) Whether the determination was proper in the first place.

d) Whether the determination was erroneous and ought to be set aside.

e) Who shall bear costs of the appeal.

E. ANALYSIS AND DETERMINATION

(a) **Whether there was strict adherence to procedure**

9. The Appellant contended that the Registrar had lifted word for word large portions of a report by a previous Registrar and that he failed to personally interrogate witnesses as required by law. It was contended that since the Registrar did not *personally* interrogate the witnesses for the parties and did not conduct a hearing, he did not act fairly and in accordance with the law. It was submitted that it was not sufficient for him to rely on the proceedings and evidence recorded in 2015 by a former Registrar.

10. The Respondent, on the other hand, contended that **Section 18 of the Land Registration Act** made it optional for the Registrar to call witnesses in the determination of a boundary dispute. It was further contended that, in any event, the Registrar already had a record of the evidence recorded much earlier and the relevant maps and documents to enable him make the determination. It was pointed out that the Appellant's witnesses had in fact testified and their evidence, though not very relevant to the boundary issue, was recorded. The Respondent found nothing wrong with the procedure adopted by the Registrar in the determination of the boundary dispute.

11. The court has considered the material and submissions on record. It would appear that the Appellant was of the view that we are dealing with two different offices of the Land Registrar in this matter. The Appellant made every effort to distinguish the office of *P.M. Mengi* from that of *C.M. Ayienda* even though both were Land Registrars in the same office although they served at different times. The court takes the view that the office of the Registrar in this case is only one office and that is the office of District Land Registrar- Nyandarua/Laikipia. A public office should not and ought not to be personalized.

12. It would therefore follow that if the witnesses for the parties had testified before the Registrar (by whatever name) in 2015 and their evidence was still on record, there was no legal requirement for the Registrar to recall them for the purpose of personal interrogation. There is no legal requirement to the effect that every time there is a change of office holder (as opposed to the office) any witnesses who had given evidence earlier on ought to be recalled for interrogation.

13. The court is further of the opinion that the Registrar cannot be accused of lifting word for word or plagiarizing his own report or draft report. The Registrar was entitled to rely upon not only the evidence tendered earlier on by the parties but also on all official records and documents in his possession. There is no evidence on record to demonstrate that the report dated 15th September, 2015 was ever officially published or released to the parties. There is also no evidence on record to demonstrate that the position of Maralal-Kisima road or the river had changed positions between 2015 and 2019 to warrant additional evidence being recorded. Consequently, the court finds no evidence of violation of the procedures applicable to determination of boundary disputes.

(b) Whether the Registrar violated the rules of natural justice and the dictates of the law.

14. It was submitted by the Appellant that the Registrar violated the rules of natural justice and the right to a fair hearing. In particular, it was contended that the Registrar violated **Article 47 of the Constitution of Kenya, 2010, Section 18 of the Land Registration Act (LRA), and Section 4 of the Fair Administrative Action Act, 2015 (FAA)**. It was contended that the Appellant was not accorded the opportunity of being heard, of calling witnesses and cross examining the Respondent's witnesses.

15. This issue is essentially the same issue discussed above which has been given a constitutional angle. As indicated before, the issue of the Appellant not being heard has no merit. The material on record shows that their witnesses (including the chairman) testified before the Registrar. The evidence of the Appellant's witnesses was still on record by the time the Registrar's decision was rendered in 2019. The Appellant appears to have taken the view that adverse administrative action was being taken against it hence the provisions of **Section 4 (3) of the FAA** applied to it. It must be remembered that it was the Appellant who submitted the dispute to the Registrar for determination of the boundaries between the two group ranches. These were not proceedings initiated by the Registrar against the Appellant.

The material on record further shows that the Appellant's witness were accorded an opportunity of being heard and their evidence is captured in the Registrar's report dated 14th November, 2019. In fact, the record shows that the Appellant's witnesses were heard before the Respondent's witnesses.

(c) Whether the determination was proper in the first place

16. The Appellant submitted that the Registrar did have jurisdiction to confer a share of the Appellant's property to the Respondent. It was contended that the mandate of the Registrar under **Section 18 of the LRA** was to determine boundaries only and had no authority to direct that any portion of land should move from one party to another. The Appellant contended that a certain statement in the Registrar's report suggested that the owner of parcel No. 2 should get his share from Lederer Group Ranch.

17. The court has considered the material and submissions on record on this issue. The material on record shows that dispute between the two group ranches really revolved around whether the common boundary was the Maralal-Kisima road or the unnamed river. If the boundary were to be the road that would mean that parcel No. 2 would fall within Respondent's ranch and not the Appellant's. The natural consequence would be that the allottee of parcel No 2 would be displaced and would have to seek refuge in Lederer Group Ranch. That surely cannot be said to be an allocation of land from one ranch to another. It is just a natural consequence of the determination of a boundary.

18. The court is of the opinion that it was not necessary for the Registrar to point out the natural consequences of the boundary determination. He may well have omitted any reference to what would happen to the owner of parcel No 2. He did not have to give any advice or direction as to what should be done upon determination of boundaries. Be that as it may, the court is unable to accept the Appellants' contention that the gratuitous advice by the Registrar rendered the entire boundary determination invalid, null and void. Even if there was something seriously wrong with the Registrar's gratuitous advice, that is something which is clearly severable from the rest of the determination.

19. All that the Registrar was required to do was to consider the evidence and material before him and determine whether the legitimate boundary was the road or the river. The material on record indicates that although there were some contradictory gazette notices on the

actual boundaries of each group ranch, the Registrar was able to make a determination one way or the other. Any unnecessary or superfluous statement in the determination has no effect on the validity of the Registrar's determination that the boundary separating the two group ranches was the Maralal-Kisima road.

(d) Whether the determination was erroneous and ought to be set aside

20. The Appellant submitted that the Registrar's determination was erroneous, unsupported by law and illegal hence should be set aside and that the Registrar should be ordered to revisit the dispute and determine the boundaries *de novo*. Although in its amended memorandum of appeal the Appellant accused the Registrar of bias and partiality the issue was not pursued in its written submissions. So, the Appellant prosecuted its appeal essentially on allegations of non-compliance with the rules of natural justice and other applicable laws.

21. In addition to relying upon the alleged violation of **Sections 14 and 18 of the LRA, Section 4 of the FAA, 2015** the Appellant also relied upon **Articles 47 and 50 of the Constitution of Kenya, 2010**. It was contended that there were two determinations by the Registrar and that the one dated 14th November, 2019 was irregular and unlawful since there existed an earlier determination dated 15th September, 2015.

22. The court has already dealt with most of the grounds upon which the Registrar's determination was impugned. The Appellant created the impression that there were two District and separate boundary determinations by the Registrar. It was contended the first was dated 15th September, 2015 and the second was dated 14th November, 2019. As indicated earlier, the report of 15th September, 2015 was never officially published or released to the parties. The court considers the same merely as a draft by the Registrar. It is also pertinent to point out that the draft of 15th September, 2015 never made any boundary determination at all. The draft simply suggested that the disputing parties should ask the court to correct or harmonize the gazette notices establishing the boundary of the two ranches.

23. It is also pertinent to point out that the first page of the report dated 14th November, 2019 remained the same as the draft dated 15th September, 2015. The date of the hearing remained 28th July, 2015 at 12.00 pm. The witnesses remained the same save that a determination of the boundary was made as follows:-

“ The boundary remains the Maralal-Kisima Road separating the two ranches.”

24. The court finds no fault with the Registrar's determination of the boundary between the group ranches. The same is not in violation of the **LRA, the Constitution of Kenya, 2010** or any other law. Perhaps the only drawback is that the Registrar delayed for about 4 years in making the determination. The report shows that witnesses were heard in 2015 whereas the decision was made and delivered in 2019. However, the Appellant has not complained about the delay or what effect such delay may have on the validity of the decision. As it were, there is no timeline under the **LRA** for the Registrar to make a determination upon hearing the parties and their witnesses.

25. The court is thus of the opinion that there is no evidence on record to demonstrate that the impugned decision was erroneous, illegal or a nullity. The court does not agree with the Appellant that a determination by the Registrar in the absence of a surveyor would be invalid. It is not every boundary dispute which would require the presence of a surveyor or the taking of precise measurements. There is a good reason why the Legislature vested the responsibility of determination of boundaries upon the Land Registrar and not the Land Surveyor. It is upon the Land Registrar to determine whether or not he needs the assistance of a surveyor in a given case. The material on record shows that the boundary dispute in the instant case revolved around certain gazette notices and whether the boundary ought to be along the road or river. It is a matter which primarily rested on the interpretation of the gazette notices declaring the boundaries of the two group ranches.

(e) Who shall bear costs of the appeal

26. Although costs of an action or proceeding are at the discretion of the court the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful party should be deprived of the costs of the appeal. Accordingly, the Respondent shall be awarded costs of the appeal.

F. CONCLUSION AND DISPOSAL

27. The upshot of the foregoing is that the court finds no merit in the Appellant's appeal. Accordingly, the appeal is hereby dismissed with costs to the Respondent. It is so ordered.

RULING DATED and SIGNED NYAHURURU and DELIVERED via Microsoft Teams Platform this **15th** Of **March, 2021**.

In the presence of:

Mr. Mwangi for the Appellant

Mr. Ojare holding brief for Mr. Mathea for the Respondent

CA- Carol

Y.M. ANGIMA

JUDGE

15.03.2021