



REPUBLIC OF KENYA

IN THE ENVIROMENT AND LAND COURT AT MAKUENI

ELC APPEAL NO 20 OF 2018

PETER MAKUNDI NGUSA.....1ST APPELLANT

MWIKALI MUNYAO MAKUNDI.....2ND APPELLANT

JOHN MUTUA WAMBUA (Suing as a personal

representative of the estate of

JOHN MUNYAO MAKUNDI).....3RD APPELLANT

VERSUS

FRANCIS KALOKI MUTHOKA.....RESPONDENT

(Being an Appeal against the Judgment and Decree of the Chief

Magistrate's Court at Makueni in MCC No 113 of 2013 by Chief

Magistrate James Mwaniki dated and delivered on 18th June 2019).

JUDGMENT

1. By a Memorandum of Appeal dated 3rd July 2019, the Appellants herein appealed against the Judgment of Hon J. Mwaniki delivered on the 18th of June 2019 in Makueni Civil Case No. 113 of 2013 and set out five grounds of appeal.

2. The Appellants had sued the Respondent by way of Complaint dated 19th of August 2013 seeking for the following orders: -

a) An order directing the Defendant to stop interfering with the boundaries of land directed to be excised from Plot No. Okia/417 and combined with Okia/Nzuunzi/1902 as pleaded in the plaint.

b) That in the alternative an order compelling the Makueni District Surveyor to redraw the map in accordance with the boundaries fixed under the initial court orders and directives and to reflect the actual physical existing boundaries in the land.

c) A permanent injunction to issue restraining the Defendant whether by himself, servants, agents and/or otherwise from disposing off or in any way interfering with the Plaintiffs right existing from parcel of land to be excised from Parcel No. Okia/Nzuunzi/417.

d) A permanent injunction restraining the Land Registrar Makueni, Ministry of Land and the Defendant from altering boundaries of Plot No. Okia/Nzuunzi otherwise than as per the existing boundary.

e) An order to nullify the title deed in respect to Plot No. Okia/Nzuunzi/417 issued in favour of the deceased persons and a directive that survey be carried out to establish sizes of each parcel as per the existing boundaries and title deeds be issued accordingly and any other remedy/relief that this honourable court deems just in the circumstances.

f) Costs of this suit.

3. The Appellants instituted the suit and averred that they were the beneficial owners of land Parcel No. Okia/Nzuunzi/417 and Okia/Nzuunzi

1902 pursuant to succession cause number 665 of 2011. That the boundary in respect to land Parcel No. 417 was adjudicated upon and determined in favour of the Estate of Joseph Musau Ngusa in civil case L/31/1972 and upheld in Appeal No. 613 of 1996 before the Minister. That contrary to the boundaries directed by the court in the appeal before the Minister, the Defendant brought in a District Surveyor and purported to alter the boundaries using a fraudulent map.

4. The Respondent filed a statement of Defence on 11th of September 2013. The Defence was essentially a denial of the Plaintiffs claim.

5. The trial court referred the matter to the District Land Surveyor to re draw the boundary according to the area map. That after the District Surveyor's report was filed in court, the trial magistrate in his ruling adopted the District Surveyor's report as the judgment of the court to give effect to prayer B of the Plaint.

6. The Appellants being dissatisfied with the trial magistrate judgment filed this Appeal vide the Memorandum of Appeal dated 3rd July, 2019 on the following grounds: -

a) That the learned trial magistrate erred in fact and in law by failing to give concise statement of the case, points of determination, decision thereon and reasons for his judgment.

b) That the learned magistrate erred in law and in fact in failing to put into consideration the previous orders which he had issued pertaining to the issues in dispute and more particularly the orders of 27th of November 2018 and thereby ignoring relevant guiding facts to enable him reach a fair and reasoned determination in adopting the surveyors report as his judgment hence delivering contradictory verdict over the same matter.

c) That the learned magistrate erred in fact and in law by failing to consider the fact that the report by the district surveyor did not incorporate the decision by appeal to the minister touching o the disputed land hence prejudicing the appellant in his judgment.

d) That the learned magistrate erred in law and in facts by denying the parties an opportunity to testify in this matter and proceeding to direct the surveyor to make a report without hearing the case from both sides and thereby proceeding to adopt the surveyors report as his judgment while he didn't have an opportunity to hear the case presented before him for determination.

e) That the trial magistrate erred in law and fact by failing to appreciate the spirit behind the provisions of article 159 of the constitution and ignored important facts by dismissing the appellant's arguments summarily without consideration of distinctive nature of the cases before him for consideration.

7. The Appellants prayers are that the trial court's judgment dated 18th June 2019 be set aside and an order do issue for the retrial of this case before the High Court or any other Court of competent jurisdiction.

8. The Appeal was canvassed by way of written submissions which were duly filed by both parties herein. The Appellants submitted that the trial Court violated the provisions of Order 11 rule 4 of the Civil Procedure Rules by failing to give a concise statement of the case, points of determination, the decision thereon and reasons for the decision.

9. The Appellants submitted that the trial court did not appreciate the facts of the case as they were not given an opportunity to prove their case on a balance of probabilities hence the unreasoned judgment. They cited the case of **South Nyanza Co Ltd Vs Omwando Omwando (2011) eKLR** in support of their submissions.

10. The Appellants further submitted that the learned trial Magistrate erred in adopting the District Surveyor's report which was erroneous as it was contrary to the Minister's decision in Appeal No 612/96 which stated that a portion of land was to be excised from Plot No. Okia/Nzunzi/417 and be combined with Plot No Okia/Nzuuni/1902 in order to reflect the existing boundaries. That notwithstanding the fact that it was illegal to intermeddle with a deceased property the Surveyor visited the land on 21/08/2013 and fixed the boundaries contrary to the decision of the Minister.

11. The Appellants further submitted that the trial Magistrate did not put into consideration the fact that the District Surveyor did not redraw the boundary as per the existing physical features but instead returned the same boundary delimitations which they had appealed against before the Minister whose decision had never been appealed against.

12. The Appellants argued that they were condemned unheard as they were not given an opportunity to be heard or to file submissions in support of their claim nor did the court make reference to the pleadings filed by the parties which would have assisted the court to arrive at a just finding. They relied on the following cases to buttress their submissions;

- **The Management Committee of Makondo Primary School and Another Vs Uganda Nation Examination Board, HC Civil Misc. Application No. 18 of 2010** cited with approval by Justice Lenaola (as he then was) in **Mandeep Chauhan Vs Kenyatta National Hospital & 2 Others**;
- **Mbaki & Others Vs Macharia & Another (2005) 2 EA**;
- **David Onyango Oloo Vs The Attorney General Civil Appeal No. 152 of 1986**;
- **Judicial Service Commission Vs Gladys Boss Shollei & Another (2014) eKLR**.

13. The Appellants argued that the case before the lower court arose from land Parcel No. Okia/Nzuuni/417 which is registered in the names of deceased persons who are uncles to one of the Appellants and a father to the Respondent. That since succession proceedings had not been undertaken, any dealing would amount to intermeddling with the property of the deceased person contrary to Section 45 of the Law of Succession.

14. The property was fraudulently registered in the name of the deceased and there was the decision of the minister. They argued that it was unfair to deny them an opportunity to be heard.

15. The Respondent through his submissions filed on 11th of November 2021 submitted that, by dint of Section 16 and 18 of the Land Registration Act, the Land Registrar is mandated to fix boundaries on parcels of land. The Respondent argued that the boundaries were fixed by the District Land Surveyor and each party was shown the extent of its boundary.

16. The Respondent further submitted that the court could not implement the decision of the Minister to redraw the map in respect of the parcel of land as it was only the Land Registrar through the Survey office who can redraw the map to reflect the decision of the Minister which was done in the presence of both parties, their Counsels, neighbours and the local administration. The Respondent asserts that after the exercise was done, the authority of the court came to an end. The court was urged to find that the trial magistrate was right in his judgment. The Respondent placed reliance on the case of **Micheal E G Muhindi Vs John Ngure Murekio (2017) eKLR.**

17. He further submitted that the District Surveyor used the existing physical features and the area registry index map in conducting the survey as required.

18. The Respondent further submitted that court granted prayer B and C of the plaint and that by fixing the boundary, prayers a, d and e of the plaint were dealt with. The respondent relied on the case of **Jane Njeri Arthur Vs Joseph Mwaura Njoroge (2019) eKLR** and **Azzuri Ltd Vs Attorney General & 2 Others (2009) eKLR.**

19. I have considered the record of appeal, the supplementary record of appeal and the submissions by the parties and I find that the issue for determination is whether the trial magistrate/court followed the due process in adopting the District Surveyor's report as the judgment of the court.

20. This being a first appeal, this court has a duty to evaluate, assess and analyse the evidence on record and make its own decision as was outlined in the case of **Stella and Another Vs Associated Motor Boat Company and Others (1968) 1 EA 123 (CAZ)** where the court of Appeal set out the duty of Appellate courts as follows;

“An appeal to this court from a trial court by the High Court is by way of a retrial 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 itself and drive its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge finding of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or.....”

21. The Appellants submitted that the trial magistrate failed to give a concise statement of the case, the points of determination, the decision thereon and reasons for the judgment. The Appellants further submitted that the trial magistrate erred in fact and in law in adopting the District Surveyor's report as a judgment of the court without giving the them an opportunity to prove their case on a balance of probabilities as required. The Appellants argued that the judgment was unreasoned, ambiguous, prejudicious and bad in law.

22. The Appellants urged the court to set aside the judgment and order for a retrial. On the other, hand the Respondent submitted that the surveyor fixed the boundaries as mandated by the law and that after the exercise was completed the authority of the court came to an end.

ANALYSIS AND DETERMINATION

23. Land Registrars are mandated under Section 18 and 19 of the Land Registration Act to determine boundary disputes.

24. Section 18(2) provides that;

The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.

25. Section 19 provides that;

If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any part thereof or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.

26. Section 19(2) provides that;

The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.

27. It is not in dispute that there was a boundary dispute between land parcel numbers Okia/Nzuuni/417 and Okia/Nzuuni/1902.

28. I have carefully perused the proceedings of the lower court and I find that on the 09/06/2015 the parties consented to have the District Land Surveyor visit the disputed parcels of land to mark the boundaries. The trial court directed that in the event that the parties were not in agreement with the findings of the District Surveyor, the court would visit the site during the next mention date. On 08/05/2019, the court directed the District Land Surveyor to visit the ground and re draw the boundaries going by the area map.

29. Pursuant to the court order, the District Land Surveyor visited the disputed parcels of land on the 14th of June 2019 and prepared his report. According to the District Land Surveyor's report dated 17th of May 2019 and filed in court on 18th of June 2019, the survey on the disputed parcels was done in the presence of the Appellants, the Respondent, their Advocates, the area Chief and the security personnel. The District surveyor's report indicated that the R.I.M sheet No. 4 of Nzuuni was used to place the parcel. The District Land Surveyor's report in its finding states as follows;

“That beginning from point A at the river through to point B, a distance of 128 meters. There existed marks of large old euphorbia trees that were not disputed by either party. That a straight distance of 50 meters was taken along the river to arrive to point c. the general shape of the river conformed to what was drawn on the map. That using the three points A, B and C point D was fixed at a distance of 83 meters from C and 49 meters from B. He concluded that the area Parcel No. 1982 was found to measure 0.461 hectares as per the R.I.M used to implement which was from survey of Kenya as was drawn during demarcation.”

30. When the parties appeared before the court on 19/06/2019, the Defendant's/Respondent's Counsel informed the court that they were satisfied with the District Land Surveyor's report and requested the court to adopt it in accordance with Section 16 of the Land Registration Act. The Plaintiffs/Appellants Counsel informed the court that he was not satisfied with the report as it was contrary to the Minister's decision. The trial Magistrate proceeded to render his judgment and stated as follows;

“Under the Land Registration Act, it's the office of Surveyor/Land Registrar that has the original jurisdiction to determine on the issue of boundary once the jurisdiction is exercised, the parties if dissatisfied can only come to court by way of Appeal/Judicial Review. I will adopt the surveyor's report as the judgment of the court which now gives effect to prayer (b) in the Plaintiff's claim. Prayer No. C in the claim is also granted. There no orders as to costs. The Plaintiff if they feel they are entitled to costs may file submissions on the same.”

31. The Appellants stated that the report was contrary to the earlier decision by the Minister's in Appeal No 613 of 1996. I have looked at the decision by the Minister in Appeal No 613 of 1996 made on 25/11/1997 and I find that it stated as follows;

“In view of the above facts, this appeal is partly allowed. The district surveyor is hereby directed to adjust the map boundary to conform with the court boundary (L 31/71) and my court's sketch map in which I have marked the boundary A-B-C. That the portion from P/NO 417 be merged/combined with P/NO 1902 by order.”

32. In a nutshell the Plaintiff disputed the contents of the District Land Surveyor's Report. At that point, the court should have given the Appellants an opportunity to give evidence particularly touching on the reason why they were opposed to the District Surveyor's report, call its witnesses and lastly have an opportunity to cross examine the District Land Surveyor on his findings before adopting the report as the judgment of the court.

33. The right to fair trial is secured in Article 50 of the Constitution which provides that;

Every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or if appropriate another independent and impartial tribunal or body.

34. In addition, Article 50(2)(k) of the constitution provides that;

Every accused person has the right to a fair trial, which right includes: -

k) to adduce and challenge evidence.

35. There is no doubt that the trial magistrate did not avail the Appellants the opportunity to cross examine the District Land Surveyor on his report before adopting the same as the judgment of the court. I find that the Appellants were not given an opportunity to challenge the report before it was adopted as the judgment of the court which is a breach of the rules of natural justice.

36. The **Halsbury's Laws of England 5th Edition 2010 Vol.61 at para 639** stated;

“The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rules) is a fundamental principle of justice...”

37. In the case of Martha **Wangui Karua Vs IEBC Nyeri Civil Appeal No. 1 of 2017** the court of Appeal held that;

“The rules of Natural Justice require that the court must not necessarily drive any litigant from the seat of justice without a hearing however weak his or her case may be.”

38. I find that the trial magistrate erred in failing to accord the Appellants an opportunity to cross examine the expert on his report before adopting the same as the judgment of the court.

39. The upshot of the fore going is that the court finds merit in the appeal and the same is allowed in the following terms: -

a) The judgment and decree of Hon. James Mwaniki (Chief Magistrate) dated 18th June 2019 is hereby set aside.

b) A new trial is ordered at Makueni law courts to be presided over by a magistrate other than Hon. J Mwaniki.

c) Each party shall bear its own costs of the appeal.

RULING DELIVERED, DATED AND SIGNED THIS 9TH DAY OF FEBRUARY 2022 VIRTUALLY VIA TEAMS' PLATFORM.

.....

HON. T. MURIGI

JUDGE

IN THE PRESENCE OF: -

Mr. Muthiani for the Respondent.

Ms. Muthini holding brief for Kitiindyo for the Appellants.

Court - Assistant Kwemboi.

Muthiani: I pray for a mention date for directions.

HON. T. MURIGI

JUDGE

Court: By consent mention on 29th of March 2022 before Hon. Sagero.

HON. T. MURIGI

JUDGE

09/02/2022