



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC APPEAL NO. 03 OF 2019

ELIJAH MWAU LELU APPELLANT

VERSUS

DANIEL KIAWA NDIVO RESPONDENT

JUDGEMENT

1. The Appellant filed the Memorandum of Appeal dated 12th February, 2019 against the judgment of Hon. G. M. Mutiso Principal Magistrate arising from the proceedings in Makindu PMCC No. 53 of 2010. In the impugned judgment, the trial court declined to adjudicate over the dispute citing Section 18 (2) of the Land Registration Act, 2012 which barred the trial court from entertaining an action or proceedings relating to a dispute as to the boundaries of registered land unless those boundaries had been determined in accordance with the said Section 18. The Honourable trial court went ahead to strike out the suit with no order as to costs.

2. The Appellant has urged four grounds of appeal namely: -

- a) That the Learned Magistrate erred in law and facts when he held that he did not have jurisdiction to deal with the case when in fact he had jurisdiction.
- b) That the Learned Magistrate failed to appreciate that the boundary dispute had been dealt with by the land registrar before the case was filed in court.
- c) That the Learned Magistrate erred in law in facts when he decided the case against the weight of evidence.
- d) That the Appellant prays for leave to provide additional evidence to this case.

3. Pursuant to the directions of Court issued on 4th June, 2020 that the appeal be canvassed by way of written submissions, both parties duly complied. The Appellant filed his submissions on 11th March, 2020 while the Respondent filed his on 11th August, 2020.

4. I have perused the Record of Appeal together with the Supplementary Record of Appeal dated 4th November, 2020. This being a first appeal, the Court's duty was best outlined in the case of **Selle and Anor -Vs- Associated Motor Boat Company Ltd and Others [1968] 1 EA 123 (CAZ)** where the Court of Appeal set out the duty of an Appellate Court as follows:

“An appeal to this court from a trial by the High Court is by way of 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 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 allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v. Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).”

5. I have perused the record of the trial court, the pleadings and the evidence. The ownership of the two adjoining plots is certainly not in dispute. The Appellant is the registered owner of LR. No. Makueni/Kakutha/637 whereas the Respondent is the registered owner of LR. No. Makueni/Kakutha/1349. Per the title deed of the Appellant, the acreage of his plot is 6.13 hectares whereas the acreage for the Respondent's plot, per his title deed, is 7.26 hectares. Both plots share the same Registry Map Sheet No. 19.

6. The controversy comes in when survey of the two properties was done on 30 December, 2009. The District Surveyor, Peter Ndonge, prepared his report dated 25th February, 2014 which was produced in court as DEX 2A. The said report made reference to some points P1 – P8 on a map attached thereto. The report stated that the boundary for the two plots was from point P1 to point P3 and up to point P8. The concluding remarks were that there was a “very big discrepancy between the map and the ground”. In a further report that was prepared by

the same surveyor dated 8th September, 2017 and produced as DEX3, he identified discrepancy in the acreage of the Appellant's property on the title deed and on the ground as approximately 1.4 hectares. Likewise, the discrepancy in the Respondent's property from his title deed and a ground survey was approximately 1.35 hectares. His final remarks were that the area in dispute was part of parcel number Makueni/Kakutha/637 but not Makueni/Kakutha/1349. That the Respondent was claiming part of the Appellant's property and therefore this was a land dispute.

7. I have examined the map produced as DEX 2B. I have seen that the Appellant contends that the boundary runs from points P3 to P8 while the Respondent in turn contends that the boundary runs from points P3 to P7. Before the land in between the contended boundary becomes an issue, I think that the Land Registrar, who is the custodian of the official land documentation ought to define where the official boundary is. I have seen from the Respondent's DEX7, that there was a survey/adjudication exercise that was done in the year 1974 or thereabout. It is unclear to me what the official map indicates as the boundary since the said exercise was done and seemingly, even to the parties it is also unclear.

8. The Land Registrar's ruling dated 5th February, 2010 that was produced as PEX 3 does little to aid the situation. It is noted that the ruling was made four years before the surveyor's report dated 25th February, 2014 was done. The ruling reads as follows:

“The boundary from the stream to the main road should be marked straight using the existing old euphobia as shown by the surveyor. The parties should move to court for the disputed portion since they are not willing for rectification.”

9. My view is that the Land Registrar's report (PEX3) is inconclusive as to where the official boundary for plot numbers 637 and 1349 is because there is no public record to support the finding. I think it to be prudent for the Land Registrar Makueni County to demarcate the boundaries as required under Sections 19(1) and 19(2) of the Land Registration Act, 2012. Only then can the court be called upon to hear evidence for the land in question in accordance with Sections 18(1) and 18(2) of the Land Registration Act, 2012.

10. In the circumstances, I have no sufficient cause for interfering with the trial court's judgment dated 13th July, 2018. The appeal is struck out with no order as to costs

SIGNED, DATED AND DELIVERED AT MAKUENI VIA EMAIL THIS 28TH DAY OF MAY, 2021.

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MBOGO C.G.

JUDGE

Court Assistant: Mr. Kwemboi