Kabecha v Njoroge (Environment and Land Appeal 31 of 2020)
[2022] KEELC 13734 (KLR) (3 October 2022) (Judgment)

Neutral citation: [2022] KEELC 13734 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND APPEAL 31 OF 2020

JO MBOYA, J

OCTOBER 3, 2022

BETWEEN

CHRISTINE WAMBUI KABECHA ..... APPELLANT

AND

SIMON KIRIKA NJOROGE ..... RESPONDENT

JUDGMENT

Introduction and background

1. The respondent herein filed and/or lodged a plaint dated the March 15, 2006, before the senior resident magistrates' court at Kikuyu whereby the current Respondent sought for the following reliefs;

    i. Declaration that the said developments and/or construction works by the defendant (the current appellant) are illegal and in breach of the law and for demolition of the same.

    ii. A Permanent Injunction restraining the Defendant, her servants and or agents or any other body authorized by her from trespassing and/or encroaching on to the Plaintiff 's Land Parcel no Kikuyu/Kikuyu Block 1/297.

    iii. Costs of this suit.

    iv. Any other Relief that this Honourable Court may deem fit to grant.

2. Following the filing of the Plaint, details in terms of the preceding paragraph, the Defendant (now the current Appellant) duly entered appearance on the March 30, 2006 and thereafter filed a Statement of Defense, whereby the Defendant/current Appellant disputed the claims enumerated at the foot of the Plaint dated the March 15, 2006.

3. On or about the November 21, 2008, the respondent herein filed and or lodged a notice of motion application wherein same sought for various reliefs. for clarity, the nature of reliefs that were sought at the foot of the Application dated the November 21, 2008 are paramount.

4. Consequently, it is appropriate to reproduce the said reliefs, insofar as the determination of the subject appeal hinges on the reliefs that were sought at the foot of the application herein and the evident dichotomy or variance between the reliefs sought therein and ultimately, the report that was filed with the honourable court.

5. For convenience, the reliefs sought at the foot of the Application dated the November 21, 2008 are as hereunder;

    a. The Land Registrar, Kiambu do determine, indicate and fix the boundary between LR No Kikuyu/Kikuyu Block 1/270 and LR No Kikuyu/Kikuyu Block 1/297.

    b. The Land Registrar, Kiambu do file his Report in court within 30 days of visiting the suit premises.

    c. Cost of the Application be in the cause.

6. Subsequently, the Plaintiff and the Defendant, (who are now the Respondent and the Appellant, respectively) entered into a consent, whereby the application dated the November 21, 2008 was allowed. For completeness, the consent was adopted and endorsed by the court on the March 27, 2009.

7. Notwithstanding the terms of the consent, which were adopted and endorsed by the court on the March 27, 2009, somehow, albeit without any express orders, the District Surveyor, Kiambu proceeded to and visited the locus in quo and thereafter same prepared a report dated the July 8, 2009.

8. Subsequently, the matter was mentioned before the trial magistrate on the October 2, 2009 and thereafter on the November 13, 2009, when counsel for the current Appellant made an oral application before the Honourable court seeking to have the district surveyor, who had prepared and or generated the impugned report to attend court for purposes of cross examination.

9. On the other hand, counsel for the Respondent opposed the application to have the District surveyor attend court for purposes of cross examination. Suffice it to note, counsel for the current Respondent contended that the consent order which was entered into on the March 27, 2009, did not allow either of the Parties a window to cross examine the author of the report.

10. Consequently, Learned Counsel for the current Respondent implored the Honourable court to proceed and adopt the report as filed by the District surveyor, Kiambu.

11. Having entertained the rival submissions, the trial court reserved a ruling and same was ultimately rendered on the November 27, 2009. For clarity, the trial court observed that the consent order entered into and endorsed on the March 27, 2009 did not allow either of the Parties a leeway to cross examine the author of the report.

12. Premised on the foregoing, the trial magistrate proceeded to and indeed adopted the Report by the District surveyor as filed. Thereafter, the trial court observed that what remained outstanding was the issue of fixation of the boundary.

13. As a result of the Ruling or Decision of the trial magistrate, the current Appellant felt aggrieved and therefore sought for and procured leave to appeal. Indeed, leave to appeal was granted on even date.

14. Arising from the foregoing, the Appellant proceeded to and filed the current appeal vide Memorandum of Appeal dated the December 2, 2009. However, the Memorandum of Appeal was thereafter amended on the February 22, 2010.

Grounds of appeal:

15. Vide the amended memorandum of appeal dated the February 22, 2010, the Appellant herein has raised the following grounds;

    i. The learned magistrate erred in law and in fact in relying on a report complied by the district surveyor without calling the maker or hearing any of the parties to the suit on the contents of the report.

    ii. The learned magistrate erred in law and in fact in relying on a report by the district surveyor which report was not conclusive and was not helpful to the court in resolving the issues in dispute.

    iii. The learned magistrate erred in law and in fact in refusing to make an order for the district surveyor to be summoned to be cross examined on the contents of the report.

    iv. The learned magistrate erred in law and in fact in failing to hear the suit as required and instead relying on the district surveyors report to make a ruling which is effectively meant to determine the suit.

    v. The learned magistrate erred in law and in fact in failing to hear the parties to the suit and thus abdicating her duty to hear and determine the suit to conclusion.

    vi. The learned magistrate erred in law and in fact in filing to find the report by the district surveyor was not conclusive and thereby arriving at an erroneous decision.

    vii. The learned magistrate erred in law and in fact in failing to appreciate the orders sought in the suit and directing her mind towards determining the issues raised.

    viii. The learned magistrate erred in law and in fact in making an order for the district surveyor to fix a boundary without conducting a trial of the suit as required.

    ix. The learned magistrate erred in law and in fact in awarding cost to the respondent without any basis and without hearing and determining the suit.

Submissions by the Parties:

a. Appellant's submissions:

16. The Appellant filed her submissions dated the March 10, 2022 and in respect of which the Appellant raised and ventilated four issues. In this regard, I propose to address the Issues seriatim.

17. First and foremost, the Appellant whilst arguing grounds 1, 2, 3 and 6 of the memorandum of appeal contended that the consent order which was entered into and duly endorsed by the court on the March 27, 2009 was to the effect that the Land Registrar, Kiambu to visit the locus in quo and to determine, indicate and fix the common boundaries of the two named properties.

18. Further, it was submitted that upon the visitation and the ascertainment of the boundary between the two named properties, the Land Registrar was obligated to prepare a suitable report and thereafter file same with the court.

19. Notwithstanding the foregoing, Counsel for the Appellant submitted that the Land Registrar did not visit the locus in quo nor did same prepare or file any report, either as hitherto envisaged, or at all.

20. Contrarily, counsel for the Appellant submitted that the person who visited the locus in quo and thereafter filed a report before the court was the District surveyor, Kiambu. For clarity, counsel reiterated that the report by the District surveyor dated the July 8, 2009, was prepared and filed by a stranger, contrary to the terms of the consent orders.

21. In the premises, counsel added that the said report was therefore a nullity and could not be relied upon for purposes of determining the dispute between the Parties.

22. Secondly, counsel submitted that even though the report by the District surveyor was neither provided for nor envisaged by the consent order dated the March 27, 2009, the court still proceeded to and adopted the impugned report, without allowing counsel for the Appellant to cross examine the maker thereof.

23. In this regard, counsel for the Appellant submitted that the adoption of the impugned report without the maker being cross examined was prejudicial and detrimental to the Rights of the Appellant.

24. Consequently, counsel for the Appellant has submitted that the adoption of the impugned report without affording the Appellant a right to cross examine the Maker of same, therefore denied and or deprived the Appellant of a Fair Hearing.

25. Thirdly, whilst arguing grounds 7 and 8 of the Memorandum of appeal, counsel for the Appellant contended that even though the court proceeded to and adopted the District Surveyor's report and thereby constituted same as Judgment of the court, the said report neither addressed nor determined the issues which were in dispute between the Parties.

26. In view of the foregoing, counsel for the appellant has added that even with the adoption of the impugned report, it was still incumbent upon the honourable court to set down the matter for hearing and to grant either party liberty to rely on or utilize the impugned report in the course of the hearing/ evidence.

27. Finally, counsel for the appellant submitted that by adopting and relying on the impugned report by the surveyor, albeit without hearing the parties, the court has left the dispute which was filed hanging and undetermined.

28. In support of the foregoing submissions, learned counsel for the appellant has cited and relied on various decisions *inter-alia* *Kimatu Mbuvi T/a Kimatu Mbuvi & Bros v Augustine Munyau Kioko* (2006)eKLR, *Ndolo v Ndolo* (1995) LLR 390, *Peter Makundi Ngusa & 2 Others v Francis Kaloki Muthoka* (2022)eKLR and *Samuel Ongeri Ontiri v The Chaiman BOG Nyatieko Secondary School & 2 Others* (2010)eKLR.

b. Submissions by the respondent:

29. On his part, counsel for the Respondent submitted that the parties herein entered into a consent dated the March 27, 2009 whose terms were explicit and clear. For clarity, counsel pointed out that the terms of the consent did not provide any room to either Party to cross examine the author, once the report was duly filed.

30. Based on the fact that the consent did not allow either Party a window to cross examine the author of the report, it was inappropriate and uncalled for, for the counsel for the Appellant herein to seek to cross examine the author of the report, namely, the District surveyor.

31. Secondly, counsel for the respondent submitted that the appellant and her counsel knew and was knowledgeable of the fact that the impugned report had been prepared and filed by the district surveyor as opposed to the land registrar, but same did not ventilate his reservation and/or protest before the trial court.

32. Contrarily, counsel for the respondent added that the only issue which was raised by counsel for the appellant was the need to cross examine the district surveyor, which was dismissed.

33. In view of the foregoing, counsel for the respondent has submitted that it is now too late for counsel for the appellant to contend that the impugned report was filed by a stranger without the requisite mandate and or authority to do so.

34. On the other hand, counsel for the respondent has added that the district surveyor is ordinarily the technical person, seized with the requisite expertise to determine and ascertain the boundary, where the dispute, as herein, concerned the ascertainment and of the boundaries.

35. In fact, counsel for Respondent has added that the nature of the dispute would not have been resolved by the Land Registrar. Consequently, counsel for the Respondent has submitted that the report filed by the District surveyor was therefore competent, legitimate and lawful.

36. Finally, counsel for the respondent has submitted that the learned trial magistrate was right and within her mandate to decline to allow counsel for the appellant to cross examine the district surveyor.

37. In the premises, the respondent herein contends that the appeal before hand does not raise any plausible grounds, to warrant setting aside and or review of the orders of the trial court.

Issues for determination:

38. Having reviewed the entire record of appeal as well as the written submissions filed on behalf of the parties; and having duly considered the relevant law, the following issues are pertinent and thus appropriate for determination;

    i. Whether the Report dated the July 8, 2009 was filed by the requisite and mandated person and if not, whether same could be adopted by the trial court in the manner same was adopted.

    ii. Whether the adoption of the District Surveyor's Report conclusively determined the issues in Dispute.

Analysis and determination:

Issue number 1 whether the report dated the July 8, 2009 was filed by the requisite and mandated person and if not, whether same could be adopted by the trial court in the manner same was adopted.

39. From the onset, it is appropriate to point out that the Parties herein entered into a consent, whose terms were adopted and endorsed by the trial court. For convenience, the terms of the consent were as hereunder;

    i. The Land Registrar, Kiambu do determine, indicate and fix the boundary between, L.R Kikuyu/Kikuyu/Block 1/270 and L.R Kikuyu/Kikuyu/Block 1/297.

    ii. The Land Registrar, Kiambu do file his report in court within 30 days of visiting the suit premises.

iii. Each party be at liberty to avail its Surveyor during the Exercise.

iv. Cost of the Application shall be in the course.

40. My understanding of the terms of the consent, is that the parties herein consented to and agreed upon a very specific and designated officer to undertake the exercise for the determination, ascertainment and ultimate fixation of the boundaries between the two named properties.

41. Having agreed and/or consented to have the specific/designated officer to conduct and/or carryout the exercise, it was only the said officer who had the mandate, capacity and concurrence of the Parties to undertake the designated exercise.

42. At any rate, it is also apparent that the Parties herein were also alive to the issues that either of them was at liberty to engage own surveyor, to accompany the Land Registrar during the exercise, pertaining to and concerning the ascertainment of the disputed boundaries.

43. From the wording of the consent, the only segment thereof that encompasses the inclusion, involvement and participation of a Surveyor, is where such surveyor is appointed by either Party.

44. On the other hand, the plain reading of the consent seams to denote that the surveyor, if any, that was to be chosen and or engaged by either Party was not the District surveyor but private, albeit licensed surveyor.

45. Consequently, and in the premises, the only officer who was mandated and authorized to conduct, undertake and carryout the boundary determination/ascertainment exercise was the Land registrar and not the District surveyor, Kiambu.

46. Perhaps, the terms of the consent and the designation of the Land registrar, Kiambu to undertake the boundary determination exercise, was informed by the provisions of Section 20 and 21 of the Registered Land Act, Cap 300 Laws of Kenya (now repealed), which prescribed the mandate of the Land Registrar, in the ascertainment of boundaries, wherever there existed a dispute.

47. To this end, it is appropriate to reproduce the provisions of Sections 21 and 22 of the *Registered Land Act*, cap 300 Laws of Kenya (now repealed) as hereunder;

> "(21)
>
> (1) Except where, under section 22, it is noted in the register that the boundaries of a parcel have been fixed, the registry map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.
>
> (2) Where any uncertainty or dispute arises as to the position of any boundary, the Registrar, on the application of any interested party, shall, on such evidence as the Registrar considers relevant, determine and indicate the position of the uncertain or disputed boundary.
>
> (3) Where the Registrar exercises the power conferred by Power to alter registry map and to prepare new editions. Further surveys. Boundaries. Rev. 2010] Registered Land cap. 300 21 subsection (2), he shall make a note to that effect on the registry map and in the register and shall file such plan or description as may be necessary to record his decision.

(4) No court shall entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in this section.

(5) Except where, as aforesaid, it is noted in the register that the boundaries of a parcel have been fixed, the court or the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as it or he thinks fit.

(22)

(1) If the Registrar in his discretion considers it desirable to indicate on a filed plan, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if any interested person makes 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.

(2) The Registrar shall, after giving all persons appearing by the register to be affected 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 thereupon the plan shall be deemed to define accurately the boundaries of the parcel.

(3) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the Director of Surveys, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section."

48. Premised on the foregoing provisions, I wish to make two observations. First, the Parties herein knew the designation and nature of the person that same wanted to undertake the exercise. For clarity, the Parties were clear in their minds.

49. Secondly, the Parties' consent appears to have been influenced and or inspired by the law, which essentially cloths the Land Registrar with the mandate and or power to entertain and deal with disputes pertaining to boundaries of parcels of lands, which were hitherto registered under the Registered Land Act, now repealed.

50. Essentially, the only officer who is bestowed with the legal mandate, to determine, ascertain and fixed boundaries of the kind of lands, which were in dispute, was the Land Registrar and no other.

51. In any event, it is only the Expert opinion of the known expert, in this case the land registrar, that would have been of persuasive value upon the Honourable court and not otherwise.

52. In view of the foregoing, I come to the conclusion that the learned trial magistrate was in error in proceeding to and adopting a report generated, crafted and filed by a person, who had neither been mentioned nor authorized vide the consent order which was entered into by the Parties.

53. Notwithstanding the foregoing, it is also imperative to recall that a consent entered into by the Parties has contractual effects and therefore same is binding on the Parties and by extension on the Honourable court, subject only to known and prescribed exceptions.

54. In this respect, neither of the Parties herein could renege and/or run away from the terms of the consent. In any event, neither of the Parties herein could unilaterally seek to supersede, alter and or vary the terms of the consent.

55. On the other hand, even assuming that either Party was keen to vary and or alter the terms of the Ponsent, (which was not the case) such a party would be obligated to prove and or satisfy the established conditions that were laid down in the locus classicus Decision in the case of *Brookebond Liebig Ltd v Mallya* (1975) EA, where the Court of Appeal for Eastern Africa observed as hereunder;

> " Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them...and cannot be varied or discharged unless obtained by fraud or collusion, or by agreement contrary to the policy of the court... or if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.
>
> It is well settled that a consent judgement can be set aside only in certain circumstances, eg on the ground of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable the court to set aside or rescind a contract."

56. Additionally, the circumstances where a consent order can be set aside, varied and/or reviewed were also addressed vide the decision in the case of *Flora N Wasike v Destimo Wamboko*[1988] eKLR, where the court stated and observed as hereunder;

> " It seems that the position is exactly the same in East Africa. It was set out by Windham J, as he then was, and approved by the Court of Appeal for East Africa, in Hirani v Kassam (1952) 19 EACA 131, at 134, as follows:
>
> > "The mode of paying the debt, then, is part of the consent judgment. That being so, the court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding a contact between the parties. No such ground is alleged here. The position is clearly set out in Setton on Judgments and Orders (7th edn), vol 1, P 124, as follows:
> >
> > > "Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them ... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court ...; or if the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement."

57. Just like the Parties herein could not renege and or run away from the terms of the consent, so was the Honourable court. In this regard, it is surprising that despite the trial court being privy to and or conversant with the terms of the consent which same has alluded to in the short ruling rendered on the November 27, 2009, same still found it convenient to supersede the terms of the consent and adopt a foreign report, which was neither conceived nor envisaged by the Parties.

58. To my mind, the manner in which the learned trial magistrate dealt with the proceedings and essentially adopted a report that was not provided for vide the consent order, negates all the known tenets of the law.

59. Respectfully, had the learned trial magistrate exercised some degree of diligence, the dichotomy between the ruling rendered on the November 27, 2009 and the orders made by the Honourable court on the March 27, 2009, would neither have arisen nor ensued.

60. In a nutshell, I find and hold that the leaned trial magistrate proceeded to adopt a report which was prepared and generated by a person who had neither been agreed upon nor authorized by the Parties.

61. Consequently and in the premises, the impugned report was a nullity and incapable of adoption, either in the manner undertaken by the learned trial magistrate or at all.

Issue Number 2

Whether the adoption of the district surveyor's report conclusively determined the issues in dispute.

62. At the inception of this Judgment, I reproduced the various reliefs, which were captured and or sought at the foot of the Plaint that was filed by the Respondent herein.

63. The reproduction of the said reliefs was poignant, to the extent that same was going to be critical in discerning whether the report which was adopted by the learned trial magistrate, indeed resolved and determined the dispute beforehand.

64. There is no gainsaying that when Parties come to court, same raise issues upon which they require the intervention and determination of the Honourable court. In such situations, the court is obliged to exercise fidelity and to determine all the issues in dispute between the Parties, albeit with finality.

65. Suffice it to observe that it would amount to abdication or dereliction of duty, if a court of law were to forsake any segment of a material issue placed before her for determination by the pleadings filed by the Parties.

66. Contrarily, if a court of law were to abdicate his/her duties to determine all the issues raised by the parties, then no doubt, the court would be fanning and fostering resort to self-help mechanisms, by the Parties to deal with abdicated/ remaining issues.

67. Such unwelcome scenario, must not be allowed to take root under the watch of a court of law. Consequently, it behooves each and every court to address his/her mind to the issues raised by the Parties and to endeavor to determine same with finality. For coherence, the material Issues raised by the Parties require determination of the Honourable Court.

68. Sadly however, in respect of the subject matter, the impugned adoption of the District Surveyor's report, which was constituted as Judgment, did not resolve or better still attempt to resolve the issues that were contained at the foot of the Plaint dated the March 15, 2006.

69. For the avoidance of doubt, the adoption of the report, did not establish and/or confirm whether the impugned developments were being carried out and undertaken of LR No Kikuyu/Kikuyu/Block 1/297 or otherwise. Beside, the adoption of the report did not also speak to whether an order of Permanent injunction was to issue and if so, in whose favor.

70. Essentially, the Ruling of the learned trial magistrate which adopted the District Surveyor's report remained silent on the issues that were presented before the Honourable court for determination.

Clearly, what turns out from the decision of the court is that the court left the matter the same way it was presented.

71. Based on the foregoing, the question then is; what are the Parties supposed to do when their dispute has neither been addressed nor resolved by the adjudicator, umpire or better still the Judge.

72. To my mind, time is ripe and all Judicial officers need to take their work seriously and to understand that it is paramount to endeavor to and address the substratum of the Disputes presented before them. Only then, shall the Cause of justice be suitably and properly served.

73. Notwithstanding the foregoing, it is also appropriate to take cognizance that even the provisions of Order 21 Rule 4 and 5 of the *Civil Procedure Rules 2010*, calls upon the Judicial officer to at least capture the issues for determination, the determination thereof and the reason for determination.

74. In this regard, the determination would be speaking to the salient issues in dispute, which are therefore determined or resolved, one way or the other.

75. For completeness, the Provisions of Order 21 Rule 4 & 5 of the *Civil procedure Rules, 2010* provides as hereunder;

> 4. Contents of judgment [Order 21, rule 4.]
>
> Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.
>
> 5. Court to state its decision on each issue [Order 21, rule 5.]
>
> In suits in which issues have been framed, the court shall state its finding or decision, with the reasons therefor, upon each separate issue.

76. Finally on this point, it is appropriate to refer to the holding in the case of *Samuel Ongeri Ontiri v The Chairman BOG Nyatieko Secondary School & 2 Others* (2010)eKLR, where the court considered a similar situation where the adoption of a Report/award did not addresse, resolve and or determine the issues that were in dispute between the parties.

77. For coherence, the court in the fore-cited case held as hereunder;

> "In this case the consent order is very clear. Neither the District surveyor nor Geomatic services were appointed as joint arbitrators. It would appear that their appointment and brief was purely to visit the suit premises and make some findings on the ground that would later inform the court's subsequent decision. In other words these surveyors were to give their professional advice and or findings to enable the parties and the court to know how to proceed with the case thereafter. Indeed a careful reading of the report merely shows the observations made by the the surveyors when they visited the suit premises. It cannot by any stretch of imagination therefore pass for an award. To my mind an award makes a definitive finding and is in the nature of a judgment where issues are identified, a decision is made on the same and reasons given for such decision(s). The report of the surveyors falls far too short of that expectation and therefore was incapable of being adopted as a judgment of the court.
>
> Further even if we were to assume that indeed the report was an award, it would be illegal and incapable of being acted upon as a stranger was involved and indeed apprended his signature to the same. That stranger was also one, Robert, Gusii county council surveyor. The consent order appointing the surveyors made no reference at all to and indeed did not include any

surveyor from Gusii county Council as a joint co-surveyor with the District Surveyor and Geomatic Services.

In any event, arbitration proceedings involve parties being heard on their evidence. In other words before an award is made, both parties to the dispute must be accorded a hearing. From the record, it is quite apparent that the surveyors did not receive any evidence on the issue in dispute. An award is a finding or decision made following informal proceedings with regard to the dispute between the parties. This being the case, it is necessary that parties to the disputes not only participate in the proceedings but also be accorded a hearing. This did not happen in the instant case. In effect therefore there were no arbitration proceedings and if there were, then they were a sham and at best compromised as correctly submitted by counsel for the appellant.

In my view it was wrong for the learned magistrate to have acceded to the request of the respondents to adopt the report as a judgment. That report should merely have formed part of the evidence since it did not resolve or completely adjudicate on the issue in controversy. The prayers in the plaintiff included an order for eviction, alternatively that the respondents be ordered to pay the appellants the market value of the land allegedly in their occupation. Finally there was the prayer for a permanent injunction. The report by the surveyors and which was adopted by the learned magistrate as a judgment of the court did not at all address all or any of the above issues. So that even with the adoption of the report those issues remain unresolved. As it is now it is not clear whether there is encroachment and if so by whom. If the parties intended to have the surveyors' report as a final judgment of the court, they could have expressly indicated so and made an elaborate consent order encompassing all the aforesaid issues. The appellant's suit was clearly not heard on merits.

The foregoing notwithstanding, is the resultant decree capable of enforcement and or execution? I do not think so. I have looked at the decree extracted in the original record of the trial court. It is a replica of the District surveyor's report. Such a decree is incapable of execution. Parties expect when they come to court to have a trial and hereafter an order or decree that they can leave with. This is not the case here. This is a decree in vain. Courts do not issue orders and or decrees in vain.

78. Similarly and with humility, I come to the conclusion that the short ruling which was crafted and thereafter delivered by the learned trial magistrate on the November 27, 2009 and essentially which adopted the foreign report, neither addressed nor determined the issues that were in dispute between the Parties.

79. In my considered view, the learned trial magistrate respectfully, fell in error, which error colors and vitiates the entire Ruling and the ultimate decision that was arrived at by the Trial court.

Final disposition:

80. Having reviewed the two pertinent issues that were highlighted in the body of the Judgment, it must have become clear and apparent that the proceedings and the ultimate ruling by the learned trial magistrate were inflicted by irregularities and illegalities that go to the root of the impugned determination.

81. In view of the foregoing, and taking into account the sanctity of Consent, duly entered into by Parties and coupled with the contractual nature of such consent, I am obliged to quash and set aside the impugned ruling and consequential orders made on the November 27, 2009.

82. Having pronounced myself on the outcome of the Appeal, there are two outstanding issues, which require to be addressed and resolved. First, is the issue of whether the suit herein ought to be remitted to the Chief Magistrate court for hearing and determination.

83. In this respect, I am minded to decree that because the salient issues which were presented before the Honourable court were never heard and determined with finality, it is appropriate for the matter to be remanded/remitted to the concerned Magistrate's court at kikuyu for hearing and determination by a Magistrate other than Hon L. M Njora, SRM (as she then was).

84. The second issue relates to the award of costs. In this respect, it is appropriate to recall that though the counsel for the Appellant was aware that the impugned report was prepared and filed by the District surveyor Kiambu and not by the Land Registrar Kiambu, in accordance with the consent order, same did not raise the issue with the Learned trial court.

85. In fact, the only issue that was raised before the trial court was the need to cross examined the District surveyor, which request was declined.

86. Perhaps, had counsel for the Appellant been vigilant and diligent, the matter would not have reached this far. Consequently, counsel for the Appellant did not perform his obligation as required under the law.

87. In the premises, the Appellant herein, though successful in the appeal is not entitled to an order for cost. Clearly, his/ her conduct aided the lapse that culminated into the impugned Ruling and Decision.

88. In a nutshell, I now make the following orders;

    i. The Appeal herein be and is hereby allowed.

    ii. The Ruling and the consequential orders issued on the November 27, 2009 be and are hereby quashed, vacated and set aside.

    iii. The Suit vide Plaint dated the March 15, 2006 be and is hereby remitted to the Chief Magistrate's court at Kikuyu for hearing and determination on merits.

    iv. Each Party shall bear own costs of the Appeal and the Proceedings in the Chief Magistrate's court, which culminated into the subject Appeal.

89. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF OCTOBER 2022.

OGUTTU MBOYA

JUDGE

In the Presence of;

Kevin Court Assistant:

Mr. Mwaniki h/b for Mr. Wainaina for the Appellant.

Ms. Njeri for the Respondent