REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
ELC APPEAL NO. 73 OF 2018

(FORMERLY HIGH COURT CIVIL APPEAL NO. 608 OF 2013)

GEOFFREY KARONGO MUNGA & 9 OTHERS....APPELLANTS

- VERSUS -

GEOFFREY NJUGUNA MUNGA.....RESPONDENT

RULING

At all material times, all that parcel of land known as Kiambaa/Kihara/513(hereinafter referred to only as "Plot No. 513") was registered in the name of one, Jacob Gitau Macharia, the 10th appellant herein. On or about 5th November, 1990, Plot No. 513 was subdivided into two portions namely, Kiambaa/Kihara/1817(Plot No.817) and Kiambaa/ Kihara/ 1818(Plot No. 1818). Whereas Plot No. 1818 remained in the name of Jacob Gitau Macharia, the 10th appellant, Plot No. 1817 was transferred to the 1st appellant, Geoffrey Karongo Munga on 11th September, 1990.

I have not seen on record, a copy of the mutation form that gave rise to Plot No. 1817 and Plot No. 1818. It appears however that the during this subdivision, it was not necessary to make any provision for a road between Plot No. 1817 and Plot No. 1818 since both plots had access to the main road in the area. On or about 21st September, 1993, the 10th appellant, Jacob Gitau Macharia once again, subdivided Plot No. 1818 that remained in his name into six (6) portions namely, Kiambaa/Kihara/2068, 2069, 2070, 2071, 2072 and 2073(Plot Nos. 2068, 2069, 2070, 2071, 2072 and 2073). I have seen on record a copy of the mutation form dated 6th February, 1993 for this subdivision.

During the subdivision that gave rise to Plot Nos. 2068, 2069, 2070, 2071, 2072 and 2073, an access road measuring 0.20 hectares was created between Plot Nos. 2068, 2069 and 2070, and Plot Nos. 2071, 2072, 2073 and 1817.This road was to be used by the owners of Plot Nos. 2069, 2070, 2071, 2072 and 2073 to access the main road aforesaid. Plot No. 2068 was transferred to the respondent, Geoffrey Njuguna Munga while Plot Nos. 2069, 2070, 2071, 2072 and 2073 were transferred to the other appellants. On 31st March, 2010 the appellants filed a suit against the respondent at the Senior Resident Magistrate's Court at Kiambu seeking a permanent injunction restraining the respondent from obstructing, blocking or in any other way whatsoever dealing with the access road that was created during the subdivision of Plot No. 1818 aforesaid in a manner to deny the appellants the user and enjoyment thereof. The appellants also sought an order that the road reserve be resurveyed, the road marked and the respondent compelled to remove the structures encroaching on the road.

The respondent filed a defence in the lower court on 29th April, 2010 denying the appellants' claim. The respondent averred that Plot No. 513 was supposed to be subdivided in accordance with a resolution that was reached by the parties who are family members on 1st May, 1983. The respondent averred that during the subdivision of Plot No. 1818, the surveyor who conducted the exercise colluded with the appellants in the process and subdivided the said parcel of land contrary to the earlier agreement by the parties with the intention of depriving the respondent of a portion of his land.

The respondent averred that the access road complained of by the appellants did not exist and that what was in existence was a foot path. The respondent averred that he did nothing more than fencing off a section of his land next to the alleged access road for security reasons. The respondent averred that if there was an access road as claimed by the appellants, then it was the 1st appellant who had blocked the same and not the respondent. The respondent denied that he was frustrating the decision that had been made by the Land Registrar at Kiambu for the opening of the said access road. The respondent urged the court to dismiss the appellants' suit with costs.

The appellants' case in the lower court was heard and the parties tendered evidence in support of their respective cases. In a judgment delivered on 15th January, 2013, the lower court (Hon. J.W.Onchuru (MR) PM) ordered that Plot Nos. 1817, 2068 and 2073 be resurveyed so as to put the access road in dispute on its rightful position as had been directed by the District Land Registrar, Kiambu in his ruling. The court ordered that the resurvey be carried out within six months and that the parties do share the survey cost. On the costs of the suit, the court ordered that each party to bear his own costs.

The appellants were dissatisfied with the said decision and filed the present appeal to set aside the same. In their grounds of appeal dated 20th

November, 2013, the appellants contended that the lower court erred by not entering judgment in their favour with costs. The appellants contended that the judgment of the lower court did not address the issues that they had raised and that the judgment was in vain as there was no mechanism for enforcing the same.

The appellants' appeal was determined by consent. On 10th February, 2015, the parties filed in court a letter of consent dated 3rd February, 2015 signed by the advocates for both parties settling the appeal on terms. The consent was recorded as an order of the court by the Deputy Registrar on 5th March, 2015 and an order extracted on 10th March, 2015. The consent order was on the following terms;

1. That the appeal herein be and is hereby allowed.

2. That the judgment of the Lower Court and the consequential orders be and are hereby set aside.

3. That each party to bear its own costs in the High Court and in the lower court.

4. That the Lower Court file for Civil Suit No. 92 of 2010 be and is hereby referred back to Kiambu Chief Magistrate's Court with the following directives:

5. That the ruling of the Land Registrar dated 27th November, 2003 be implemented under the supervision of the Court and in the following manner:

a. "That the District Land Registrar together with the District Land Surveyor Kiambu County be and are hereby ordered to carry out a resurvey of land parcel numbers Kiambaa/Kihara/1817, 2068 and 2073 and that an access road be created and marked on the ground between parcel numbers 1817 and 2068 from the tarmac frontage to the back and passing between 2068 and 2073.

b. That the resurvey be carried out within 90 days from the date of this order.

c. That the resurvey be effected by taking into account that the respective acreages of the subject parcels must be maintained as per the titles without interfering with any developments on the respective parcels.

d. That the resurvey be carried out by taking measurements on the ground and effecting the respective acreages as per the titles.

e. That the parties herein do appoint their individual Private Licensed Surveyors to be present during the resurvey exercise.

f. That a scientific and detailed survey report (showing acreages, dimensions, sketch plans, field notes and any relevant findings including obstructions found if any) be prepared and filed in Court either jointly between all the surveyors if they are in agreement or the dissenting surveyor(s) file separate reports within 30 days of the resurvey.

g. That each party to bear its own costs of the private surveyors and the Government fees for the District Surveyor be shared equally between the parties.

h. That in case of disagreement on the report by the District Surveyor, he and the Land Registrar together with the respective private surveyors do appear in Court on a date to be fixed by that Court to be examined on the resurvey and reports filed.

i. That upon filing of the survey reports and examinations in No. (h) above, the Court do give further orders as may be necessary for the removal of any obstructions, maintenance of beacons and such other orders as it may deem necessary.

j. That the Lower Court is hereby directed to set a mention date within 14 days of this order for the adoption of the above as its own orders for the purposes of implementation.

k. That there be a mention date in the High Court Civil Appeal No. 608 of 2013 to confirm compliance of the above orders on the expiry of the 90 days from the date of this order on 4th May, 2015."

Following the consent order, the lower court suit was mentioned on 26th May, 2015 and the orders of the High Court adopted for implementation. Pursuant to the said order, on 13th October, 2015, The District Land Surveyor Kiambu and the District Land Registrar Kiambu in the presence of the parties and their private surveyors visited the parcels of land namely, Plot Nos. 1817, 2068 and 2073 and carried out a resurvey as had been ordered by the court. The District Surveyor and the District Land Registrar filed their report dated 4th November, 2015 in court on 6th November, 2015. In the report, the District Surveyor and the District Land Registrar stated that they established the beacons of the three parcels of land using the Registry Index Map (R.I.M) and the respective acreages of the parcels according to their titles and created access road in accordance with the court order. They stated further that after computing the ground acreages, they found the same to be tallying with the registered and R.I.M acreages. They stated further that during the resurvey, they found some obstructions on the access road in the form of a gate pillar at the entrance to Plot No. 2068 and a barbed wire fence separating Plot No. 2068 and the other two plots. The pillar and the barbed wire fence were found to be in the middle of the access road. The District Land Registrar and the District Land Surveyor attached to their report, a survey plan showing the three parcels of land, their acreages and other dimensions, and the access road that they established.

The respondent did not agree with the report by the District Land Registrar and the District Land Surveyor. The respondent filed in court on 29th January, 2016 its survey report dated 22nd December, 2015 prepared by Hime & Zimmerlin Licensed Surveyors. In the report, the said surveyors referred to the family agreement dated 1st May, 1983 on how they wanted Plot No. 513 subdivided. The said surveyors also referred to their visit to the property in march, 2001 when they assessed the extent to which Plot No. 1817 had encroached on the access road in issue which encroachment according to them was confirmed by the District Land Registrar in 2003. The respondent's surveyors stated that upon studying the R.I.M, they formed the opinion that Plot No. 1817 was incorrectly established in that its establishment was contrary to the agreement that the parties had reached as a family.

The said surveyors then embarked on an attempt to subdivide Plot No. 513 in accordance with the family agreement aforesaid according to which a 6-meter access road was to run longitudinally through the middle of the plot leaving equal areas on each side. In conclusion, the respondent's surveyors stated that the developments on Plot No. 1817 encroached on the road and could not be accommodated in the re-establishment of the road in accordance with the parties' agreement aforesaid. The said surveyors stated that if the road was bent to accommodate the said developments, such move would compromise the acreages of Plot No. 2068 and Plot No. 2073. The said surveyors stated that Plot No. 1817 should be moved eastwards slightly to remove its encroachment on the resurveyed road while leaving the built up area undisturbed. The respondent's surveyors annexed to their report a sketch survey plan showing the extent to which Plot No. 1817 had encroached on the access road and how its boundaries could be moved to minimize the encroachment.

Since the District Land Registrar and the surveyors did not file in court a joint report, they were summoned to give evidence on their reports and were examined and cross examined. The District Land Registrar and District Surveyor testified in support of their report. The appellants' and the respondent's private surveyors also testified. After the testimony of the District Land Registrar and the surveyors, the lower court (Hon. J.Kituku PM) after considering the High Court order, the survey reports submitted by the parties and the evidence adduced, delivered a judgment on 20th April, 2016. The lower court found the survey report prepared by the District Land Surveyor and the District Land Registrar, and the appellants' surveyor consistent with the High Court order and accepted the same. The lower court thereafter ordered the removal of the respondent's gate pillar and barbed wire fence that had encroached on the access road within 21 days failure to which the appellants were to be at liberty to remove the same at the respondent's cost.

What is now before me is the respondent's application brought by way of Notice of Motion dated 27th March, 2019 seeking various reliefs. In the application, the respondent has sought the following orders;

1. The ruling of the Land Registrar dated 27th November, 2003 be implemented under the supervision of this court.

2. In the alternative, this court do supervise the implementation and observation of clauses 5 (a) to 5(i) of the consent order recorded herein on 5th March, 2015.

3. This Hounarable Court be pleased to set aside the judgment and consequential orders issued by Hon. J. Kituku PM in Kiambu CMCC No. 92 of 2010 on 20th April, 2016;

4. This Honourable Court do issue such further orders and/or directions as it may deem just and fit.

5. The costs of this application be provided for.

The respondent's application that was supported by the affidavit of the respondent sworn on 28th March, 2019 was brought on several grounds. The respondent contended that the consent that was recorded on 5th March, 2015 was not complied with, observed and/or implemented. The respondent contended that the judgment that was delivered on 20th April, 2016 by Hon. J. Kituku PM pursuant to the said consent was a nullity because he had no jurisdiction to hear and determine the matter at the time. The respondent contended that he stood to suffer immense prejudice and injustice if the orders sought were not granted.

The application was opposed by the appellants through a replying affidavit sworn by the 1st appellant Geoffrey Karongo Munga on 6th November, 2019. The appellants contended that prayers 1 and 2 in the application were incapable of being granted because the same were dealt with in the consent that was recorded herein on 5th March, 2015. The appellants contended further that the orders of the High Court made on 5th March, 2015 having been made by consent could only be reviewed or set aside by another consent. The appellants contended that the court had no jurisdiction to review or alter the said orders. The appellants contended that prayer 3 in the application was misconceived, incompetent and incapable of being granted. The appellants argued that the lower court was acting on instructions of the High Court and as such it could not be said to have lacked jurisdiction to deal with the matter that was before it.

With regard to the respondent's contention that the consent order was not implemented or complied with, the appellants averred that the proceedings of the lower court speak for themselves and that the same show that the lower court complied with the consent order to the letter. The appellants averred further that the issue of the jurisdiction of the lower court was not raised before that court and that there was nothing left in the consent order to be implemented since the access road had been marked and the obstructions standing thereon removed. The appellants averred that the respondent was treated fairly by the lower court and as such allegation of misconduct on the part of the magistrate who dealt with the matter had no basis.

On the issue of costs, the appellants averred that they were entitled to recover the costs of the applications that the respondent filed in the lower court after the determination of the appeal and also to seek reimbursements for the costs that they paid on behalf of the respondent. The appellants termed the respondent's application frivolous and an abuse of the process of the court.

The respondent's application was heard on 19th November, 2019. The respondent addressed the court through his attorney, Lawrence Munga while Mr. Muchiri appeared for the appellants. In his submissions in support of the application, the respondent's attorney reiterated

the grounds set out on the face of the application and the supporting affidavit. The attorney reiterated that the lower court had no jurisdiction to make the judgment sought to be reviewed and that the report by the District Land Registrar and the District Land Surveyor that was relied on by the lower court in the said judgment was not prepared in accordance with the terms of the consent order of 5th March, 2015.

The respondent's attorney submitted that while the District Land Registrar and the District Land Surveyor were ordered to take measurements on the ground, the District Land Registrar and the District Land Surveyor used maps instead. The respondent's attorney submitted that the judgment of the lower court had already been executed and the respondent's fence demolished. The respondent's attorney submitted that the access road should be in the middle of what was formerly Plot No. 513. He urged the court to allow the application.

In his submission in reply, Mr. Muchiri relied entirely on the 1st appellant's replying affidavit filed in response to the application and the record both of the lower court and of this court. I have considered the respondent's application together with the affidavit filed in support thereof. I have also considered the replying affidavit by the appellants and the submissions by the parties. At the beginning of this ruling I have gone to considerable detail in setting out the genesis of the dispute between the parties and the position taken by the parties to the dispute. With that background, it is now easy to understand the orders that were made herein on 5th March, 2015 and what they were intended to achieve. In my view, the whole dispute arose when the respondent refused to accept the subdivision of Plot No. 1818 that gave rise to among others, his Plot No. 2068. It was not disputed that Plot No. 1817 owned by the 1st appellant was not created at the same time as Plot No. 2068. Plot No. 1817 is a subdivision of Plot No. 513 while Plot No. 2068 is a subdivision of Plot No.1818. Plot No. 513 was the mother title for all the plots but Plot No. 1817 was curved out of that plot in 1990 before the remainder of Plot No.513 namely, Plot No. 1818 was subdivided in 1993 to give rise to among others, Plot No. 2068 and Plot No. 2073.

The appellants and the respondent as members of one family may have agreed in 1983 on how they wanted Plot No. 513 subdivided and particularly the position of the access road that was to serve the subplots arising from Plot No. 513. However, it appears that when Plot No. 513 was being subdivided in 1990 to create Plot No. 1817, no regard was paid to the so called agreement that was made in 1983. By the time Plot No. 1818 was being subdivided to create among others Plot No. 2068 and Plot No. 2073, Plot No. 1817 was already in existence. The road of access that was envisaged in the parties' agreement of 1983 was created during the subdivision of Plot No. 1818 that gave rise to among others Plot No. 2068 and Plot No. 2073. Although the parties had agreed that the road would pass in the middle of the former Plot No. 513, it was not possible to do that during the subdivision of Plot No. 1818 because when the plot was being subdivided, Plot No. 1817 was already in place and its boundary on the side where the road was to pass did not leave room for a six-meter road. That meant that if the road was to be in the middle of the former Plot No. 513 and was to be straight, it was going to pass through a portion of Plot No. 1817. Faced with this challenge, the surveyor who was subdividing Plot No. 1818 made the road to bend when it reached plot No. 1817 so that it passed next to the boundary of Plot No. 1817 that was already in place rather than inside the plot.

The problem arose when the respondent ignored the said road that was created during the subdivision of Plot No. 1818 that was bent near Plot No. 1817 and insisted on a straight line road in accordance with the agreement of 1983. The respondent fenced off a portion of the said road that was in the mutation form for the subdivision of Plot No. 1818 and in the Registry Index Map (R.I.M) for the area. In my view, the respondent behaved as if the road that was created during the subdivision of Plot No. 1818 did not exist. It was as a result of his fencing off of a portion of the said road thereby blocking the appellants from using the same that led to the filing of the lower court suit. In the lower court, the parties were unanimous that although the said road was on the Registry Index Map, the same was not on the ground. What was on the ground was a foot path. When the parties took the dispute to the District Land Registrar, Kiambu for determination in 2003, the District Land Registrar in a ruling dated 27th November, 2003 ordered that Plot No. 1817, Plot No. 2068 and Plot No. 20173 be resurveyed so that the access road is placed at the right position on the ground while ensuring that the said parcels of land retained their respective acreages. This is the same order that was made by the lower court in its first judgment dated 15th January, 2013 that was appealed to this court. However, in that judgment, the court did not direct what was to happen after the resurvey.

The consent order that was recorded herein on 5th March, 2015 also directed the implementation of the ruling that was made by the District Land Registrar on 27th November, 2003 but under the supervision of the court. The gist of the respondent's application before the court is that the said consent order was not implemented in accordance with its terms. As I have stated earlier, the application was brought on several grounds. Upon considering the terms of the said consent order and the proceedings of the lower, I find no merit in the respondent's application. I am satisfied that the lower court complied fully with the order of this court. The respondent's contention that the lower court had no jurisdiction to deal with the issues that were referred to it by this court pursuant to the said consent order is in my view misconceived. This is because, first the matter was filed in the lower court before the establishment of this court and was heard and determined. The matter was referred back to the lower court by this court not for rehearing of the original suit but to supervise the implementation of a decision that was made by the District Land Registrar. It could not be said therefore that the lower court had no jurisdiction on account of the conservatory orders that were made in the High Court at Malindi concerning the jurisdiction of the Magistrates Courts to hear environment and land disputes. Secondly, that decision of the High Court at Malindi was subsequently overturned by the Court of Appeal meaning that the lower courts had jurisdiction to hear such matters. Lack of jurisdiction is therefore not a valid ground to warrant interfering with the lower court decision that was made on 20th April, 2016.

I am also not in agreement with the respondent that the lower court ignored clause 5(a) and (c) of the consent order. I have perused the report that was filed in court by the District Land Registrar and the District Land surveyor on 6th November, 2015 that formed the basis of the lower court's decision. The report was in my view made in accordance with clause 5(a) of the consent order. The purpose of the resurvey was to establish an access road that was on the Registry Index Map but was not existing on the ground. I am in agreement with the appellants' contention that the District Land Registrar and the District Land surveyor were not expected to carry out fresh survey that would have entailed interfering with the boundaries of the existing parcels of land. As I have stated earlier, Plot No. 1817 was in existence when Plot No. 1818 was subdivided which subdivision made a provision for a road that was bent. In my view, it was this road with a bend that the District Land Registrar and the District Land surveyor were supposed to establish on the ground. The road was not illegal as claimed by the respondent. The road was in the Registry Index Map that had not been amended. The District Land Registrar and the District Land surveyor had no power to establish a road through Plot No. 1817 which was the desire of the respondent. Plot No. 1817 was not involved and was not affected when the access road was being created during the subdivision of Plot No. 1818. The District Land Registrar and the District Land surveyor could not therefore interfere with the same when establishing the road that was created during the subdivision of Plot No. 1818. I am not in agreement with the approach that was adopted by the respondent's surveyor. His survey and report assumed that Plot No. 513 had not been subdivided and that it was being subdivided a fresh in accordance with the agreement that the parties had made in 1983. That was

not what was intended by the consent order of 5th March, 2015.

The respondent had also taken issue with the demolition of his fence and gate pillar. The respondent did not demonstrate that during the resurvey that was conducted by the District Land Registrar and the District Land surveyor, the acreage of Plot No. 2068 was reduced. Contrary to the submissions that was made by the respondent, the District Land Registrar and the District Land surveyor took measurements on the ground and not on the maps. According to the survey plan that was attached to the report by the District Land Registrar and the District Land surveyor, the acreages of the parcels of land that were resurveyed were not affected. The respondent's barbed wire fence and gate pillar were demolished because they were found to be standing on the established road. The lower court had power under the consent order of 5th March, 2015 to make the demolition orders.

I am also not in agreement with the respondent that the lower court ignored the report by the District Land Registrar that was made on 27th November, 2003 on the encroachment by Plot No. 1817 on the access road. As I have stated earlier, Plot No.1817 was created earlier. Although it was said that it was supposed to be part of Plot No. 2073, it was located in such a way that its boundary extended past the middle of what was formerly Plot No. 513 where the access road was supposed to pass according to the parties 1983 agreement. The District Land Registrar noted this fact in his report of 27th November, 2003. This fact was also acknowledged in the respondent's surveyor's report. I wish to observe however that neither the District Land Registrar's report dated 27th November, 2003 nor the consent order made herein on 5th March, 2015 directed that any portion of Plot No. 1817 be interfered with. What the District Land Registrar's report dated 27th November, 2003 and the consent order dated 5th March, 2015 provided for was that the access road be established. The order did not direct that the said road be established in accordance with the said agreement that was made by the parties in 1983. The District Land Registrar and the District Land surveyor established the said access road in accordance with the Registry Index Map (R.I.M) and the ground measurements. Their role was to ensure that the road that was in the R.I.M was established on the ground without interfering with the acreages of the various plots and developments on the ground. As I have stated earlier, there was no evidence that the acreage of the respondent's parcel of land was interfered with. With regard to developments, I do not think that a barbed wire fence erected on a road of access or a pillar erected in the middle of such a road can amount to development that was envisaged in the consent order of 5th March, 2015.

On the issue of costs, I am in agreement that the costs that were claimed by the appellants from the respondent were for applications that were filed after the determination of the appeal. They were neither the costs of the appeal nor the costs that were incurred in the lower court up to the time the appeal was determined which each party was to bear. I have noted that the lower court in its judgment dated 20th April, 2016 did not award any costs. The costs must therefore have been for other expenses and applications as aforesaid. In any event, I am of the view that if there was a dispute as to whether or not the costs that were demanded or claimed by the appellants were payable, the same should have been raised before the taxing officer. The costs that were certified by the taxing officer as payable to the appellants cannot therefore be aground for reviewing the orders that were made by the lower court on 20th April, 2016.

In conclusion, I find no merit in the Notice of Motion application dated 27th March, 2019. The application is dismissed with costs to the appellants.

Delivered and Dated at Nairobi this 5th day of May 2020

S. OKONG'O

JUDGE

Ruling read through Microsoft Teams Video Conferencing platform in the presence of;

Mr. Muchiri for the Appellants

N/A for the Respondent

Ms. C. Nyokabi-Court Assistan