



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC CIVIL APPEAL NO. 10 OF 2019

(FORMERLY HCA 31 OF 2019)

VISION AFRIKA HOUSING CO-OPERATIVE SOCIETY LTD.....APPELLANT

VERSUS

STEPHEN KAMAU MWANGI.....1ST RESPONDENT

LAND REGISTRAR, NAIVASHA.....2ND RESPONDENT

REGIONAL SURVEYOR RIFT VALLEY.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

(Being an appeal from the Ruling of Hon. B Mararo, Principal Magistrate dated and delivered on 23rd January 2019 in the Chief Magistrate's Court at Nakuru ELC Case No.127 of 2018)

J U D G E M E N T

1. This appeal arises from the ruling of Hon. B Mararo Principal Magistrate delivered on 23rd January 2019 in Nakuru CMC ELC No.127 of 2018. The learned Principal Magistrate vide the ruling dismissed the Appellant's Notice of Motion application dated 12th June 2018. By the application the Appellant had sought an order that the 2nd and 3rd Respondents (the Land Registrar and Regional Surveyor respectively) re-fix the land boundaries/beacons between the Appellant's land parcel **Gilgil/Karunga Block2/257** and the 1st Respondent's land parcel **Gilgil/Karunga Block 2/258** to conform with the Registry Index Map (RIM) as per the reports the 2nd and 3rd Respondents had prepared. The appellant further sought an order of mandatory injunction requiring the 1st Respondent to remove the fence that was inside land parcel 257 and further to vacate and surrender vacant possession of the portion he had encroached upon on land parcel 257.

2.The appellant being aggrieved by the ruling of the learned Principal Magistrate has appealed to this Court and by a Memorandum of Appeal dated 21st February 2019 and filed in Court on the same date has listed 8 grounds of appeal as herein under:-

*1. That the learned magistrate erred in law and fact by failing to take cognizance that there was no report and/or beacon certificate to contradict the reports by the 2nd and 3rd Respondents which report gave a determinate finding on encroachment by the 1st respondent into the Appellant's parcel **Gilgil/Karunga Block2/257**.*

2. That the learned magistrate erred in law and fact by failing to appreciate that the 1st Respondent was present during site visit by the 2nd and 3rd Respondents but he only became hostile and unco-operative during the boundary measurement exercise.

3. That the learned magistrate erred both in law and fact when he failed to appreciate that the office of the Land registrar (2nd respondent) in conjunction with the relevant survey office is mandated by law under Section 17 to 20 of the Land Registration Act to re-fix and/or align land boundaries.

4. That the learned magistrate erred in law and fact by failing to take cognizance of the consent/agreement filed in Court on 17th July 2018 between the Appellant and the office of the attorney general on behalf of the 2nd and 3rd Respondents directing that the 2nd and 3rd Respondents should visit the locus quo and carry out their mandate to align the Land Boundary as per the RIM (Registry index Map) and that costs for the work be shared between affected parties.

5. That the learned magistrate erred in law and fact by failing to realize that no prejudice would be occasioned upon the 1st Respondent if site visit was to occur and Fresh/additional reports complied as per orders of the Court.

6. That the learned magistrate erred in law and fact by failing to assist in resolving the boundary dispute and thus compounding the problem further by suggesting to parties that the court was not the proper forum to approach.

7. That the learned magistrate erred in law and fact by failing to take cognizance of the binding case law provided on similar circumstances where boundaries were fixed via court order and thereon provision of police security thus the magistrate flouted the principle of "stare decisis" as set out in applicable high court decisions.

8. That the learned magistrate erred in law by taking into consideration and account some irrelevant factors that could not have assisted the parties in resolving the problem presented before court.

3. The appellant prayed for orders:-

(a) The appeal be allowed.

(b) The ruling of the Hon B Mararo (PM), in Nakuru CM's ELC No 127 of 2018 delivered on 23rd January 2019 be set aside and/or be reviewed.

(c) That the Appellant's Notice of Motion dated 12th June 2018 and filed in Court on 13th June 2018 before Nakuru CM's ELC No.127 of 2018 be is hereby allowed in terms of prayer 2 and 3 of the application.

(d) That any costs for alignment or re-fixing of boundaries for the affected parcels be shared between the Appellant and the 1st Respondent.

(e) That the costs of the appeal and the application before the subordinate Court be borne by the 1st Respondent.

4. The brief background leading to the present appeal is that the appellant, a society duly registered under the Co-operative societies Act, Cap 490 Laws of Kenya on or about 15th November 2017 was registered as the proprietor of land parcel **Gilgil/Kamunga Block 2/257** measuring approximately 2.040 Hectares. The land parcel is adjacent to and shares a common boundary with the 1st respondent's land parcel **Gilgil/Karunga Block 2/258**. The Appellant had purchased the land with the objective of subdividing the same amongst its members. The Appellant averred that on or about 20th November 2017 after they had engaged a surveyor to carry out the subdivision they discovered that the 1st Respondent had encroached onto their land parcel land that when they requested the 1st Respondent to remove the Perimeter fence to rectify the boundary anomaly the 1st Respondent refused.

5. The appellant thereafter approached the Land Registrar and the Surveyor to resolve the boundary issue and after visiting the site the Land Registrar and the surveyor affirmed that indeed the 1st respondent had encroached onto land parcel 257 and was in possession and occupation of approximately 0.17 Hectares of the Appellant's land. The Land Registrar and the surveyor prepared reports dated 4th May 2018 and 30th April 2018 respectively. The Appellant vide the plaint filed in the subordinate Court inter alia sought an order under paragraph (b) that:-

(b) That the 2nd and 3rd defendnts be ordered to refix the land boundaries/beacons between the plaintiff's parcel **Gilgil/Karunga Block 2/257** and the 1st Defendant's parcel **Gilgil/Karunga Block 2/258** so that the boundary conforms with the Registry Index Map and the exercise be carried out within fourteen (14) days from issuance of the order hereof.

6. The Notice of Motion the ruling whereof has given rise to the present appeal was filed simultaneously with the plaint.

7. The 1st Respondent in, his response to the Appellant's application swore a replying affidavit. He stated he was allocated land parcel **Gilgil/Karunga Block 2/258** by Chokereria Farmers Co-operative Society where he was a member in 1982 and obtained title for the land in 1989. He affirmed his land measured approximately 2.21 Hectares and that he has occupied the same since 1982. He faulted the Appellant for purchasing the land before ascertaining its extent and dimensions. He denied the Land Registrar and the Surveyor had given him any notice before they visited the site.

8. The parties argued the appeal by way of written submissions. The appellant's submissions were filed on 9th October, 2019 and the 1st Respondent's submissions were filed on 25th November 2019. The Respondent placed reliance on the written submissions that he had made before the subordinate Court which were filed in on 26th September 2019. Additionally the 1st respondent contended no case for mandatory injunction had been made out to warrant grant of mandatory injunction by the lower Court. He maintained there was no evidence of any encroachment asserting that the boundaries on the ground had existed since the land was allocated.

9. This is a first appeal to this Court and as is customary this Court is obliged to reevaluate the evidence presented before the Court below in order to determine whether the decision the learned trial magistrate reached was justifiable having regard to the evidence. The appellate Court ordinarily will not interfere with the trial Court's findings on facts and/or exercise of discretion unless it is plainly clear that the trial court applied the wrong principles and/or it is clear on the evidence that the findings cannot be supported. See **Sella & Another -vs- Associated Motor Boat Co. Ltd & others (1968) EA 123**.

10. The suit before the lower Court had not advanced to formal trial and the ruling the subject of the appeal essentially was on an interlocutory application. The Court thus has to re consider and reevaluate the application afresh to determine whether the ruling by the learned magistrate was justified.

11. The undisputed facts are that the plaintiff is the registered owner of land parcel, **Gilgil/Karunga Bock 2/257** which as per the records held by the Land office measures 2.040 Hectares. The 1st defendant on the other hand is the registered owner of land parcel **Gilgil/Karunga Block 2/258** which according to records held by the Land office measures 2.21 Hectares approximately. The two parcels of land share a common boundary as per the Registry index Map (RIM). The plaintiff's complaint is that the 1st defendant has encroached onto their land parcel 257 and assert that the land registrar and the surveyor have affirmed that to be the case after visiting the site and carrying inspection. The report by the Land Registrar dated 4th May 2018 indicated there was encroachment by the owner of parcel 258 into parcel 257 extending to about 20 metres on the lower side. The surveyor who carried out measurements on the ground using the RIM from established points affirmed that indeed there was encroachment by the owner of parcel 258 into parcel 257 to the extent of 20 metres at some point. The report indicated the area of land parcel 258 on the ground was 2.375 Hectares as opposed to the area of 2.21 Hectares as per the records. He further indicated the area of land parcel 257 on the ground was 1.87Hectares as opposed to an area of 2.040 Hectares as per the records. It was on account of these reports the plaintiff filed the application before the lower Court seeking the alignment of the parcel boundaries

12. The 1st Respondent's response was that his land had always been occupied and fenced by him since the time it was allocated to him by the society . He further asserted that the 2nd and 3rd respondents never gave him any notice of any visit to the site insinuating that he had not been given any opportunity to give his input before the officers prepared their report.

13. The learned trial magistrates in rendering his ruling appeared to fault the appellant/plaintiff for not doing due diligence before they purchased the property (plot 257). He was of the view that the vendors of the plot to the plaintiff ought to have been involved to shed light and to give the history of the land in regard to the positioning of boundaries. He further went on to suggest that as parcel's 257 and 258 were part of Chokereria Farmers' Co-operative Society, the Society would have had records in regard to the boundaries/beacons. With respect, I think the learned magistrate misdirected himself. The position would be where the land had been surveyed and subdivided and registered as in the present matter, all the records would be available at the Lands office and that in the case of boundary dispute it was the Land Registrar who had the authority and mandate under the law to establish and fix the boundary.

14. Sections 18 and 19 of the Land Registration Act, 2012 make provisions for the establishment and fixing of boundaries. I set out hereunder these provisions for ease of reference.

18. Boundaries

(1) Except where, in accordance with [section 20](#), it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.

(2) 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.

(3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary:

Provided that where all the boundaries are defined under [section 19\(3\)](#), the determination of the position of any uncertain boundary shall be done as stipulated in the Survey Act ([Cap. 299](#)).

19. Fixed boundaries

(1) 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 parts 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.

(2) 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.

(3) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section.

15. Section 18(2) of the Act ousts the jurisdiction of the Court to deal with boundary disputes unless the land registrar has determined the boundary. It is therefore the Land Registrar who has the statutory mandate to determine boundary disputes. In the instant matter there is evidence there was a determination by the Land Registrar which indicated there was encroachment by parcel 258 on parcel 257. The Registry Index Map (RIM) defines the approximate boundaries of parcels of land in regard to registered land in respect of particular registration sections. In the event of any boundary dispute the RIM becomes critical in establishing the positioning of the boundary.

16. In the present matter there is a RIM and each of the land parcels has its approximate area indicated in the respective titles. There must

have been an area list that was used to process the titles. The fact that a party may have placed a fence inside another person's parcel of land cannot make the fence the correct boundary of the parcels of land. The fence ought to be placed where the correct boundary ought to be. The person mandated to establish and fix the boundary in regard to registered land is the Land Registrar acting in concert with the surveyor.

17. In the present matter it is my view that there was ample basis for the magistrate to find that indeed there was a boundary dispute relating to land parcels 257 and 258 as to require the Land Registrar and the surveyor in exercise of their mandate under the Land Registration Act 2012 to visit the site and to fix the boundary upon giving all the parties likely to be affected notice of to their visit and affording all parties who wished to be heard a chance to be heard. No party stood to be prejudiced by the Land Registrar ascertaining and fixing the correct boundary position between the two parcels of land.

18. The order for mandatory injunction prayed for by the appellant under prayer (3) of the Notice of Motion dated 12th June 2018 was premature as prayer (2) of the application had sought for the re-fixing of the boundary and until that had been done the mandatory injunction could not issue. In the premises I allow the appeal and in place of the learned trial magistrate's order dismissing the Notice of Motion dated 12th June 2018 I substitute thereof an order allowing the application in terms of prayer (2) thereof save that, instead 14 days for the Land Registrar to comply with the order hereof, I direct that the compliance be within **sixty (60)** days from the date of the judgment hereof having regard to the logistics that have to be put in place before the site visit can be done.

19. As relates to costs I order that each party bears their own costs for the application before the Magistrate's Court and of this appeal.

20. Orders accordingly.

Judgment dated signed and delivered at Nakuru this 20th day of February 2020.

J M MUTUNGI

JUDGE