



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC. APPEAL NO. 365 OF 2017

MARGARET GACHOKI THONGORIAPPELLANT

VERSUS

PETER NJENGA KARIENYE.....RESPONDENT

(Being an Appeal from the Judgment of Principal Magistrate's Court

at Githunguri in Civil Case No. 14 of 2010 delivered on 30th May, 2013 by

Hon. B.M. Nzakyo, Ag. Principal Magistrate)

JUDGMENT

1. On 16th February, 2010, the Respondent sued the Appellant in Githunguri Principal Magistrate's Court Civil Suit Number 14 of 2010. After hearing the parties, the learned Magistrate allowed the Respondent's Plaint and ordered for the eviction of the Appellant from a parcel of land known as Githunguri/Githiga/3206 (*the suit property*).
2. The Appellant has challenged the decision of the learned Magistrate on the ground that the Magistrate erred when he found that the Appellant was entitled to land known as Githunguri/Githiga/3207; that the learned Magistrate failed to take into account the fact that the parties had their respective portions of land on which they had resided since 1983 and that the Magistrate failed to take into account the development made on the suit property by the Appellant.
3. The Appellant finally averred in the Memorandum of Appeal that the learned Magistrate erred in failing to find that the Award of the Tribunal was made in a matter in which it had no jurisdiction and that the Magistrate failed to order for a resurveying of land parcel number Githunguri/Githiga/3206.
4. This being a first Appeal, this court is under an obligation to evaluate the evidence that was tendered in the lower court and arrive at an independent conclusion, while giving allowance to the fact that it did not observe the demeanour of the witnesses who testified.
5. The Appeal proceeded by way of written submissions. The Appellant's counsel submitted that parcel of land known as Githunguri/Githiga/399 was registered in the name of Ngugi Karienyee, who is a brother to the Appellant (*deceased*) and a step-brother to the Respondent. Counsel submitted that Ngugi was registered to hold the suit land in trust for his three brothers who included one Karanja Karienyee.
6. The Appellant's advocate submitted that the four (4) brothers had been allocated each his own portion of land by their late father which they developed; that the Respondent has 1½ acres out of the suit land and that the matter ended up in the Land Dispute Tribunal and the Provincial Tribunal which held that the Respondent was entitled to 1½ acres.
7. Counsel submitted that the Respondent had the Surveyor excise the 1½ acres; that the remaining portion of land was not sub-divided amongst the remaining three (3) brothers and that since 1983, the brothers occupied parcel number Githunguri/Githiga/399.
8. Counsel submitted that the Respondent admitted that the 1½ acres given to him by the Tribunal was bigger than the portion of land he was tilling; that the Respondent wants his land to be extended towards the Appellant's land and that the court should take into consideration not only the law and the facts of the dispute but also minimize hardship on the parties.
9. The Appellant's counsel submitted that the Respondent had a vendetta against the Appellant (*deceased*) because the Appellant did not pay his costs and the survey fees and that the lower court could have ordered that the portion of 1½ acres which the Respondent was entitled to should be attached on the portion that was not occupied where no demolition would be required. Counsel submitted that this court has unfettered discretion to order for a fresh survey and also a visit to the suit land by an independent surveyor who would file a report indicating

how best to sub-divide the 1½ acres without evicting anyone.

10. On his part, the Respondent's advocate submitted that the Appellant conceded in his Defence that the Respondent is the registered proprietor of land known as Githunguri/Githiga/3206; that the Appellant did not raise the issue of boundaries in the lower court and that the lower court visited the *locus quo* and had a chance of viewing both parcels of land being parcel number 3206 and 3207.

11. This suit was commenced by the Respondent by way of a Plaint dated 10th February, 2010. In the Plaint, the Respondent averred that he is the registered proprietor of land known as Githunguri/Githiga/3206 having been so registered on 22nd July, 2009; that the Appellant has his own land and that the Appellant should be evicted from the said land.

12. The Appellant filed a Defence in which he admitted that parcel of land known as Githunguri/Githiga/3206 is registered in the name of the Respondent. The Appellant further averred that he has been in occupation of the said land and that it is the Respondent who has unlawfully moved the boundary into the land occupied by him. The Appellant finally averred that the lower court did not have jurisdiction to entertain the claim.

13. The Respondent informed the lower court that the Appellant is his step-brother; that he has a Title Deed for parcel of land number Githunguri/Githiga/3206; that the said land was part of the land owned by their late father and that when the issue of division of the land was disputed, the Tribunal ruled that he gets 1½ acres of the land.

14. The Respondent informed the lower court that his brothers shared the remaining 2½ acres and that he enforced the Tribunal's Award by retaining a Surveyor who sub-divided the land accordingly. According to the Respondent, the Appellant should be evicted from his portion of land.

15. In cross-examination, the Respondent stated that he used to till less than 1½ acres before the Tribunal's decision; that the land had not been sub-divided and that it is the Surveyor who sub-divided the land in dispute.

16. According to the Respondent, his land is sandwiched between the Appellant's land and the land belonging to his other brother, Karanja; that his land extends to the Appellant's house; that there is no house on the side of Karanja and that the Appellant never paid the Surveyor's fees.

17. The Surveyor, PW2, stated that he was served with a court order for the sub-division of parcel number Githunguri/Githiga/399; that he was mandated to sub-divide the land into two portions of land measuring 0.607 Ha and 0.913 Ha; that he issued to both parties a letter informing them when he will visit the land for surveying purpose; that he moved on the land and sub-divided the same and that he prepared a Mutation form to show the sub-division.

18. PW2 stated that parcels number 3206 and 3207 were registered and that the survey map was amended according to the Mutation form. It was the evidence of PW2 that the court order did not state from which end he was to create a portion measuring 1½ acres and that the house that was affected by the sub-division that he carried out was a semi-permanent house.

19. The Appellant (*deceased*) informed the lower court that the Respondent is his step-brother; that he settled on the land in 1961 with his mother and other brothers; that he settled on the Western side of the land while the Respondent's mother settled in the middle of the land and that all the portions of the land that the four (4) brothers were using were equal. According to the Appellant, he has developed his land and that the Surveyor had indicated that he was to retain his developed land.

20. In cross-examination, the Appellant admitted that the land he is living on is registered in the name of the Respondent; that he was not present when the survey was done and that he lives in a semi-permanent house made of wood.

21. The Appellant's brother, DW2, informed the court that they were four (4) brothers; that their father's land was registered in the name of their elder brother and that before their father died in the year 1978, he showed each one of them their respective portions of land within Githunguri/Githiga/399.

22. According to DW2, they later on learnt that parcel number 399 had been sub-divided into two portions in the year 2004; that he was not informed of the said sub-division and that the Respondent should not evict the Appellant. According to DW2, the land should be re-surveyed so that each one of them can remain on his respective parcel of land. After hearing the parties, the learned Magistrate found that the Respondent had proved his case on a balance of probabilities.

23. I have perused the proceedings and noted that several exhibits were produced in the lower court including the letters that the Surveyor served upon parties herein (*PEXB 9*); the survey maps (*PEXB 10 (A) and (B)*); the Application for consent; the consent of the Land Control Board; the Certificate of Official Search and the Mutation form (*PEXB 11, 12, 13 and 14 respectively*). However, none of those exhibits are in the Record of Appeal filed on 30th October, 2018.

24. Order 42 Rule 13(4) (e) of the Civil Procedure Rules provides as follows:

“13(4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say:

a. ...

b. ...

c. ...

d. ...

e. all affidavits, maps and other documents whatsoever put in evidence before the magistrate.”

25. Exhibits produced in the lower court must be included in the Record of Appeal. In the absence of exhibits in the Record of Appeal, the Appeal before me is incompetent and must fail on that ground.

26. In the circumstances, the Appellant’s Appeal is struck out with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 24TH DAY OF APRIL, 2020.

O.A. ANGOTE

JUDGE