



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT**  
**AT MURANG'A**  
**ELCA NO.12 OF 2019**

**MARY NJERI KINURI.....APPELLANT**

**VERSUS**

**JOHN NJOROGE KIMOTHO.....1<sup>ST</sup> RESPONDENT**

**DISTRICT SURVEYOR, MURANGA.....2<sup>ND</sup> RESPONDENT**

**LAND REGISTRAR, MURANGA.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The background of this Appeal is that it predates the Land Dispute Tribunal (LDT) case at Kiharu where the 1<sup>st</sup> Respondent sued the Appellant in respect to a boundary dispute between parcels Nos LOC 20/KAMBIRWA/1666 and LOC 20/KAMBIRWA/1896. The complaint of the 1<sup>st</sup> Respondent then against the Appellant was that the houses and structures of the Appellant had encroached onto his land LOC 20/KAMBIRWA/1896 along the boundary between the two parcels. The 1<sup>st</sup> Respondent then requested the LDT Tribunal to order that the Government Surveyor do mark the boundary between the two parties.
2. According to the record, at the hearing of the LDT, the Appellant refused to take part in the proceedings and insisted that the parcel in dispute was a subject of a Civil Appeal in CA No 14 of 1992. The LDT noted that this Appeal was in respect to parcel LOC 20/KAMBIRWA/1897 and not LOC 20/KAMBIRWA/1896. It then proceeded to render its decision which was that the Government Surveyor to visit the properties and mark the boundaries between the two parcels 1896 and 1666 in the presence of the District Officer or his representative, the Land Registrar and the LDT Elders. Any party aggrieved with the decision had 30 days to Appeal.
3. The award was adopted as the orders of the Court on the 19/8/2011 before the Learned Resident Magistrate Hon J Githuku in LDT Case No 30 of 2011.
4. It would appear that the Appellant gave Notice to Appeal to the Provincial LDT on the 9/9/2011. Nothing is told about what became of the said Appeal.
5. On the 25/1/12 the Appellant sought orders to stay the execution of the decree of the Court issued on the 25/8/11 pending the hearing and determination of the Appeal at the Provincial Appeals tribunal. The grounds were that the two parcels of land do not border each other and therefore a dispute relating to encroachment was untenable. The record shows the orders were declined vide the Court orders of 10/2/12.
6. On the 1/8/2014 the Court enjoined the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as parties to the suit in the lower Court for purposes of enforcement of the Courts decree issued on the 19/8/2011.
7. Pursuant to the Court orders of the 19/8/2011 the 2<sup>nd</sup> and the 3<sup>rd</sup> Respondents visited the locus in quo on the 13/3/15 and filed a report in Court dated the 17/3/15 on the 5/11/15.
8. With this report the 1<sup>st</sup> Respondent filed an application by way of Notice of Motion on the 5/11/15 seeking the following orders;
  - a. That the Court be pleased to order the 1<sup>st</sup> Defendant/Respondent to quit and vacate the Plaintiffs suit land parcel No 1896 forthwith.
  - b. That the Court be pleased to order the 1<sup>st</sup> Defendant/Respondent to demolish structures on the boundary of the Plaintiffs land

parcel 1896 forthwith.

c. That in the event that the Defendant/Respondent failing refusing and or neglecting to quit vacate and demolish the structures on the said land she be forcibly evicted and the structures be demolished at her expense.

d. That the Defendants/Respondent do meet the costs of the application.

9. The application was grounded on the following;

a. That the suit land was a subject of a boundary dispute between the Plaintiff and the 1<sup>st</sup> Defendant.

b. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were ordered to mark the boundary between the plaintiff's land being parcel 1896 and the 1<sup>st</sup> Defendant's land being parcel 1666.

c. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have already filed their respective reports in Court.

d. The 1<sup>st</sup> Defendant has refused to comply with the findings of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants hence frustrating the Plaintiff.

10. The Plaintiff then reiterated the grounds aforesaid in his Supporting Affidavit sworn on the 4/11/15 and filed on even date. In addition, he added that the Surveyor found that there was a semi-permanent house and structures along the boundary of the two parcels. That despite demand to remove the structures the 1<sup>st</sup> Defendant was adamant forcing him to file the application.

11. The 1<sup>st</sup> Defendant opposed the application vide the Replying Affidavit sworn on the 29/8/17 and filed on the 29/8/17. In it she deponed that the application was a sham and lacked stratum in law in that the orders sought cannot be countenanced by the Court as they potent a radical departure from the contents of the LDT award. That the Applicant was seeking to unlawfully amend the award of the panel of Elders. That the Applicant is introducing a new cause of action in the matter making the application defective and bad in law. She sought for the dismissal of the application with costs.

12. The application was canvassed through written submissions.

13. The Court rendered its decision on the application on the 27/8/19 as follows;

“The Plaintiff has demonstrated that the application is with merit and I hereby allow the same as prayed.”

14. Aggrieved by the ruling the Appellant proffered an Appeal on the following grounds;

a. The Learned Principal Magistrate erred in law and not finding that the dispute in the defunct Land Dispute Tribunal was a boundary dispute and not an eviction dispute.

b. The learned Principal Magistrate erred in law and fact in not finding that the tribunal, had no jurisdiction to hear an eviction case.

c. That the learned Principal Magistrate erred in law and fact and in not ruling that the application dated the 4/11/2015 brought in a purely different cause of action namely eviction.

d. That the learned Principal Magistrate erred in law and fact by not finding that the application that he allowed was a radical departure from the contents of the award.

e. That the learned Principal Magistrate erred in law and fact in that the order issued by the Court can only issued after the filing a substantive suit.

15. The Appellant sought the following orders;

a. The Appeal be allowed.

b. The application in the lower Court dated 4/11/2015 be dismissed.

c. The cost of this Appeal and the suit in the lower Court be borne by the 1<sup>st</sup> Respondent.

16. The parties canvassed the Appeal by way of written submissions.

17. The Appellant submitted that the application lacked the legal stratum as it was a departure from the contents of the award in the tribunal. That the orders sought had no basis in law and equity rendering the application defective and bad in law.

18. The 1<sup>st</sup> Respondent opposed the Appeal and submitted that the issue before the tribunal was a boundary dispute which could be determined by the Land Registrar and the Surveyor, the result of which they found for a fact that the Appellant had encroached on the

Respondent's parcel of land as there were structures encroaching on the boundary. Once this finding was made by the Surveyor the 1<sup>st</sup> Respondent sought that the same be removed and the Appellant vacates the suit land. That the Court had jurisdiction to deal with the matter of encroachment and trespass and order for the eviction of the trespasser without filing a fresh suit.

19. Whilst relying on the case of **Samuel Njagi M'Nyamba Vs Gilbert Ndwiga Mwangie (2019) EKLK**, the 1<sup>st</sup> Respondent submitted that the Court was right in granting the orders as it did.

20. Having reviewed the pleadings in the lower Court, the evidence tendered vide rival affidavits, the submissions of the parties and the case law where provided, the issues for determination are; whether the application in the lower Court was competent; whether the Surveyor did mark the boundaries of the two parcels of land in pursuance to the Court orders; whether the Appellant has encroached on the land of the 1<sup>st</sup> Respondent.

21. Although the ownership of the two plots are not in dispute, the parties have not presented any ownership documents in form of certified copies of titles or green cards to demonstrate their ownership status.

22. The mandate of the LDT as provided under Section 4 of the LDT Act included boundary disputes such as this one. After the repeal of the LDT in 2012, the Hon the Chief Justice then through practice directions contained in the Kenya Gazette Notice No 16268 directed that all proceedings which were pending before the magistrate Courts having been transferred from the defunct LDT shall continue to be heard and determined by the same Courts. The award of the LDT tribunal was adopted by the Court on the 19/8/2011. The orders directed the Surveyor to visit the land and mark the boundaries between the two parcels of land in the presence of the parties and the local administrators. It is on record that these orders were complied with by the Surveyor and Land Registrar and a report filed in Court in 2015.

23. The dispute in the LDT was a boundary dispute. The said dispute was not heard and determined. Instead the panel of elders directed that the boundaries be established. By the time the boundaries are established the LDT had been repealed and abolished and all the cases emanating therefrom were now placed before the magistrate's Court. In any event the award of the tribunal had been adopted in 2011 by the Court thus bringing the matter under its jurisdiction. The Appellant has argued that the 1<sup>st</sup> Respondent should have filed a new case as the application raises a new cause of action. I would think this is getting into the arena of semantics. I say so because the dispute in the LDT was a boundary dispute. I find no justification why the 1<sup>st</sup> Respondent should have filed a fresh suit. The facts of the dispute are consistent with the case of the parties in the LDT which has not been heard and determined and which dispute is within the jurisdiction of the lower Court. In arriving at this holding, I fortify myself with the provisions of Art 159(d) of the Constitution that justice shall be administered without undue regard to technicalities and the overriding objectives as contained in section 1A, 1B and 3A which require this Court in particular to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

24. The orders of the Court in respect to the Surveyor visiting the locus in quo and marking the boundary were very clear. I have read the report filed by the Land Registrar and in specific that of the Surveyor dated the 17/3/15 read as follows;

- "i). the bone of contention was dispute between the common boundary marked A-B on the sketch map attached.
- ii). The interested parties/owner of parcel 1666 did not appear during the exercise despite being swerved with the boundary dispute summons by the Land Registrar.
- iii). The owners of parcel No 1896 pointed their boundaries D-C whose boundary marks/features were well maintained at the time of the survey.
- iv). The boundary marks features from D through E to F were also clearly visible and maintained as the road is clearly marked on the ground.
- v). All the boundaries quoted in iii) and iv) above were found to reflect the Registry Index Map (RIM) used as drawn above.
- vi) Further the registered owner of parcel No 1896 pointed to the Surveyor s a section of the boundary marked A-B which had boundary marks
- vii). The comparison of RIM and the measurements on the ground proved that the boundary marked A-B was in the correct position
- viii). However, the Surveyor observed that there is a semi-permanent house and structures along the boundary section G-B hence the section had no boundary features.

In conclusion the Surveyor stated that at the time the site was visited the boundary section A-G depicted the correct position of the common boundary."

25. According to the said report it is clear that under part viii the Surveyor observed that there is a semi-permanent house and structures along the boundary section G-B hence the section had no boundary features. The Surveyor does not state with clarity if he established the boundary in this section G-B and the outcome of his findings. It is on the basis of this report that the 1<sup>st</sup> Respondent sought the orders of vacation or eviction of the Appellant ostensibly on a charge of boundary encroachment. It is also borne of the ruling that the learned Principal Magistrate placed reliance on the report in arriving at his decision.

26. It is not clear from this report if the structures are encroaching on parcel 1896 or they are in situ on parcel 1666 and if there is indeed any encroachment and the extent of such encroachment. From the report the Surveyor did not mark the boundary between G-B and the

conclusion is that he did not comply with the Court orders. Inter alia, the Surveyor did not file any drawings or sketches of the two parcels to show the encroachment if any or the boundaries in issue. Neither was the RIM annexed to his report so as to guide the Court. The report is at best inconclusive and the Court is unable to determine the dispute to its logical conclusion. The Court is unable to say whether or not the Appellant has encroached on the 1<sup>st</sup> Respondents land and to what extent. Equally the Court is unable to determine if the Appellant's house and structures are sitting on the boundary and if yes to what extent.

27. In the end the Appeal is allowed in the following terms;

- a. The Ruling of the Court dated the 11/6/19 is set aside in its entirety.
- b. The Land Registrar and the Surveyor, Murang'a County are ordered to visit the locus in quo in the presence of the parties and their legal representatives and mark the boundaries between the parcels of land and determine if there is any encroachment and if so the extent of the said encroachment and file their comprehensive reports together with the RIM and the necessary drawings if any in the Chief Magistrates Court within 60 days from the date herein or such other time after the COVID -19 Pandemic.
- c.. On receipt of the report in b) above, the matter be heard afresh by Hon Magistrate Court on priority basis.
- d. The costs of the application and the Appeal shall be borne by each of the parties equally.

28. **It is so ordered.**

**DATED, SIGNED & DELIVERED VIA EMAIL THIS 14<sup>TH</sup> DAY OF MAY 2020**

**J G KEMEI**

**JUDGE**