



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 558 OF 2009

GEORGE NGUGI NJUGUNA.....APPELLANT

VERSUS

JEREMIAH M. NJEHU.....RESPONDENT

JUDGMENT

(Appeal against the original judgment of Hon. A.O. Aminga (R.M.) in Limuru SPMCC No. 212 of 2006 delivered on 15th October, 2008)

1. The appellant herein filed this appeal on the following grounds:

- i. That the learned magistrate erred in law and in fact by holding that the court had jurisdiction to hear the matter.
- ii. That the learned magistrate erred in law and fact by not appreciating the fact that the subject matter of the suit was a boundary dispute that ought to have been adjudicated upon under the Land Dispute Tribunal Act, Number 18 of 1990.
- iii. That the learned magistrate erred in law by adjudicating over the matter without having the jurisdiction to handle the matter as properly indicated in the Magistrates' Court Act Cap 10 part 111A section 9A (1) (b).
- iv. That the learned magistrate erred in law and fact in failing to uphold the preliminary objection dated and filed on 27th November, 2006 objecting to the jurisdiction of the magistrate's court to hear land disputes.
- v. That the learned magistrate erred in law and fact in failing to comply with the provisions of the Land Disputes Tribunal Act No. 18 of 1990 that gives the relevant Land Dispute Tribunal jurisdiction to hear and determine boundary disputes.
- vi. That the learned magistrate erred in law and fact in exercise of his discretion in failing to consider and correctly apply the principles involved and determining that the court's jurisdiction was not ousted vide Land Disputes Tribunal Act No. 18 of 1990 specifically section 3 (1).
- vii. That the learned magistrate erred in law and fact by not appreciating the fact that the fence purportedly installed in 1964 could not maintain the same condition for a period of 44 years.
- viii. That the learned magistrate erred in law and fact in granting mandatory injunction that

demanded the defendant to move his gate to an acceptable distance as by law required without specifying the distance and the law applicable.

ix. That the learned magistrate erred in law and fact by basing his reasoning on extraneous facts not adduced before him.

2. The respondent herein sued the appellant for trespass and sought an injunction restraining the defendant, his servant/agent from trespassing, encroaching and/or in any other manner interfering with the plaintiff's parcel of Land No. Limuru/Ngecha 603; a mandatory injunction compelling the defendant to reinstate the boundary barbed wire and posts to their original position and by use of the same quality materials as initially used by the plaintiff and an order compelling the defendant to remove the metal gate post concreted on the plaintiff's parcel of land No. Limuru/Ngecha/603 and erect same at a distance as by law required from the common boundary; an order empowering the Kiambu District Surveyor to visit the suit premises and re-mark/re-identify the common boundary as per survey sheet No. 5 of 1959; damages for trespass and costs.

3. The appellant denied the respondent's claim and averred that the trial court had no jurisdiction to hear and make a determination on the matter. It was contended that the matter ought to have been before the Land Dispute Tribunal.

4. Brief facts are that the respondent is the registered owner of Limuru/Ngecha/603 while the appellant is the occupier of Limuru/Ngecha/615.

5. The two parcels neighbor each other. The respondent's claim was that in the year 2004 or thereabout, the appellant while conducting repairs on his fence shifted several posts of the respondent's fence from the common boundary and as a result encroached into the respondent's land. He further alleged that in the process of the repair, the appellant erected a metal post on his land to secure his gate. The respondent lamented that he not only stood a chance to lose part of his land but that his property was at a risk of being delineated. This court is therefore tasked with the duty to determine whether or not this was a boundary dispute within the jurisdiction of the trial court and whether or not it could issue mandatory orders against the appellant.

6. The appellant submitted that the Land Disputes Tribunal Act (repealed) in its preamble sets out its jurisdiction in certain land matters to be specifically adjudicated upon by the Land Disputes Tribunal. That it provides that ***"an Act of Parliament to limit the jurisdiction of the magistrate's courts in certain cases relating to land; to establish Land Disputes Tribunals and define their jurisdiction and powers and for connected purposes"***. That section 3 and 4 of the said Act provides that

Section 3 ***"(1) subject to this Act, all cases of Civil nature involving***

(a) The division of and/or the determination of boundaries to land including land held in common

(b) A claim to occupy or work land

(c) Trespass to land shall be heard and determined by a tribunal established under section 4."

Section 4 ***"(1) There shall be established a tribunal, to be called the Land Disputes Tribunal, for every registration district.***

(2) Each Tribunal shall consist of-

(a) a chairman who shall be appointed from time to time by the District Commissioner from the panel of elders appointed under section 5; and

(b) either two or four elders selected by the District Commissioner from a panel of elders

appointed under section 5.”

7. Section 159 of the Registered Land Act, Cap300 (now repealed) provided for the jurisdiction of the Land Dispute Tribunal to hear and determine dispute relating to boundary dispute. Where an Act of parliament grant specific jurisdiction and prescribes procedures, then the same has to be followed unless the Act itself says otherwise. To support that argument the appellant cited the case **Msambweni Land Dispute Tribunal & another v. Bakari Ali Mwakumanya ex parte Diana Muthoni Muturi [2014] eKLR** where the Judge held that the Tribunal’s jurisdiction is limited by section 3 of the Land Disputes Tribunal Act No. 18 of 1990 and that the Tribunal’s functions are limited to the division of, or determination of boundaries to land including land held in common, a claim to occupy or work on land or trespass to land. The appellant further cited **Republic v. The Land Disputes Tribunal, Kajiado North Ex parte Rachael Gathoni Mbai & another [2012] e KLR** where the issues that arose concern a boundary dispute and trespass and the court essentially held that where one written law amends another written law, the amending written law shall so far as it is consistent with the tenor thereof and unless a contrary intention appears, be construed as one with the amended law. The court further held that “ *since the Land Disputes Tribunal Act came into force much later than the Registered Land Act and provided for the land disputes relating to determination of boundaries to be dealt with by tribunals established under it, it must then follow that the jurisdiction of the registrar under the Registered Land Act over such matters must have been ousted and or inferred with. When enacting the Land Disputes Tribunals Act, Parliament must have been aware of the provisions of section 21 of the Registered Land Act. It must then have donated the Land Registrar’s powers in that regard to the tribunals established under the Land Disputes Act. I think that by Parliament not directly or expressly repealing section 21, it intended that the Land Registrar would determine a boundary where none had been fixed and noted in the register. In this case the boundary having been fixed and registered, any consequential dispute arising there from can only be dealt with by the respondent. The issue of determination of boundaries falls squarely within the purview of the respondent according to section 3 (1) thereof.*”

8. The appellant further submitted that this case should be heard at the Environment and Land Court as established by Parliament under section 4 of the Environment and Land Court Act No. 19 of 2011 pursuant to Article 162 (2) (b) of the Constitution 2010.

9. The respondent submitted that the specific alleged acts the appellant is said to have done were shifting some of the respondent’s fencing posts from the common boundary and moving them inside towards the respondent’s land, damaging the respondent’s barbed wire fence, erecting a metal gate post beyond the common boundary and altering the access point. The respondent then cited section 3 of the Land Dispute Tribunal Act No. 18 and submitted that in establishing the court that has jurisdiction there should be a distinction between determination of boundaries and settling boundary disputes. That from Harrap’s Essential English Dictionary, the word determine means to establish, to ascertain, to reach a decision and to resolve. Hence the tribunal has the jurisdiction to create and establish boundaries where none existed. That it is not within the court precept to go to the ground and start forming boundaries. That on the other hand, settling a boundary dispute means resolving a disagreement in relation to boundary. That therefore the tribunals establish boundaries while courts settle disputes arising from the same. The respondent further cited section 21 (4) of the Registered Land Act which provides that “**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.**” And submitted that the boundaries of the suit plots is known as it was determined in the year 1959 vide survey sheet No. 5 of 1959 17th edition published on 23rd March,1993 and that in the circumstances the dispute herein is a boundary dispute within the jurisdiction of the trial court and not the tribunal.

10. It is worth noting that in his submissions, the appellant also contested this court’s jurisdiction to deal with this matter and I shall thereby deal with it in view of the finding in the locus classicus on jurisdiction thus **Owners of the Motor Vessel “Lilian “S” v. Caltex Oil (Kenya) Ltd [1989] KLR1** where it was held:

“...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending

other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

11. The Environment and Land Court was established to operationalize the provisions of Article 162 (2) (b) of the Constitution. The contemplation therein was that Environment and Land Court will be the court to hear disputes related to the environment and land. The said Act became operational after the 5th November 2012. In view of section 30 of the said Act, matters that were filed before the Act came into force ought to continue before the courts where they were filed before the Act became operational or as per the Chief Justice’s or Chief Registrar’s directions. It must however be noted that such continuity could not apply where a forum ceased to exist for example a case could not continue before the Land Disputes Tribunal after the Land Disputes Act was repealed. In my view therefore, this court has the jurisdiction to hear this appeal.

12. The next issue is whether the trial court had jurisdiction to entertain the suit. The suit properties were registered under the Registered Land Act (Cap 300) which was repealed upon the passage of the **Land Registration Act, 2012**. At the time of this dispute both the Registered Land Act, and the Land Disputes Tribunal Act made provisions for resolution of boundary and trespass disputes. Part II, of the former was dedicated to boundaries and related matters. Under that Part the Registrar had powers with regard to boundaries. **Section 21(2)** stipulated that:

“21 (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.”

13. **Section 159**, on the other hand vested in the High Court and the Resident Magistrates’ court the power to entertain any civil suit relating to title to, or possession of land or any other interest in land, subject only to the limitation that in respect of Resident Magistrate’s Court, that power would be exercised ***“where the value of the subject matter in dispute does not exceed twenty five thousand pounds.”*** It provided:

“Civil suits and proceedings relating to the title to, or the possession of, land, or to the title to a lease or charge, registered under this Act, or to any interest in the land, lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration, shall be tried by the High Court and, where the value of the subject matters in dispute does not exceed twenty five thousand pounds, by the Resident Magistrate’s Court, or, where the dispute comes within the provisions of section 3 (1) of the Land Disputes Tribunals Act in accordance with that Act. ”

14. Where the dispute came within the provisions of **section 3(1)** of the Land Disputes Tribunals Act the dispute was to be resolved by the Land Dispute Tribunal in accordance with that Act.

The decision of the Tribunal would be filed and entered in the magistrate’s court as a judgment. Appeals from the Tribunal lay to the Provincial Appeals Committee and thereafter to the High Court only on points of law. The Land Disputes Tribunal Act amended **section 159** of the Registered Land Act by expressly recognizing the jurisdiction of the Tribunal in matters enumerated under **section 3(1)** aforesaid.

15. The letter dated 18th April, 2008 from the District Surveyor to the Senior Resident Magistrate Limuru Law Courts reveal that the boundary between the suit lands had been established vide Survey Sheet No. 5 of 1959, 17th Edition Published on 23rd March, 1992. That, what was to be done was remarking / re identifying the common boundary between the lands as per the said survey sheet. Section 21(4) aforesaid provides as follows:

“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.” (Emphasis mine)

16. The Court of Appeal in **Wamutu v. Kiarie (1982) KLR 480** had this to say in relation to the latter section ;

“Section 21(4) of the Registered Land Act provides that *the court has no jurisdiction to hear a matter relating to boundary disputes or registered land, unless the boundaries have first been determined by the Land Registrar.* The court in this case had jurisdiction to hear the matter as the boundary had already been determined.

17. Considering the above provision coupled with the respondent’s prayers I find that the trial court had the jurisdiction to determine the said suit.

18. On whether the trial magistrate erred in issuing mandatory orders, it emerged from the evidence on record, particularly, the Surveyor’s report dated 18th April, 2008 that the appellant had encroached into the respondent’s land. The appellant on the other hand merely stated in his testimony before court that he did not in any way interfere with the respondent’s land. In my view this was a mere denial. The appellant did not satisfy court that he did not interfere with the respondent’s land while the respondent proved otherwise. There being sufficient evidence on record to prove that the appellant had encroached into the respondent’s land, the only right order to issue was a mandatory injunction against the appellant. I therefore find that the learned magistrate did not misdirect himself in granting the said orders.

19. I have said enough, I think, to show that all the grounds listed in the appeal do not convince me that I should allow the appeal. The appeal is hereby dismissed with costs to the respondent.

Dated, Delivered and Signed at Nairobi this 9th day of March, 2017.

.....

L. NJUGUNA

JUDGE

In the presence of

.....***For the Appellant***

.....***For the Respondent***