REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO 188 OF 2011

FRANCIS KAGUMA MUHOI ………………..APPELLANT

VERSUS

REGINA WAMUYU KANYI ………..……..….RESPONDENT

JUDGMENT ON APPEAL

(Being an Appeal on the judgment of the Honourable A.B Mong'are, Senior Resident Magistrate delivered on 4th October 2011 in Nyahururu PMCC No. 31 of 2009)

(Appeal; Appellant having sued respondent for orders that the respondent has lost her rights over certain land; appellant embarking on a subdivision of his land and in the process taking over the respondent's land and combining it with his own; new subdivided title deeds being issued which show a take over of the respondent's land; appellant failing in his suit before the Magistrate's Court and appealing; Magistrate giving order for respondent's land to be surveyed and she be shown her boundaries; appeal filed on this decision; no previous claim for adverse possession having been made; no basis upon which the appellant could purport to take over the respondent's land; the take over not sanctioned by law; the area maps still showing that the respondent's land is intact; no indication in the maps that there are new subdivisions; no error in the Magistrate making an order for the respondent to be shown the boundaries of her land; appeal dismissed with costs)

1. This is an appeal arising from a judgment delivered on 4 October 2011 by the Honourable A.B Mong'are, Senior Resident Magistrate. In the judgment the plaintiff's suit was dismissed hence this appeal. This being a first appeal, I have the duty to assess the pleadings and evidence and determine whether the learned trial Magistrate arrived at the correct findings.

2. The suit itself was commenced by way of a plaint filed on 18 February 2009 before the Principal Magistrate's Court at Nyahururu. In the plaint, the appellant, as plaintiff, pleaded that he was the registered proprietor of the land parcel Nyandarua/OlJoro Orok Salient/610 which land he pleaded he has subdivided into the titles Nyandarua/OlJoro Orok Salient/18409-18422. The plaintiff pleaded that he has been in quiet possession of the land ever since the year 1988 when he was allocated the same by the Settlement Fund Trustees (SFT). He pleaded that he has made massive developments and has been on the land without interruption. He pleaded that on 14 February 2009, the defendant accompanied by a surveyor and her son entered the land and undertook survey work which excised a portion of 10 acres on the claim that the said portion had encroached on the land Nyandarua/OlJoro Orok Salient/1440 belonging to the defendant. The plaintiff pleaded that the actions of the defendant were illegal as she had no court order or other valid authority to effect the subdivision. He was also of the view that any claim by the defendant was time barred. In the suit, the plaintiff applied for the following orders :-

(a) A declaration that the defendant's claim (if any) over L.R No.Nyandarua/OlJoro Orok Salient/610 or its subdivisions is time barred by virtue of the Limitation of Actions Act, Cap 22, Laws of Kenya.

(b) A permanent injunction restraining the defendant by herself, servants, agents and/or employees from sub-dividing, entering, taking possession, fencing, remaining or in any other way interfering with the plaintiff's quiet use and possession of the suit land.

(c) Any other or better relief deemed fit by this honourable court.

3. The respondent entered appearance and filed defence and counterclaim. She pleaded that she is the owner of the land parcel Nyandarua/OlJoro Orok/Salient/1440 (parcel No.1440) which she averred neighbour's the appellant's land parcel No. 610. She pleaded that the appellant's land parcel No. 610 measures 4.8 Ha (11.8 acres) and that her land measures 4.2 Ha (10.4 acres). She pleaded that the appellant has been in occupation of his land parcel No. 610 whereas she has been in occupation of her land parcel No. 1440. She pleaded that vide a mutation dated 12 March 2008, the appellant purported to divide his land parcel No. 610 into 14 portions whose acreage totalled more than 17 acres. She pleaded that the extra land was created from her land parcel No.1440 and about 10 acres hived off. She further pleaded that the appellant removed the fence subdividing his land with that which belongs to her. On 14 February 2009, she engaged a surveyor to fix the boundaries but they were chased away by the appellant. She then lodged a boundary dispute with the District Land Registrar which was to be heard on 18 February 2009, the same day that the appellant filed his suit. In her counterclaim the respondent sought the following orders :-

(a) An order directing the District Land Registrar to fix the boundary between L.R No. Nyandarua/OlJoro Orok Salient/610 and Nyandarua/OlJoro Orok/Salient 1440 and a mandatory injunction be issued restraining the defendant by himself, his servants, his agents, and/or employees from in any way interfering with the plaintiff's quiet occupation on her land parcel Nyandarua/OlJoro Orok Salient/1440 in perpetual.

(b) Costs of the counterclaim plus interest.

(c) Any other or further relief that the Honourable Court may deem fit and just to grant.

4. Together with the suit, the appellant sought an order of injunction which he lost. The matter thereafter proceeded for hearing. In his evidence, the appellant testified inter alia, that he held the title to the parcel No. 610. He stated that he has subdivided the same into 14 portions which he has sold, save for three, namely parcel Numbers 18409, 18410 and 18422. He stated that he has never had a quarrel until the year 2009. He named a Mr. Wangondu and Mr. Gachingo as his neighbours and stated that there was no free land between them. He testified that he entered the farm in the year 1988. He stated that he is not aware of the respondent's title and was not aware of the land parcel No. 1440. He testified that his land is 17 acres. In cross-examination, he testified that according to the title deed, his land parcel was 11 acres. He justified this by stating that at times land is not exact on the ground as reflected in the title document. When shown the Registry Index Map, he identified the parcel No. 1440 as the one bordering the land parcel No. 610. He testified that he subdivided his land in the year 2008 and that he had no problems prior to the subdivision. He testified that he had planted trees around the boundaries of his land.

5. The respondent on the other hand testified that she lives in Nairobi. She testified that she was allocated the land parcel No. 1440 in the year 1993. Her title deed which was issued on 30 June 1993 reads 4.2 Ha. In 2002 she came to visit the land and found some posts had been removed. His son came to fence and was chased away. She thought there may be a boundary dispute and reported to the District Land Registrar. She later learnt that the appellant had encroached on her land so as to combine it with his own and produce 14 parcels totalling 17 acres. She stated that it was not possible for the land on the ground to be more than the one reflected in the title deed. In cross-examination, she testified that her son and nephew have been cultivating her land and they had built a site house which was removed. She testified

that her posts demarcating the boundaries were removed and she thought that this was ordinary theft. She stated that the defendant entered her land in the year 2008.

6. The respondent called the Deputy District Surveyor Nyahururu District as her witness. He testified that pursuant to a court order, he visited the site. He did not see any boundaries on his visit which was on 3 November 2010. He testified that the two plot numbers 610 and 1440 appear in the Registry Index Map (RIM). He testified that the mutation of the parcel No.610 was not done at their office but that they did issue new parcel numbers to the subdivisions.

7. In her judgment, the learned trial Magistrate drew five issues as follows :-

(a) Whether the land parcels NO. 610 and 1440 exist.

(b) Whether the plaintiff interfered with the defendant's land parcel No. 1440.

(c) Whether the suit by the defendant is time barred.

(d) Is there need for the Land Registrar to fix back the boundaries ?

(e) Who pays the costs of the suit ?

8. On the first issue, she did hold that the two land parcels do exist both on paper and on the ground. On the second issue, she held that the appellant did interfere with the respondent's land. She pointed at Section 21(2) of the Registered Land Act (now repealed) and was of the view that the same gives the Land Registrar power to fix boundaries. She dismissed the plaintiff's submissions that the parcel No. 610 no longer exists. On limitation of time, she did not agree that the issue of boundary is time barred and can be allowed at any time. She was also of the view that the injunction is not time barred and that the subdivisions were done with an attempt to merge the two parcels of land. She ordered the Land Registrar to proceed and fix the boundaries. In the end, the plaintiff's suit was dismissed and the counterclaim upheld with costs and interest.

9. In his Memorandum of Appeal, the appellant has attacked the judgment on the following grounds :-

i. The learned trial Magistrate erred in law and fact in dismissing the appellant's case despite overwhelming evidence in support of the prayers sought.
ii. The Learned trial Magistrate erred in law and fact in allowing the respondent's counterclaim which was time barred by virtue of the Limitation of Actions Act, Cap 22, Laws of Kenya.
iii. The Learned trial Magistrate erred in law and fact in granting the prayers sought in the counter-claim in absence of jurisdiction to do so.
iv. The Learned trial Magistrate erred in law and fact in holding that the sub-division of the original title No. 610 had not taken place despite the registration of a mutation and issuance of titles in respect thereof.
v. The Learned trial Magistrate erred in law and fact in holding that title NO. 1440 existed on the ground without any evidence to support the finding.
vi. The Learned trial Magistrate erred in law and fact in making a judgment which was against the weight of evidence.

10. The appellant has asked for the judgment to be set aside and his claim as set out in the plaint be allowed.

11. In his submissions, Mr. Gakuhi Chege for the appellant, argued all the six grounds of appeal together. He submitted inter alia that the appellant could not be held guilty of interfering with the respondent's land parcel No. 1440 as he had all along occupied what he considered to be his land parcel No. 610 since the year 1988. He pointed at the evidence of DW-2 who testified that there was no boundary between the two land parcels on the ground. He attacked his evidence by stating that DW-2 did not measure the sizes of both parcels of land to establish if there was any encroachment by the appellant. He argued that the issue

was not a boundary dispute but a land claim. He submitted that despite the respondent obtaining title in the year 2003, she did not take any action over the possession thereof until she filed her counterclaim, which was said to be 17 years from the date she received her title deed. He referred to Section 7 of the Limitation of Actions Act, which provides for a 12 year limitation period for claims of land. He attacked the learned Magistrate's finding that a boundary determination has no limitation of time. He submitted that disputes related to boundaries are not exempted. He further submitted that the orders sought in the counterclaim could not be granted as the same were sought against the District Land Registrar, Nyandarua who was not a party to the case. In any event he submitted that the orders were not prerogative in nature and offended Section 16 of the Government Proceedings Act. He relied on ***Ogutu & Another vs Okumu*** **(KLR) 780** as authority that adverse orders cannot be made against a person not a party to a suit. He submitted that no order could issue against the District Land Registrar as he was not a party to the suit. He was of opinion that it is the appellant's case that should have succeeded.

12. On the other hand, Mr. Waichungo for the respondent, in his submissions wondered how the appellant's land grew from 11 acres to 17 acres. He was of the view that the intention was to excise part of the respondent's land. He submitted that assuming that the respondent's claim is a claim for land, the course of action arose in the year 2008. He submitted that the Government Proceedings Act did not apply as the respondent never sought an injunction against the Government. He submitted that there was no reason to enjoin the Land Registrar. He dismissed the issue that the court had no jurisdiction and submitted that counsel for the appellant has not shown how the court did not have jurisdiction.

13. I have considered the matter. I have already set down the pleadings, evidence and judgment of the learned trial Magistrate above and I need not repeat the same. I have also set down the grounds of appeal. Save for ground No. 3 which raised the issue of jurisdiction, I think the other grounds are essentially a complaint that the suit ought to have been held in favour of the appellant. On jurisdiction, counsel for the appellant did not submit anything to demonstrate that the Magistrate had no jurisdiction. I am left to wonder why the appellant thought of raising the issue of jurisdiction. On my part, I have not seen anything that would give me the impression that the Magistrate had no jurisdiction to handle the matter. I have to dismiss this ground of appeal.

14. On the other grounds of appeal, I think on the facts, there can be no question that the parcel Numbers 610 and 1440 existed together at some point. The parcel No. 610 measured 4.8 Ha whereas the parcel No. 1440 was issued with title to 4.2 Ha. I have seen the mutation form which purported to subdivide the land parcel No. 610 into 14 parcels of land. I have calculated the total acreage in the mutation form and the same reflects acreage of 6.919 Ha which is about 17 acres. I do not see how the mutation can be said to have been a proper mutation. If the land was of extra acreage, the surveyor needed to note that in his mutation which he did not. No explanation has been given as to where the extra acreage came from.

15. According to DW-2 the land parcel No. 610 exists and he was not aware that it has been subdivided. He testified in cross-examination that amendment (and I can only think of amendment to the RIM) was not done. The RIM was actually produced as an exhibit and it does show that the parcel numbers 610 and 1440 are still existing. The same does not reflect the alleged subdivisions of the parcel No. 610 , or the disappearance of the parcel No. 1440, although it appears as if some people hold what they consider to be title deeds to the subdivisions. I think in the circumstances, the appellant needed to produce a copy of the register or search certificate to demonstrate that indeed there has been a legitimate subdivision of the land parcel No. 610 and that it no longer exists. This is because the expert, who is DW-2 , has stated that the land parcel No. 610 is intact and the RIM has never been amended to reflect any subdivision. His evidence was never rebutted by the plaintiff who, apart from copies of title deeds, purporting to be from the subdivision of parcel No. 610, produced nothing else.

16. Even if the subdivisions exist, I do not see how the appellant could properly have subdivided his land and have an increased acreage as a result. His explanation that the land was bigger on the ground is completely unsupported. If his case is that he has occupied the land parcel No. 1440 for a period in excess of 12 years and needs to be given title to it, he ought to have filed suit for adverse possession, and it is only if he had succeeded, that he could now be registered as proprietor of the land parcel No. 1440. He could not purport to issue to himself title to the respondent's land without a valid court order. His claim

that any rights of the respondent over the land parcel No. 1440 are time barred are in my view out of place. If he had wanted such declaration, he ought to have filed suit by way of adverse possession so that his claim, that he has been in continuous occupation of the land parcel No. 1440 can be tested in evidence. He could not simply decide for himself that the respondent’s rights are extinguished without lodging a claim of his own. Since he was the plaintiff, he needed to assert and establish his own claim over the land parcel No. 1440 and demonstrate what law would allow him to have the land as his own. He never did this.

17. I therefore do not see how it could be argued that the respondent’s rights over the land parcel No. 1440 are time barred. In fact, the quarrel of the respondent is that the appellant illegally subdivided his land to include that of the respondent. That quarrel only came to be after the purported subdivision which was done in the year 2008. It cannot be said that when the counterclaim was lodged in the year 2009, the 12 years provided in Section 7 of the Limitation of Actions Act, for lodging a claim for recovery of land, had lapsed. They had not. Neither can I buy the argument that there is limitation of time within which one ought to approach the Land Registrar for a determination of boundaries. Boundaries can be determined at any time.

18. The decision of the learned trial Magistrate was that the aim of the appellant was to include the respondent’s land in his subdivision. I cannot fault the learned trial Magistrate on this holding. It is indeed also my view. The appellant was of course trying to be mischievous during the mutation. I indeed do not know how the subdivided titles can be legitimized as they are not even reflected in the Lands office as DW-2 testified. But if the owners thereof wish to lodge any claim, they are free to do so and the same will be considered on merits. They do not appear to have lodged any claim of their own and if the appellant does not own these subdivisions, I do not know what locus he has to claim them. The appellant on his part did not lead any evidence to demonstrate that the three subdivisions that he holds are situated in the land that is alleged to fall within the confines of the land parcel No. 1440. Without any such evidence, I cannot assume that they do.

19. There was attack in the decision of the Magistrate to refer the matter to the District Land Registrar. I see no fault in the Magistrate referring the matter to the District Land Registrar to determine the boundaries of the land parcel No. 1440. That indeed was what the respondent wanted done. It has not been claimed that the Land Registrar has no power to determine boundaries and indeed he has. It was not necessary for him to be a party to the suit for the court to issue an order to him to fix the boundaries. The respondent did not purport to state that she had applied for fixing of boundaries to the Land Registrar and that the Land Registrar had refused to fix the boundaries. She was not in any way seeking any adverse order against the Land Registrar. The order directing the Land Registrar to proceed and fix the boundaries was not an order that was adverse to the Land Registrar and it cannot be argued that an adverse order was issued against a person who was not a party to the suit. It was a directive to the Land Registrar that he can proceed to fix the boundaries as had been applied for by the respondent before the appellant filed the plaint.

20. From my discussion above, I am unable to find any fault in the judgment of the learned trial Magistrate. The effect is that I find no merit in this appeal and the same is hereby dismissed. The directive to the District Land Registrar, to point out the boundaries to the land parcel No. 1404 may be executed.

21. The appellant will shoulder the costs of this appeal.

22. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 4th day of May, 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of: -

Mr Khobe holding brief for Mr. Gakuhi Chege for appellant

N/A on part of Mr. Martin WAichungo for respondent

CA: Janet