



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CIVIL APPEAL NO. 43 OF 2006

CRESTERS KULOBA WAMBUAPPELLANT

VERSUS

JACKSON MWANIKI NDUNG'U.....RESPONDENT

*(Being an appeal from the decision of the Bungoma District Land Registrar, Bosire K.E.M esq
adopted in court vide Bungoma SPMC Misc Civil Application no 157 of 2006)*

JUDGMENT

1. This appeal is brought against the decision of the Bungoma District Land Registrar made on 14th July 2006 and adopted by the Bungoma Senior Principal Magistrate's court in Misc. Civ. App. no. 157 of 2006 on 7th September 2006. The appellant listed seven grounds in his memorandum of appeal filed in court on 20th September 2006 which were as follows;

1. The District Land Registrar's proceedings and decision were biased in that he recorded evidence that was not adduced to the detriment of the appellant's claim.
2. The District Land Registrar erred in altering the original boundary which is on the registry map and in creating an boundary in parcel land NO. E. BUKUSU/S. KANDUYI/8830 thereby excising part of the appellant's land duly developed to the respondent's side.
3. The district Land Registrar erred in ordering that the appellant arrange to remove the house he had build in Mr. Mwaniki's plot when the said house correctly falls on the appellant's plot no. E. BUKUSU/S. KANDUYI/8830 as per the available map and mutations.
4. The district land registrar erred in finding that the appellant had planted a new boundary inside Mr. Mwaniki's land when there was evidence of such planting of a new boundary in the respondent's plot.
5. The District Land Registrar exceeded his power and contradicted himself in the findings and ruling in that whereas he found that there was a six metre wide road separating the two parcels of land and serving as a common boundary between the two plots, he at the same time said that the road was not existing contrary to the evidence available on the map for the said registration area and mutations.
6. The District Land Registrar failed to notice the discrepancy in acreage on plot no. **E. BUKUSU/S. KANDUYI/1596** on the green card it is 0.6 and 0.5 hectares whereas on mutation is it clearly 0.5 hectares.

7. The District Land registrar erred in creating a new boundary between parcel no. **E. BUKUSU/S. KANDUYI/8830** and **1596** when there was existing boundary which is the six metre road separating the two parcels from time immemorial.

2. The parties were represented and their advocates argued the appeal by filing written submissions. Mr. Bw'onchiri for the appellant submitted that the registrar failed to comply with the provisions of section 21 (3) of the Registered Land Act (*repealed*) when he reached his decision. Secondly, the registrar went outside the mandate conferred to it by section 21 and 22 of the Act by ordering the applicant to remove the house on one of the parcels. Lastly the appellant submitted that the procedure adopted by the respondent in filing the award of the land registrar was erroneous as the respondent ought to have filed a substantive suit as provided for under Sec. 21 (4) of the Registered land Act (*repealed*).

3. The respondent on his part submits the appeal is overtaken by events because the appellant already undertook subdivision of the suit parcel E. Bukusu/S. Kanduyi/8830 during the pendency of this appeal hence there is no appeal. The respondent submits further that this appeal was filed out of time and should be dismissed with costs. In explaining time, the respondent states that the registrar's decision was made on 14th July, 2006 and this appeal was filed on 20th September 2006. It is his case that the registrar's decision is appealable within 30 days from the date of the decision hence this appeal was filed out of time. Lastly the respondent submits this appeal is an abuse of the court process as the application adopting the registrar's award was reached by consent of both parties. He submitted that there are several court decisions that have held that a consent order can only be set aside on the grounds that can be justified e.g fraud, mistake or misrepresentation. He relied in the case of **Flora Wasike vs. Destino Wambuko [1982 – 1988] KAR 266**. The respondent urged the appeal to be dismissed with costs.

4. From the pleadings the issues for determination in my view are three namely;

i. Whether the appeal is time barred.

ii. Whether the registrar failed to comply with the provisions of section 21 of Cap 300.

iii. Whether this appeal is an abuse of the court process.

5. The time for filing appeals against the decisions or awards of registrars is provided for under section 150 of the Registered Land Act (*repealed*). Section 150 (1) provides the time to appeal at 30 days of the date of refusal by the Land registrar. Secondly, the appeals from the district Land Registrar lie first to the Chief Land Registrar. The provisions of the repealed Act still apply to this appeal since it was operational when the decision was made. Further, the new Land Registration Act has similar provisions as regards procedure and time on appeals of the decisions of the district Land Registrar under sections 19. The decision complained of was made on the 14th July 2006 and the appeal filed on 20th September 2006 which is more than 30 days from the date of the decision. The appellant was not required to wait for the award to be filed in court for him to challenge it as there is no such provision under the law. The appeal before court was therefore filed out of time without leave of the court and is thus incompetent.

6. **Did the Land Registrar contravene the provisions of section 21 (3)?** Section 21 (3) provides that;

“Where the registrar exercises the power conferred by subsection (2) he shall make a note to that effect on the registry map and in the register and shall file such plan or description as may be necessary to record his decision.”

The section requires the registrar to make a note on the registry map and in the register. The appellant did not verify whether such entry was recorded in the register. In the appellant's view, that recording ought to have been filed with the award. This is not what the law requires the registrar to do as the entries are to be made in the register and filed in their records. In my understanding, the records mean the land registry records. There was no evidence showing that such entry was not made on the map or registry. I find this submission as a misinterpretation of the provisions of the applicable section.

7. The respondent submitted that this appeal was an abuse of the court process because the appellant consented to its adoption as an order of the court. The appellant on his part submitted that the procedure followed in adopting the award was erroneous, as the respondent ought to have filed a substantive suit. The Registered Land Act (*repealed*) gave the registrar power to determine all issues concerning boundary and any person aggrieved by the registrar's decision to appeal to the Chief Land Registrar. The decision by the respondent to have the registrar's award adopted as an order of the court is not clearly provided for, as the Act makes the decision of the registrar as regards determination of boundary as final. The appellant also consented to this procedure and cannot therefore question that process on appeal unless he has set aside the consent order in the subordinate court. Further I do make a finding that this appeal is an abuse of the court process for the reason that it ought to have been filed with the Chief Land Registrar before lodging it to this court.

8. Consequently, I find this appeal as incompetent and lacking in merit for the reasons given above. The appeal be and is hereby dismissed with costs to the respondent

Dated and Delivered at Bungoma this 4th day of November 2014.

A. OMOLLO

JUDGE