



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NUMBER 276 OF 2009

ANN WOKI KARANJA. APPELLANT

VERSUS

NDICHU MURUGAMI. RESPONDENT

*(From the Ruling and orders of L. M Wachira, Resident Magistrate in Kikuyu PMCC Misc.
Application No. 20 of 2007)*

J U D G M E N T

This matter originated from the decision of the Kiambu West Land Disputes Tribunal in Tribunal case No. KW/LND/9/3/2007 whose award dated the 15th August, 2007 stated as follows: -

- “1. That the Kiambu Land Surveyor visits plot Nos. Dagoretti/Thogoto/1234 and Dagoretti/Thogoto/961 and determine the correct position of their common boundary.***
- 2. That the boundary set by the Surveyor as (1) above should be moved to leave an uninterfered boundary.”***

The above award was made and adopted into a judgment by the Kikuyu Resident Magistrate’s court in an application referred to as Miscellaneous Civil Application no. 20 of 2007 and was read to both parties on 5th October, 2007.

A decree drawn by the court on the adopted award and the resultant judgment did not read any differently. It stated thus: -

- “1. That the Tribunal award is adopted as judgment of this court.***
- 2. That the Kiambu Land Surveyor visit plot No. Dagoretti/Thogoto/1234 and Dagoretti/Thogoto/961 and determine the correct position of their common boundary.***
- 3. That the boundary so set by the Surveyor as above should be clear and if the objector’s building is on the boundary, the building should be moved to leave an uninterfered boundary.***
- 4. “***

A District Surveyor visited the two plots to investigate the position of the common boundary between the two plots. He later filed his Report dated 25th May, 2008. His findings were that the

Respondents house had been built fully on Respondent's plot No. Dagoretti/Thogoto/961 but that its one wall was exactly just touching on the common boundary. Secondly, the toilet breather made of plastic pipe was protruding from and through the said wall to the Objector/appellant's land L.R. No. Dagoretti/Thogoto/1234.

Although the Report indicated that the Respondent was willing to remove the toilet breather, the Applicant/Appellant had filed the Miscellaneous Civil Application No. 20 of 2007 which for unexplained reason was shown as filed on 7th July, 2008. It sought orders that: -

That the Respondent – Ndichu Muraguri alias Murugami, do demolish and/or remove the stone wall and the septic tank from the middle of the common boundary and that in default, the OCPD Kiambu Police Station do enforce the court orders to be granted.

The court notices that an exactly similar application was later filed on 3rd March, 2009 by the Appellant. It is not clear to me which of the two applications was heard but a Ruling dated 4th May, 2009 was delivered and it dismissed the Applicant/Appellant's application seeking enforcement of the lower court's decree and judgment aforementioned. It is the said dismissal that prompted the Applicant/Appellant to file this appeal.

In his Memorandum of Appeal, the Appellant complained that the honourable trial magistrate failed to appreciate the really issue before him which was merely to implement or enforce the judgment and decree earlier issued by the same court based on the adopted award of the Kiambu West Land Disputes Tribunal in Tribunal case No. KW/LND/9/3/2007. The Appellant further complained that the trial magistrate deliberately gave the decree before him a twisted meaning from what the decree read to enable the court to spare accurate implementation.

I have carefully read the appeal record which contains the relevant tribunal and award and the decree drawn and issued from them, which I have, for easy reference, cited hereinabove. The express reading of the decree confirms the clear meaning of the original award and the original judgment and decree of the lower court adopted from them. It was clear that no construction or structure by either owner of the two plots should touch on the common boundary. To that end however, the District Surveyor's Report pointed out that one wall of the Respondents building, actually touched the common boundary. He also found that the toilet breather pipe protruding from self-same wall, was extending to the Appellant's land. These two structures clearly contravened on the court decree and the lower courts legal duty was to implement the decree by ordering the wall to be moved together with the protruding toilet breather pipe, backwards towards the Respondent's plot.

What apparently troubled the honourable trial magistrate, was probably the expense which would be involved in breaking the existing wall in order to build another wall behind it. It also was likely to mean breaking the whole building down as one wall might not be easy to break alone without bringing down the whole structure that the wall supported. In the court's view, however, there was no other way of enforcing the said court's decree, unless of course, the Appellant would be persuaded not to execute his judgment. Such other course however, was not available, otherwise the Appellant would not have filed the application for implementation.

The honourable trial magistrate applied several reasons to avoid granting the orders for implementation of the decree. She had no legal cause to do so. The application before her was lawful, straight-forward and meritorious. The honourable trial magistrate should have granted it. She instead took into account extraneous matters and failed to take into account matters which were relevant. She applied the law sparingly, at the expense and prejudice of the Appellant/applicant and in discrimination towards him. In the circumstances there are good reasons for this Appellate court to interfere with the Ruling appealed from, which is hereby set aside. In its place an order to demolish the said wall belonging to the Respondent, is hereby granted, to be enforced with the assistance of the OCPD of the Kiambu Police Station unless voluntarily demolished by the Respondent within a period of 60 days from date of delivery of this judgment. Costs are to the Appellants, here and below. Orders accordingly.

Dated and delivered at Nairobi this 4th day of July 2013.

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D A ONYANCHA

JUDGE