



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT ELDORET

CIVIL APPEAL NO. 14 OF 2018

MARIA T. CHEBIEGO..... APPELLANT

VERSUS

KIMUTAI KANGOGO SAWE & 18 OTHERS..... RESPONDENTS

(Being an appeal from the Judgement and Decree of Honourable N. Wairimu Principal Magistrate, dated and delivered on 21st October 2018 in Eldoret CMCC NO. 382 OF 199. MARIA T. CHEBIEGO VS KIMUTAI KANGONGO SAWE & 18 OTHERS)

JUDGMENT

This appeal arises from a suit filed by the appellant against the respondents in the lower court seeking for an order directing that the boundaries on the ground and the road of access of Plot No. Cheptiret/Cheplaskei/Block 4 (Mosop) 3, 90, 91 and 92 be adjusted so as to correspond with the Registry Index Map an order of recovery of the Plaintiff's land and costs of the suit.

The trial court after considering the evidence on record and the testimonies of all the witnesses delivered a judgment wherein it held that the dispute was resolved after the parties entered into a consent to have the Surveyor visit the land and prepare a report. That the parties were in agreement that it was a surveyor who could resolve the issue hence went ahead and visited the land following a consent entered between the parties and prepared a report dated 15th May 2007 in which the District Land registrar made recommendations. The trial court therefore adopted the recommendations as an order of the court

The appellant being dissatisfied with the decision of the trial court, filed the current appeal and listed 12 grounds of appeal.

APPELLANT'S SUBMISSIONS

Counsel submitted that the basis of the Plaintiff's claim was that the Defendant removed the initial beacons placed by the District Surveyor and extended his land and thereby annexed part of the Plaintiffs land. Counsel further stated that the Defendant and the interested parties also declined to use the access road provided for in the Registry Index Map and instead opted to open another road on the Plaintiffs parcel of land.

Mr. Kamau consolidated that grounds of appeal to one major ground namely: the court erred in law and fact by failing to make an order directing that the boundaries on the ground and the access road of Plot No. Cheptiret/Cheplaskei/Block 4(Mosop) B, 90, 91 and 92 be adjusted to correspond with the registry map.

It was counsel's submission that the Learned Magistrate erred in making a blanket adoption of the report by the District Land Registrar on the ground that the Land Registrar purported to state that the Registry Index Map should be amended to reflect the ground position. That this position presupposes that the survey done earlier was erroneous and the Registry Index Map is the document which has errors.

That the evidence on record shows that the survey was done properly by the District Surveyor which settled the dispute and each person was given their respective parcel of land. Counsel submitted that the dispute was precipitated by the removal of the beacons by the defendant and also creation of a road in between appellant's parcel of land hence the court should have first addressed the placement of bacons on the ground in accordance with the Registry Index Map and incase of any variation, it would be at that point that the court would have ordered a re-survey.

Mr Kamau also submitted that in the alternative and in order to ensure finality of the dispute, it was also incumbent on the court to make orders that would guide the finality of the dispute which orders should have incorporated the following:

- a) In the event that a resurvey would result in gains or losses, such gains or losses should be proportionate as between the owners

of Plots No. 1 — 9.

b) Any such amendment of titles should thus affect all plots from No. 1 — 9.

c) The costs of survey should be borne either by the state or by all the parties equally as the parties had already paid for the survey hence if the same was to be redone then the state should bear costs.

Counsel therefore urged the court to allow the appeal with costs to the appellant.

1ST

RESPONDENT'S

SUBMISSIONS

Counsel for the 1st respondent submitted that the dispute between the Plaintiff and the Defendant is one of boundaries of which the Honorable Court has no jurisdiction to entertain. That the respondent further made an alternative prayer that the matter be referred to the County Land Registrar for hearing and determination.

Counsel submitted that the issue for determination is whether the suit is a boundary dispute which was referred to the Land Registrar whose findings have neither been reviewed nor challenged even in the instant appeal.

Ms Tum further submitted that the plaintiff sought for orders from the Honorable Court directing that the boundaries on the ground and the road of access on Plot Nos. CHEPTIRET/ CHEPLASKEI BLOCK 4(MOSOP 13)90, 91 & 92 be adjusted so as to correspond with the R.I.M and an order of recovery of Plaintiff's land. That as at the time the suit was filed in 1997, the operating law was Registered Land Act Cap 300 whereby Section 21(4) which provided for the procedure to be followed on issues relating to boundary disputes and how it should be resolved as follows:-

"No court shall entertain any action or other proceedings relating to a dispute as to take boundaries of Registered Land unless the boundaries have been determined as provided in this Section. "

Counsel submitted that from the amended plaint dated 27th March, 2015, the subject matter was subdivided and new titles issued in 2015 and as a result of the amended plaint, the operating law is The Land Registration Act, 2012 which replicates section 21(4) in Section 18(2) of the Land Registration Act the procedure to be followed on issues relating to boundary disputes as follows:-

"The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of Registered Land unless the boundaries have been determined in accordance with this section.

Ms Tum submitted that both sections are couched in mandatory terms as they state clearly that the court cannot entertain actions relating to disputes as to boundaries unless they are determined as per the provisions of the sections.

It was counsel's further submission that the matter proceeded and in 2001, the Plaintiff and the Defendant by consent referred the matter to the District Land Registrar for hearing and determination through a letter of consent dated 10th February, 2001 (The letter is in page 147 of the Record of Appeal). That the matter was further mentioned on 4th July, 2003 in presence of counsel and it was ordered by the court that the dispute be referred to the then Land Registrar for hearing and determination. The Land Registrar visited the site and filed a report dated 13th April, 2007 giving recommendations for consideration by the court.

Counsel therefore submitted that there was no error of fact or law that the trial court committed since the Trial Magistrate in her Judgment referred to the consent entered into between the parties that referred the matter to the District Land Registrar for hearing and determination. Further that the appellant never sought for review of the findings of the Land Registrar thfore the same remains unchallenged hence binding on the parties.

Ms Tum submitted that the Registry Index Map only indicates approximate boundaries and the approximate situation on the ground. And even if the court is called upon to determine the matter it will still require the input of the Land Registrar who has the technical advice and resources of the District Surveyor to determine and ascertain the boundaries.

Counsel relied on the case of Willis Ochola v Marv Ndege [2016]eKLR. where the court held that it does not have jurisdiction to hear and determine boundary disputes.

On the issue as to whether the trial court erred in not rendering the recovery of the plaintiff's land counsel submitted that the 'Plaintiff's prayer for an order of recovery of the was not expounded on where and from whom it is to be recovered from. That from the evidence of both the Plaintiff and the Defendant and corroborated by their witnesses which confirmed that they bought land in L.R.No.6876/1 Mosop Farm a land buying company which land was surveyed and allocated. That in the process it was found that the land was a little bit smaller and therefore members had their share of acreages reduced.

Ms Tum therefore submitted that the appellant did not adduce any evidence to prove from whom she was claiming the land from either from the defendant or any other person. Further that the adopted Surveyor's report does not indicate that the 1st Respondent has taken land from the Appellant and therefore there was no order of recovery of the Appellants land from the report which remains unchallenged.

On the issue of costs, counsel submitted that the appellant could not have been awarded costs against the 1st Respondent as there was no case established against the 1st Respondent. Counsel therefore urged the court to dismiss the appeal with costs to the respondents.

2ND TO 19TH RESPONDENT'S SUBMISSIONS

Counsel for the 2nd — 19th respondents fully associated herself with the submissions by the 1st respondent and fully supported the judgment of court delivered on 23rd October 2018 vide Eld CMCC No.382 of 1997 and further submit as follows: -

Counsel submitted that the issues for determination were as to whether the trial court evaluated the entire evidence in arriving at her judgment and whether the appeal herein has any merit.

On the first issue, counsel submitted that this was purely a boundary dispute whereby the plaintiff had claimed that the defendants had interfered with the boundary of her parcel of land known as Cheptiret/Cheptiret Block 4(Mosop B)/33. That the parties testified and called their witnesses and their evidences evaluated by court at page 262-270 of the record of appeal which is a reflection of the evidence and testimonies tendered by the witnesses.

Ms Kipsei submitted that the law is clear that when there is a boundary dispute the court has a duty to pave way for the Land Registrar and the Surveyor to visit the suit parcels and conduct a survey and furnish the court with a report emanating to the scene visit.

Counsel cited the case of **Jane Njeri Arthur —vs- Joseph Mwaura Njoroge (2019) Eklr** where Justice Christine Ochieng held; -

“I find the proceedings and decision of the Land Registrar dated the 17th August 2006 regarding the boundary dispute relating to parcel proper and decline to set the same aside”.

The Honorable Court in the above case relied on the following authorities and statutes; -

i) Samuel Wangau —vs- A.G & 2 others (2009) eKLR ii) Azzuri Limited —vs- Pink Properties Limited (2018) eKLR iii) Ali Mohammed Salim —vs- Faisal Hassan Ali (2014) EKLR iv) Sections 21 (1) (2) & (3) of the Registered Land Act (now repealed)

Counsel urged the court to find that the appeal lacks merit hence should be dismissed.

ANALYSIS AND DETERMINATION

This duty of the court in an appeal is to reconsider and evaluate the evidence and draw its own conclusions as was set out by the Court of Appeal in the case of **Kenya Ports Authority versus Kusthon (Kenya) Limited (2009) 2EA 212** where the court held inter alia, that:-

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

From the record of appeal and then submissions by counsel, there is only one issue for determination the trial Magistrate rightly or wrongly adopted the recommendation of the Land Registrar in respect of the boundary dispute.

Parties are bound by their pleadings and the court cannot be left to guess what parties want but they have not put across in their pleadings. From the pleading it is evident that the appellant's claim was for the boundaries to be adjusted to correspond with the Registry Index Map and order for recovery of land.

The parties entered into a consent dated 10th February 2001 referring the matter to the Land Registrar for hearing and determination of the boundaries. The Land Registrar visited the site and filed a report dated 15th April 2007 which stated as follows;

“a resurvey of all the land parcels enclosed by the railway line and the river (i.e. parcels 1-9) should be done such that the resulting areas can be compared with the registered areas and at the same time the ground distances between parcels 1 and 9 measured to determine their variation with the R.I.M. this may assist in resolving the boundary problem with a view of amending the R.I.M to reflect the ground position.”

The appellant's bone of contention is that the Land Registrar's Report that the RIM be amended presupposes that the survey done earlier by the District Commissioner, which settled the dispute was erroneous but the evidence on record shows that the survey was done correctly by the District Surveyor.

The appellant in her submissions does not state precisely which of the two surveys she is contesting and further the appellant referred to the evidence of PW3 at pages 139-144 of the supplementary record of appeal wherein PW2 indicated that the produced documents show that the final survey was completed and the final R.I.M produced. Further, that the said R.I.M was used by both Registrars in preparation of their respective reports as per pages 227 and 228 of the record of appeal.

This leaves the court come to the conclusion that if the previous surveys were not erroneous, then there would have been no final survey which resulted in the RIM. It should also be noted that the final report by the Land Registrar has not been challenged as per the testimony on page 144 of the supplementary record of appeal.

The parties herein consented to the resolution of the dispute vide a referral to the Land Registrar, and the said report was not challenged I find no reason to fault the adoption of the report by the court.

Under Section 19 of Land Registration Act, 2012 the duty to fix boundaries to registered land is vested in the Land Registrar. It provides as follows:

“19. (1) If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.

2) The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.

(3) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section.

The section specifically gives the Land Registrar the mandate to fix boundaries and the court would not be in a position to determine boundaries as it does not have the technical expertise in surveying. The court relies on such expertise to guide in decision making. This particular case benefited from such expertise where a report was filed in court and adopted as a judgment of the court. If the parties were not happy with the contents of the report, then they should have asked the Land Registrar to help with the implementation of the same.

I find that the issue still lay at the door step of the Land Registrar and the Surveyor and not the court as that is their mandate to resolve boundary disputes.

In the case of **Azzuri Limited —vs- Pink properties Limited (2018) eKLR** the court held;

“On our part, looking at the impugned judgment, it is clear to us that the decision of the trial court was primarily based not only on the weight of the evidence, but on the failure by the appellant to follow the laid down grievance handling mechanism; namely, referral of the dispute to the Land Registrar as per section 18 of the Land Registration Act. It is common ground that the suit land is in a general boundary area (as opposed to a fixed boundary area). Resolution of disputes in a general boundary area is provided for under section 18 (supra) which states:

The parties were wise enough to have referred the matter for hearing and determination by the Land Registrar who exercised his mandate and came up with a report as required by the law. If this had not been done, then the Trial Magistrate would have declined to hear the matter on account of lack of jurisdiction.

On the issue for recovery of land, the plaintiff’s claim was ambiguous as it did not target anyone to recover the land from. The evidence adduced did also not support a claim for recovery of land. The evidence on record is that when the land buying company bought the land and surveyed it was discovered that the acreage had reduced therefore all the buyers had reduced acreage.

On the issue of costs, it is trite that costs follow the event and in this case the report filed by the Land Registrar did not indict any wrong doing on any party but a resolution for all the parties as it was a boundary dispute. Therefore, there was no need to order for costs as each party would bare their own costs.

I have considered the appeal, the submissions of counsel and the relevant authorities and find that the appeal lacks merit and is therefore dismissed with costs to the respondents.

DATED and DELIVERED at ELDORET this 24TH DAY OF NOVEMBER, 2020

M. A. ODENY

JUDGE