

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI
Civil Appeal 49 of 2000

WILGRAM MBUA.....APPLICANT

Versus

STANLEY WAWERU KAMAU.....RESPONDENT

JUDGMENT

This is an appeal against the judgment of the learned Resident Magistrate A. M. King'oo dated 6th October, 1998 in the Principal Magistrate's Court, Murang'a Civil Case No. 291 of 1992 dismissing the Appellant's claim of Kshs.38,438/= against the Respondent as costs arising out of a land boundary dispute between the two parties.

According to the evidence adduced in court, the parties have had a long standing boundary dispute alleged settled, resurrected, settled, resurrected to the point where one of them is today saying that the dispute is settled while the other party is saying the dispute is not settled.

It was not the court which has been settling that dispute. It is the Provincial Administration, that is the District Commissioner, the area District Officer, the area Chief, the area Assistant Chief and their administrative Police Officers sometimes in the company of the Land Registrar and a Government Surveyor who have been settling the dispute.

The court was not assisted by evidence from any of those officers. Even the Land Registrar whose evidence is important not only to show that indeed he has been involved in settling the boundary dispute but also to let the court know which one of the two disputing parties is the culprit, was not called to give evidence and produce the proceedings he has been recording, as exhibit. In fact the Land Registrar under *Section 24(2)* of the Registered Land Act, is the person to decide the party which should pay costs and how much to pay before those costs are "recoverable as a civil debt by any person responsible", under *Section 24*, "for the maintenance of the feature."

The trial magistrate had the evidence of the Appellant and the evidence of the Respondent only and having noticed inconsistencies in the Appellant's evidence, apart from the fact that that evidence was insufficient, concluded that the Appellant had failed to prove his case, even on the balance of probabilities. The Respondent's position was that the Appellant could not incur the costs he was claiming on Government officers who were performing their official duties at Government expenses. From the evidence on record, each party claims to have been the winner. Costs, where payable, are normally paid to the winner. The evidence of the Land Registrar to confirm to the court the winner was omitted. Having read the evidence on record, I have no reason to fault the decision of the learned trial magistrate.

Accordingly, this appeal is hereby dismissed with costs to the Respondent.

Dated this 1st day of July, 2005.

J. M. KHAMONI

JUDGE