



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Kwach, Cockar & Omolo JJ A)

CIVIL APPEAL NO. 52 OF 1993

BETWEEN

NGURUMAN LIMITED.....APPELLANT

AND

SHOMPOLE GROUP RANCH & ANOTHER.....RESPONDENTS

(Appeal from a decree of the High Court of Kenya at Nairobi (Githinji and Couldrey, JJ) dated the 23rd February, 1993)

in

HCC Misc Civil Application No 930 of 1991)

JUDGMENT

Cockar JA. My Lords, Nguruman Ltd, the appellant herein and Shompole Group Ranch, the 1st respondent herein, are owners of two adjoining areas of land comprising of 26,993 acres and 50,000 acres respectively. The common boundary extends for several kilometres. On 12th February, 1991, Nguruman filed a suit in the Resident Magistrate's Court at Narok alleging that during December 1990, Shompole had committed trespass into the former's land and in the course had caused damage. There were prayers for damages and for a permanent injunction to restrain Shompole from entering Nguruman's land. In its written statement of defence Shompole claimed the part of the land where the trespass was alleged to have been committed (hereafter referred to as the affected area) as being on its own land. Various consent orders followed restraining Shompole to its own land prior to the alleged trespass, the noteworthy of these being the one dated 11th April, 1991, which was executed by the learned advocates for both the parties and filed in Court, wherein the Land Registrar Kajiado was requested to appoint the District Surveyor to ascertain, delineate and fix, in the presence of the chairmen of both the estates, the actual physical boundary line on the ground of the affected area. On 17th July, 1991, the Land Registrar ascertained and fixed the boundary and his report dated 9th August, 1991, was put before the Court on 12th August, 1991.

According to para 6 of the affidavit dated 31st October, 1991 of Moses Loontasati Ololouaya in support of the Chamber Summons filed on behalf of Nguruman under order 39 rules 2(3) and 9 of the Civil Procedure Rules, it appears that after the cross-examination of the Surveyor by the Court and the

advocates of both parties, his report was provisionally accepted pending a further revisit to the area by him to physically point out the boundary to the parties. It is further deponed in para 7 of the said affidavit that at the same time viz: on 12th August, 1991, the Court explained to the representative of Shompole, who was in Court, that its people must cease trespassing on the Nguruman property as there was a court order to that effect. On 30th October, 1991, the said Chamber Summons under order 39 rule 2(3) and 9 of the Civil Procedure Rules was filed, praying for the chairman and office bearers of Shompole to be committed to civil jail for contempt committed by trespass. The same was fixed for hearing on 21st November, 1991, inter parties. Despite service of the hearing notice there was no appearance on behalf of Shompole and the Chamber Summons proceeded to hearing. Three witnesses were called on behalf of Nguruman. The Resident Magistrate, thereafter in a fairly lengthy, detailed and reasoned ruling found Shompole's chairman and office bearers guilty of contempt and imposed a fine of Shs 6,000/- and in default 3 months imprisonment on the chairman and each of the said officials of Shompole.

Shompole responded with an application under order 53 rule 3 of the Civil Procedure Rules to the superior court for an order of *certiorari* to issue to call into the superior court and quash the judgment, proceedings and

consequential orders of the Resident Magistrate's Court at Narok. After hearing the advocates for both the parties the superior court (Githinji and Couldrey JJ) allowed the application, called in the proceedings and consequential order of the Resident Magistrate Narok, and quashed them after finding that this being a boundary dispute therefore under section 21(4) of the Registered Land Act (cap 300) the Resident Magistrate did not have any original jurisdiction to have entertained the suit. The superior court had also found that Shompole had been established for the sole purpose of dealing in group land for settlement of its members. Under the provisions of section 9A(3)(b) of the Magistrates' Courts Act (cap 10) the Resident Magistrate, therefore, had no jurisdiction to have even entertained the suit.

This appeal is directed against the decision of the superior court and is based on eight grounds of which the first seven may be summarised into 2 main grounds as follows:

1. Was Shompole a body corporate established for the sole purpose of dealing in land for the purpose of settlement of its members?
2. Did s 21(4) of the Registered Land Act apply in this suit thereby putting the matter beyond the jurisdiction of any court?

The 8th ground, of no great importance, challenges the award of costs for 2 counsel.

With regard to the first of the above two grounds, s 9A(1) of the Magistrates' Courts Act (cap 10) has debarred a Magistrates' Court from exercising jurisdiction and powers in cases of a civil nature in four types of matters described therein of which (b) and (d) are as follows:

- (a)
- (b) the decision of, or the determination of boundaries to land, including land held in common,
- (c)
- (d) trespass to land.

Having thus deprived the Resident Magistrate's jurisdiction in respect of the aforesaid matters sub s (3) of the section then proceeds to exempt certain parties from the aforesaid sub s (1) in the following terms:

Subs (3). This section shall not apply where any party to the issue is:

- (a) _____

(b) A co-operative society, a company registered under Companies Act or any other body corporate, unless that society, company or other body was established for the sole or main purpose of purchasing or otherwise dealing in land for settlement of its members, shareholders or persons having the controlling interests therein.

The superior court found that sub s (3) did not apply to Nguruman and I agree. With regard to Shompole there is no dispute that Shompole Group Ranch falls within the ambit of Land (Group Representatives) Act – cap 287. After detailing the procedure laid down for the incorporation of groups who have been recorded as owners of land under the Land Adjudication Act the learned judges referred to s 8 which gives power to group representatives to sue and be sued in their corporate names and also enjoins them as a matter of duty to hold any property and to exercise their powers on behalf of and for the collective benefit of all members of the group. The essential gist of the entitlement that ensues to the members under the term “collective benefit” is set out by the learned judges in their reference to the provisions of the second and third schedules to the Act as follows:-

“The provisions in the second schedule include the right of undivided shares the right of every member to use the land water rights and other services and assets in the group ownership. Group land can be charged for development of the area. By third schedule, the committee of the group on owing (among) other things, encourage members to manage their land or graze their livestock with a view to achieving greatest practical social and economic benefit for the members, prepare a plan for development of the land and establish a procedure for marketing of livestock and produce owned by members of the group.”

Having so correctly set out the rights of each member in respect of the manner of use of the land the learned judges then continued:

“From the foregoing, it is clear to our minds that although group representatives as body corporates are not established for sole purpose of purchasing land for settlement of members they are nevertheless established for the sole purpose of dealing in group

land for settlement of members and that this purpose (?) as long as they exist. We conclude therefore that the learned Resident Magistrate had no jurisdiction to deal with the dispute.”

With respect the judges have erred in their above reasoning. Having noted that they were clear in their minds that group representatives as body corporates are not established for the sole purpose of purchasing land for settlement of members in the next breath they do a turnabout, without offering any reason for doing so, that the group representatives are nevertheless established for the sole purpose of dealing in group land for settlement of members. Where is it provided in any of the sections of the Act or in any of the three schedules of the Act that the purpose is for the settlement of the members? Nowhere is the term “settlement of members”, or even the word “settlement” mentioned anywhere in the Act or in any of the said schedules. In fact the set up of the Act and schedules thereto are all designed to cater for a community of people who are expected to follow a communal way of life and to regulate the sharing of such facilities as water or land for grazing or to establish a procedure for marketing of livestock and produce owned by members. In my view the judges erred in concluding that the Resident Magistrate did not have jurisdiction on this ground and I uphold the grounds of appeal involving interpretation of the relevant portions of s 9A of the Magistrates’ Courts Act and the Land (Group Representatives) Act (cap 287).

As to the ground alleging this to be a boundary dispute, s 21(2) of the Registered Land Act has authorised the Registrar, on application of any interested party, and on such evidence as the Registrar considers relevant, to determine and indicate the position of the uncertain or disputed boundary. Sub s (4) of the section has removed the settlement of boundary disputes from the jurisdiction of any court by the following provision:

“s 21(4) No Court shall entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in this section.”

The plaint in the Resident Magistrate's Court had alleged trespass and had sought damages and an injunction. The plaint had not sought the Court's assistance in solving a boundary dispute. Nor had the defence pleaded a boundary dispute; it had pleaded Shompole's ownership of the affected land. It is also to be noted that the defence had not sought the plaint to be struck out on the ground that this was a boundary dispute. Pleadings closed

on 20th March, 1991. About 3 weeks later on 11th April, 1991, the parties filed a duly signed consent order whereby *inter alia* they had both sought the Land Registrar Kajiado to take steps therein stated for the purpose of ascertaining, delineating and fixing the actual physical boundary line on the ground of the affected area. The parties presumably must have got this order served on the Land Registrar Kajiado who thereupon took the necessary steps. This is what the learned judges had to say in respect of the aforesaid events:

“So when the suit was instituted and when the learned magistrate assumed jurisdiction to determine the suit on 25th March, 1991, the boundary dispute had not been referred to the Land Registrar for determination and the Land Registrar had not determined the disputed boundary in accordance with s 21(2) of the Registered Land Act.

From the foregoing and in addition to our findings above it is our view that the learned magistrate did not in the circumstances of the case, have original jurisdiction and that the plaintiff in the suit should have invoked the original jurisdiction of the Land Registrar before the institution of the suit.”

It is clear from the above conclusions of the learned judges that they had completely over-looked the fact that the existence of a boundary dispute had not been pleaded either in the plaint or in the defence. It was a suit seeking damages and an order for injunction for trespass. The learned judges also do not appear to have been impressed by the fact that after the institution of the suit for trespass and soon after the pleadings were closed, the parties realised that the cause of trespass was on account of uncertainty of the boundary in the affected area. Thereupon the parties themselves agreed to refer the boundary dispute to the Land Registrar. By getting that recorded in the court file all that the parties had done in effect was that instead of sending their joint application directly to the Land Registrar as required under section 21(2) of the Registered Land Act they agreed to have it sent through the Court. Did that act of sending a joint application through the Court mean a non-compliance with the sub-section? It is to be observed that the court proceedings had then come to a standstill awaiting the determination of the boundary by the Land Registrar. The Court did not at any time take upon itself to resolve the boundary dispute.

To my mind the provisions of s 21(4) had not been offended in any way.

As stressed earlier this suit had not pleaded nor sought a prayer for the determination of a boundary dispute. The boundary dispute was very properly referred under section 21(2) by the parties jointly to the Land Registrar through the consent order executed by the parties themselves and recorded in the court file. Thereafter evidence relating to the Land Registrar's determination of the boundary was properly received by the Resident Magistrate under s 21(5) of the Registered Land Act. With respect the learned judges erred in their finding on this issue also. In my view this appeal must succeed and the ruling and the order of the Resident Magistrate must be restored.

I have had the benefit of perusing in draft form the judgment of my Lord Kwach JA and I am in entire agreement with it. I also concur with the orders proposed by him as regards the fate and the costs of this appeal.

Kwach JA. This appeal raises a short but important question of statutory construction. Nguruman Ltd (the appellant) is a limited liability company incorporated in Kenya with its registered offices in Nairobi. The appellant is the registered proprietor of land parcel LR No Narok/Nguruman/Kamorora/1 in Narok district. The respondent is a group ranch incorporated under section 7 of the Land (Group Representatives) Act (cap 287). The issue of a certificate of incorporation of group representatives confers on the group representatives power to sue and be sued in their corporate name, and to acquire, hold, charge and dispose of property of any kind, and to borrow money with or without giving security.

The group representatives are under a duty to hold any property which they hold as such and to exercise their powers on behalf and for the collective benefit of all the members of the group. They are also enjoined to fully and effectively consult the other members of the group on the exercise of their power.

On diverse dates in December 1990 members of the first respondent, who are in truth peripatetic Maasai herdsmen, trespassed into the appellant's land with their livestock, threatened its workers, grazed their cattle and cut down trees in preparation to settle thereon permanently. The appellant filed a suit against the first respondent in the Resident Magistrate's Court at Narok seeking among other reliefs, a permanent injunction to restrain the first respondent, its members and agents from trespassing on its land. The first respondent filed a defence denying the appellant's allegations of trespass. The first respondent contended that it was the owner of the portion of land in question as it formed part of its own land and its members and their livestock occupied it lawfully.

On 26th February, 1991 the Resident Magistrate Narok granted the

appellant a temporary injunction which was extended from time to time by consent. On 11th April, 1991, a consent order was recorded which contained the following two paragraphs:

“(3) The Land Registrar Kajiado do appoint as a matter of urgency his District Surveyor to call upon the chairman of the plaintiff and the chairman of the defendant to appear before him on a mutually convenient date for the purpose of ascertaining delineating and fixing the actual physical boundary line on the ground of that portion of the boundary in dispute between the plaintiff and the defendant and more particularly LR Nguruman/Kamorora/1 and Kajiado/Shompole/3.

(4) That this matter be mentioned on 4th June, 1991 when the appointed surveyor should attend and submit his report of the above exercise.”

It is evident from the language of the consent order of 11th April 1991 that the appellant and the first respondent owned two parcels of land with a common boundary and that there was a dispute over the exact position of the boundary. I think both parties appreciated this and they must have asked the Resident Magistrate to record the consent order in those terms with the provisions of section 21(2) of the Registered Land Act (cap 300) in mind. Section 21(2) of the Registered Land Act provides:-

“ 21(2) where any uncertainty or dispute arises as to the position of any boundary, the Registrar, on the application of any interested party, shall, on such evidence as the Registrar considers relevant, determine and indicate the position of the uncertain or disputed boundary.”

Pursuant to the consent order the District Land Registrar, Kajiado, investigated the matter and determined the boundary which showed conclusively that the first respondent had trespassed into the appellant's land. After receiving the Land Registrar's report the Resident Magistrate heard submissions made on behalf of the appellant, in the absence of the first respondent, and delivered a ruling making final orders in favour of the appellant as prayed in the plaint which included damages in the sum of Shs 125,000/-.

Instead of appealing against the decision of the magistrate, the first respondent decided to apply for judicial review of the decision. The first

respondent applied for an order of *certiorari* to bring up and quash the proceedings and judgment before the Resident Magistrate's Court. In the statement in support of the application for leave to apply for judicial review it was stated *inter alia*:-

“(i) The applicants contend that the proceedings before the Narok Court are null and void as they offend against the provisions of the Magistrates Jurisdiction (Amendment) Act, 1981 as further amended by Act No 19 of 1984.

(j) That a Magistrate's Court has no inherent jurisdiction and indeed its only jurisdiction is derived by Act of Parliament and the parties to a suit cannot endow a Magistrate's Court with jurisdiction especially

where Parliament has expressly removed jurisdiction from the Magistrate's Court."

The application was heard by Githinji and Couldrey JJ and in a reserved ruling they allowed the application and quashed the proceedings and order of the Resident Magistrate. It is against that decision that the appellant has now appealed to this Court. The decision is challenged on 8 grounds the main ones being that:

"(1) The judges erred in law in holding that section 9A(3) of the Magistrates' Courts Act (cap 10) only applies when all parties are companies or bodies corporate within the subsection. In fact the subsection applies when any party is a company.

(4) The judges erred in law in interpreting section 21(4) of the Registered Land Act (cap 300) to take jurisdiction away from the magistrate."

Sections 9A to 9E of the Magistrates' Courts Act (cap 10) was introduced by the Magistrates' Jurisdiction (Amendment) Act, 1981, which has since been repealed by section 11 of the Land Disputes Tribunals Act, 1990, which came into force on 1st July, 1993 by Legal Notice No 91 of 1993. At the time of the trial before the Resident Magistrate, the Magistrate's Jurisdiction (Amendment) Act was still in force.

Section 9A(1) of the Magistrates' Courts Act limited the jurisdiction of Magistrates' Courts in certain disputes concerning land. It deprived those Courts of jurisdiction in cases of a civil nature involving the beneficial ownership of land; the division of, or the determination of boundaries to

land; a claim to occupy or work land; and trespass to land. By subsection (2) disputes concerning these matters were to be referred to a panel of elders to be resolved. But subsection 3 restored jurisdiction to the Magistrates' Court in self-same matters depending on the status and object of any of the parties to the dispute. It provided -

"9A(3) This section shall not apply where any party to the issue is -

(a) a building society registered under the Building Societies Act; or

(b) a co-operative society registered under the Cooperative Societies Act, a company registered under the Companies Act or any other body corporate, unless that society, company or other body corporate, was established for the sole or main purpose of purchasing or otherwise dealing in land for settlement of its members, shareholders or persons having the controlling interests therein."

The plain meaning of this provision is that the Magistrates' Court retained jurisdiction in a case of trespass involving a company if that company was not established for the sole or main purpose of purchasing or otherwise dealing in land for settlement of its members. So, in the case of the appellant, which is simply a company incorporated for purposes other than purchasing or dealing in land for settlement of its members, section 9A would not apply, with the result that the Magistrate's Court had jurisdiction to adjudicate in a dispute concerning trespass to land between the appellant and any other party regardless of the status and object of the latter.

The judges found as a fact that Nguruman Ltd, the appellant, was not established for the sole purpose of dealing in land for settlement of the shareholders and therefore the Resident Magistrate, and not a panel of elders, would have jurisdiction to resolve disputes involving trespass to its land or a boundary disputes. In this they were clearly right but having arrived at that conclusion the judges continued:

"But that is not the end of the matter if the other party to the dispute ie Shompole Group Ranch, was established for the sole purpose of purchasing or dealing in the land for settlement of members, the panel of elders and not the Resident Magistrate could have the exclusive jurisdiction."

In relation to the first respondent, the judges held that although group representatives as body corporates are not established for the sole purpose of purchasing land for settlement of members, they are

nevertheless established for the sole purpose of dealing in group land for settlement of members and that is their purpose as long as they exist. For that reason the judges concluded that the Resident Magistrate had no jurisdiction to deal with the dispute. This was clearly a grave misdirection because, having established that the appellant was not established for the sole purpose of dealing in land for settlement of its members, that should have been the end of the matter so far as the issue of the magistrate's jurisdiction was concerned. In that event it was immaterial whether or not the first respondent fell within the exception because section 9A(3) of the Act refers to "any party to the issue". In thinking that both parties had to fall outside the application of the section before the magistrate could assume jurisdiction in the case the judges were clearly wrong. I would allow this appeal on this ground alone.

I now turn to ground 4 which deals with the application of section 21(4) of the Registered Land Act (cap 300). The judges held that when the suit was instituted and when the Resident Magistrate assumed jurisdiction to determine the suit on 25th March, 1991, the boundary dispute had not been referred to the Land Registrar for determination and the Land Registrar had not determined the disputed boundary in accordance with section 21(2) of the Registered Land Act and that therefore he had no jurisdiction to deal with the matter. Section 21(4) states -

"21(4) No Court shall entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in this section."

The judges read and construed this provision as taking away jurisdiction from the magistrate because as at the time he assumed jurisdiction the boundary had not been determined by the Land Registrar. The record shows that both parties appreciated right from the start that the issue in controversy between them was a boundary dispute, and they themselves applied to the Land Registrar through the good offices of the Court by the consent order dated 11th April, 1991, signed by their respective advocates to determine the boundary within the intendment of section 21(2) of the Registered Land Act. If the intention was to prohibit even the institution of a suit then this should have been expressly stated as has been done in section 30(1) of the Land Adjudication Act (cap 284) which uses the words "no person shall institute and no Court shall entertain". The issue in this

case was trespass, a matter which the magistrate had jurisdiction to deal with. So the suit as originally instituted was competent. That it turned out to be a boundary dispute was not the fault of the appellant, but once it dawned on both parties that it was, they applied to the Land Registrar to deal with the matter as required by law before the Court proceeded to determine the matter finally. The magistrate could not of course entertain the suit until and unless the boundary had been determined by the Land Registrar. In my judgment therefore, the judges were wrong in holding that the magistrate had no jurisdiction. This ground of appeal also succeeds.

Mr Osmond, for the first respondent, thought that this was a dispute which should have been referred to a panel of elders to be resolved but for the reasons I have stated, that position is not tenable on any view. There were other grounds of appeal urged by Mr Le Pelley, for the appellant, but I do not find it necessary to deal with them as their determination, one way or the other, will not affect the decision I have arrived at on the main point of jurisdiction. The decision of the High Court was anchored on the issue of jurisdiction and the determination of that issue is, in my judgment, sufficient to dispose of this appeal. For these reasons, I would allow this appeal.

As Cockar and Omolo, JJ A also agree, this appeal is allowed and the ruling and order of the High Court dated 23rd February, 1993 is hereby set aside and substituted by an order dismissing with costs, the first respondent's application filed in the High Court on 15th July, 1992. The ruling and order of the Resident Magistrate is hereby restored. The appellant and the second respondent will have the costs of this appeal to be paid by the first respondent.

Omolo JA. I agree with the judgments of my Lords Kwach and Cockar JJ A and I have nothing useful to add.

Dated and Delivered at Nairobi this 13th day of July 1994.

R.O.KWACH

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JUDGE OF APPEAL

A.M.COCKAR

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JUDGE OF APPEAL

R.S.C.OMOLO

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JUDGE OF APPEAL

I certify that this is a true copy
of the original.

DEPUTY REGISTRAR