IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: HANCOX JA, CHESONI & PLATT Ag JJA)

CIVIL APPEAL NO. 10 OF 1983

MWANGI MURAGURI……...…… APPELLANT

VERSUS

KAMARA RUKENYA…… RESPONDENT

JUDGMENT

The issue for the magistrate to determine in this case was whether the appellant had encroached over the red boundary, as indicated on the plan exhibited before him, which was that determined by the Land Registrar after his visit to the area on May 30, 1977 and as confirmed in his letter to

the parties dated July 12, 1977. In doing so he acted under section 21(2) of the Registered Land Act, cap 300. It was only if that process had not taken place that the trial court would have been precluded from entertaining the action by virtue of subsection (4) of that section. Otherwise it had jurisdiction to hear and determine the case under section 159 of the Act, as the section was at that time.

The magistrate did not, however, have jurisdiction to change the boundary as fixed by the Registrar from the red to the black line on the plan, because it was not an issue before him. It may be that he was misled by the use of the word “rectify” in the plaint. On this ground I would uphold the learned judge’s decision allowing the first appeal, though not for the reasons given by him, namely that the case was covered by section 149 of the Act. This was not a case stated procedure at all, but a straightforward appeal from the magistrate under the Civil Procedure Act.

I would therefore dismiss the appeal and affirm the order of the learned judge that the parties recognise the boundary as determined by the Land Registrar, though for different reasons.

As Chesoni & Platt Ag JJA are in agreement there will be an order that this appeal be dismissed with costs.

Platt Ag JA. This is a second appeal in a matter concerning the boundary of contiguous parcels of land numbers 340 and 339 in Githii/Muthambi.It originated in the court of the senior magistrate at Nyeri, where the learned magistrate dismissed the plaintiff’s claim. On appeal to the High Court, the trial court’ judgment was reversed, so that the plaintiff generally succeeded in his original claim. Now the defendant appeals to this court.

Because the roles of the parties have been reversed, it will save confusion if they are referred to as they

appeared at the trial.

The plaintiff, Mr Kamara Rukenya, had sued the defendant, Mr Mwangi Muraguri, alleging in his plaint that in January 1977, the defendant changed the common boundary. He sought orders that the defendant be ordered to rectify the boundary and not to interfere with it.

The facts upon which the plaintiff relied and which are not in dispute on this appeal are that the parties lived in their respective parcels, the plaintiff in No 340 and the defendant in No 339, in relative peace until the defendant put up a fence in land occupied by the plaintiff. The plaintiff reported a boundary dispute and in May 1977, the Land Registrar and a Surveyor visited the site and heard what the parties had to say. The Land Registrar fixed the boundary along what he thought had been the old boundary at the time of demarcation in 1959. He marked this boundary "red" on the registry map. The defendant's boundary remained as a black line on the map. The result was that the defendant moved out of the area between the red and black lines, but did not remove his fence. The plaintiff brought his suit as it seems to confirm the boundary and seek non-interference with it. In his evidence he asked that the defendant's fence be removed to the line of the 1959 boundary. The plaint was drafted by the plaintiff himself, which accounts for the odd use of language such as "rectification of the boundary."

The trial court took up the defendant's case, set out in the defence, that the Land Registrar had wrongly sited the 1959 boundary. After reviewing the evidence, the trial court decided that the proper line of the 1959 boundary was where the defendant had built his fence. The plaintiff's case was rejected, including the evidence of the Land Registrar, and the suit was dismissed.

The High Court held in effect that the trial court had no jurisdiction to come to this conclusion, under the provisions of the Land Registration Act (cap 300). I will in future refer to it as "the Act." Mr Chakava for the defendant, has appealed on the ground that the High Court was wrong in holding that the learned senior resident magistrate had no jurisdiction to determine a boundary dispute under the relevant sections of the Act. The question raised in other grounds relating to the scope of the High Court's powers in such a matter were not pressed.

There is an air of ellipsis about Mr Chakava's argument. It springs no doubt from the terms of the order drawn up as a result of the High Court's judgment. It says that the senior resident magistrate, Nyeri, had no jurisdiction to determine a boundary dispute. The source of that order is probably remarks in the judgment as follows:

"The legal position is that it is only the High Court which has powers to consider that dispute after the Registrar has determined the boundary. The lower court had no jurisdiction to entertain the dispute."

Taken broadly, those words may be misleading. Mr Chakava was able to demonstrate that section 21(4) of the Act applied to oust the court's powers of dealing with boundary disputes only when the Land Registrar had not determined the boundary. That provision reads:

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

The provisions for determining a boundary dispute will be found in section 21(1) and (2).

Then when the court has jurisdiction it may call for evidence of the boundary, except where it is noted in the register that the boundaries have been fixed under section 22 of the Act.

Mr Chakava pointed out that in this case, the Land Registrar had been invited to determine the boundary and had done so. That was of course an action under section 21(2) of the Act and not section 22 as the learned judge appears to have thought. There was no case here of "fixed boundaries" within that section. This argument was convenient to the plaintiff. He had brought his case on the strength of the Land Registrar's boundary and had proceeded to call the evidence of the Land Registrar himself under section 21(5) of the Act. But the omission in Mr Chakava's argument was the question whether the trial court

could disregard the Land Registrar's boundary and fix another. It was this omission which robbed the judgment of the High Court of its full meaning.

The scheme of this part of the Act is that the Land Registrar alone is to determine the boundary and not the courts. The courts should not determine the position of the boundary before the Land Registrar has determined its position; nor after he has done so. Supposing that the learned magistrate in this case said to himself, "I will not accept the Land Registrar's boundary; and I will ignore it and fix another;" that is tantamount to saying that court can determine a boundary without the Registrar doing so. Section 21(4) then comes into operation by implication. The courts must accept the decision of the Land Registrar. In fact the learned senior resident magistrate did disregard the Land Registrar's boundary and determined that the boundary should be elsewhere. It was there that he exceeded his powers. As far as the plaint went, the court was clothed with jurisdiction. The irony of the situation is that it was the defence that insinuated illegality and vitiated the judgment of the trial court.

The learned judge then came to the right conclusion. The dispute with which he was concerned was the dispute which developed between the parties at the trial because of the defence. He held that it was only the High Court under section 149 of the Act that had power to consider a challenge to the boundary after the Registrar had determined the boundary. We are not called upon to consider the operation of section 149, (nor of the application of prerogative orders mooted on the first appeal). The key to the judgment is the remark -

"The parties must recognise the boundary fixed by the Land Registrar."

The final conclusions of the learned judge show, without doubt, that the "dispute" which was not justiciable before the trial court was the dispute whether the Land Registrar's boundary was the correct boundary.

Mr Kaburu, however, was invited to address the court on the terms of consequential orders, if any, were needed. He sought the orders which he had asked for on first appeal; namely, a declaration that the defendant is a trespasser and secondly damages for such trespass.

These orders were not prayed for in the plaint, nor had any amendments to the plaint been asked for. The High Court very properly did not grant these orders.

Secondly, there is the question whether the defendant should be removed from the land. The High Court declared that the parties must recognize the boundary fixed by the Land Registrar. Rectification in the plaint was probably loosely used, in same way that the Land Registrar used it himself in evidence. It probably meant the determination of the proper boundary after hearing the parties. At any rate, the Land Registrar observed -

"The procedure for rectifying a disputed boundary is for the parties complaining to report the dispute at my office."

The High Court's order sufficiently declared that the Land Registrar's boundary was to be the boundary that the parties must recognise and that probably carried with it the idea that the boundary must not be interfered with. In any case there is no need to make an order for an injunction to that effect, as the defendant has moved away.

Lastly, as far as the fence is concerned, the parties will no doubt bear in mind the High Court's order. If any consequential order is needed application can be made to the senior resident magistrate.

I would therefore dismiss the appeal with costs.

Chesoni Ag JA. The facts of this appeal have been stated in detail by Platt JA and Hancox JA has in a nutshell pointed out the issue. I had the advantage of reading my two brothers' judgments in draft.

The Land Registrar had fixed the boundary as required by section 21(2) of the Registered Land Act (cap 300). The respondent's case in the senior resident magistrate's court according to the pleadings was that the appellant had, during the month of January 1977, changed the boundary fixed by the Land Registrar between land parcel No Githi/Muthambi/340 which the respondent owned and Githi/Muthambi/339 belonging to the appellant. The respondent, therefore, sought orders for the appellant to return to the original boundary fixed by the Land Registrar and a perpetual injunction restraining the appellant from interfering with that original boundary. The correct issue was as stated by Hancox JA and not what the senior resident magistrate purported to decide. This was not a case of uncertain or a dispute as to the position of the boundary which is exclusively for the Registrar to decide (section 21(2)), but a dispute whether or not the respondent had crossed or interfered with the boundary, a matter that the senior resident magistrate had jurisdiction to deal with and had he dealt with that issue before him rather than deviating to deal with matters exclusively placed under the Registrar by the statute, the learned judge might not have held that he (senior resident magistrate) had no jurisdiction to do what he did. In effect the senior resident magistrate in his judgment found that the respondent had crossed the boundary, so he should have found for the appellant. I agree that this appeal should be dismissed with the orders proposed by Hancox JA and Platt Ag JA.

Dated and Delivered at Nairobi this 2nd December, 1983

A.R.W. HANCOX

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JUDGE OF APPEAL

Z.R. CHESONI

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JUDGE OF APPEAL

H.G. PLATT

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Ag JUDGE OF APPEAL