



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(Coram: Madan, Law and Potter, JJ A)**

**CIVIL APPEAL NO. 64 of 1981**

**Between**

**KIARIE WAMUTU..... APPELLANT**

**AND**

**MUNGAI KIARIE..... 1ST RESPONDENT**

**NDUNGU MUNGAI alias**

**NGICHU WATHIRU..... 2ND RESPONDENT**

**(Appeal from the judgment and order of the High Court of Kenya at Nairobi (Trainor, J) dated  
3rd July, 1981**

**in**

**Civil Case No 337 of 1977)**

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**JUDGMENT**

**MADAN JA** The appellant was the plaintiff in a suit which he filed in the High Court on 15th February, 1977 originally against the second respondent as the sole defendant. The first defendant was joined under order of court made on 28th February, 1980. The defendants are father and son respectively.

The plaintiff's case against the defendants was that he was the registered proprietor of a parcel of land known as Kiganjo/Nembu/177 and his neighbour the first defendant was the registered owner of the adjacent parcel of land known as Kiganjo/Nembu/183, and the two parcels shared a common boundary and/or growing hedge and are subject to the provisions of the registered Land Act, Cap 300 (the Act). The two defendants had

“set upon the plaintiff 's land and alienated the same by changing and/or altering the common boundary and/or growing hedge between the two land parcels from its original position and took away some of the plaintiff's land measuring 46171 square feet or thereabouts making the same a part of his land despite repeated requests by the plaintiff not to alienate the same and to reinstate the boundary to its original position.”

The plaintiff in addition to certain ancillary reliefs asked for an order restraining the defendants from damaging alienating and/or altering the common boundary, also an order for reinstatement of the boundary and the growing hedge in its original position prior to the interference with the same.

Besides denying any transgression on their part the defences of both defendants was that a boundary dispute existed between them and the plaintiff and the boundary between them had not yet been fixed by the Registrar as provided by section 21 of the Act, and the plaintiff's suit was unmaintainable because of the provisions of section 21(4) of the Act.

When the suit came up for hearing on 10th July, 1978 the court recorded the following consent order:

“The matter be referred to Land Authorities if that is necessary and if not the parties be at liberty to restore the suit to the hearing list”

It seems the matter was referred to the Land Registrar appointed under section 7 of the Act who issued a Boundary Dispute Summons to both parties that he would visit the disputed boundary on 11th May, 1979 to determine and indicate its position. The Registrar or his authorized representative did not visit the land on 11th May or at any time later until 5th June, 1981. On that day the defendants applied under O.VI rule 13 of the Civil Procedure Rules for the plaint to be struck out and the suit dismissed as provided under that section; further, that the court had no jurisdiction to try and determine the issues in the suit there being specific statutory provisions which would meet the necessities of the case.

A zealot for brevity the learned judge made the following order:-

“Application granted with costs to the defendants. Leave to appeal refused.”

The plaintiff has appealed on the grounds that leave to appeal was refused erroneously because right of appeal is given under Order XLII rule 1 of the Civil Procedure Rules; the judge made his decision without assigning any reasons for his decision; the judge erred in holding that the plaintiff's suit was unmaintainable when the court had previously allowed the same to proceed and refer the matter to Land Authorities, in striking out the plaintiff's suit when he had inherent powers to hear and determine it, in holding that section 21(4) applied, in failing to appreciate that the defendants could not plead the provisions of section 21 having raised the same issue unsuccessfully before another judge and having offended the provisions of the section, in coming to his decision on wrong principles, in not giving audience to the plaintiff's counsel and in disregarding his submissions, in reaching an illegal decision contrary to the provisions of law.

It did not lie with the judge to refuse leave to appeal. Order XLII rule 1(1) provides that an appeal shall lie as of right from an order made under Order VI (pleadings generally) (paragraph c). The judge also failed to observe the provisions of Order XX rule 4 which states that judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

I read in the record of appeal that Mr Gaturu who appeared for the plaintiff was heard and addressed his arguments to the court, he has not shewn that he was cut short in any way.

Section 21(2) and (4) read as follows:-

“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.

(3).....

(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 judge was right in striking out the plaint as the boundary between the parties not having been determined as provided in section 21 the court had no jurisdiction to entertain the plaintiff’s action. With respect on the previous occasion the judge erred in making the order referring the matter to Land Authorities for he too had no jurisdiction to hear and determine the suit because of the provisions of section 21(4) of the Act which deprives the court of jurisdiction in cases involving boundary disputes under the Act. Even if the defendants had not applied to strike out the plaint the court was bound to take note of the provisions of sub-section (4) and do so of its own motion.

I would dismiss the appeal with costs. As Law and Potter JJ A agree it is so ordered.

**LAW J A** I have read in draft the judgment prepared by Madan, J A I agree with it, for the reasons stated by him, and concur with the order proposed. The Registrar must carry out the mandatory duty imposed on him by law and demarcate the disputed boundary, under section 21(2) of the Registered Land Act.

**POTTER J AI also agree.**

**Delivered at Nairobi this 10th day of November, 1982.**

**K D POTTER**

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**JUDGE OF APPEAL**

**E J E LAW**

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**JUDGE OF APPEAL**

**C.B MADAN**

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**JUDGE OF APPEAL**