



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MURANG'A**

**ELCA NO. 6A OF 2018**

**FRANCIS NGARU NJUGUNA.....1<sup>ST</sup> APPELLANT**

**DAVID MUTERU (substituted by Virginia Wanjira).....2<sup>ND</sup> APPELLANT**

**v**

**ONESMUS NJUGUNA NGARU (legal representative of the estate of**

**JOHN NGARU NJUGUNA.....1<sup>ST</sup> RESPONDENT**

**JAMES THIONGO NJUGUNA.....2<sup>ND</sup> RESPONDENT**

**(Being an appeal from the judgment and decree in SPMCC No 411 of 2004**

**at Muranga (A K Kaniaru, SPM) dated the 2/11/12).**

**JUDGMENT**

1. The background of the appeal as can be gathered from the record is that the Parties herein are related. The Appellants and the Respondents are step brothers being the sons of Onesmus Njuguna Ngaru, deceased. The late Ngaru in his lifetime owned Land Reference No. LOC14/KAIRO/756. The land according to the certified copy of the green card measured 14.1 acres. According to the mutation form on record dated the 14/12/01 the said Njuguna in his lifetime subdivided the land into 13 subplots numbered LOC14/KAIRO/2176-2188 measuring variously 1.1746 and 0.04 ha. The mutation provided for an access road measuring 0.1543 to complete the subdivision. Title for LOC14/KAIRO/756 was closed on the 26/2/2002 upon the birth of the 13 plots and the access road. It is not in dispute that the said Ngaru, at his old age of 90 years or thereabouts distributed his land during his lifetime to his 7 children, both sons and daughters in various shares/sizes. According to the certified copies of the green cards on record in respect to the plots, some of the plots were transferred to the beneficiaries in 2002 while some were still in the name of the late Onesmus Njuguna Ngaru.

2. It is not in dispute that the sons got 3 acres and the daughters 1.3 acres. In addition, each of the siblings were given plots measuring 50ft \*100ft with the exception of John Ngaru Njuguna who got a plot of 100ft \* 100ft (did not get a shamba).

3. The evidence led shows that the protagonists in this case were given land as follows;

- |                              |   |             |
|------------------------------|---|-------------|
| a. 1 <sup>st</sup> Plaintiff | – | 2185        |
| b. 2 <sup>nd</sup> Plaintiff | – | 2177 & 2183 |
| c. 1 <sup>st</sup> Defendant | – | 2184        |
| d. 2 <sup>nd</sup> Defendant | – | 2178.       |

4. Fast forward, 2.5 years later, some of the beneficiaries being the Appellants herein complained to their father that their plots LOC14/KAIRO/(2184 and 2174) were smaller on the ground.

5. In the lower Court it was the Plaintiffs (Respondents) case that on the 29/6/2004 the Defendants (Appellants) on suspicion that their plots were smaller caused the resurvey of the plots. They allege that their finding was that there was an excess of 1.4 acres of land that the

Defendants sought to redistribute the alleged excess among the land parcels by making adjustments to the ground positioning of the plots and boundaries. They aver that arising from the said illegal resurvey of the plots on 31/8/04, the 1<sup>st</sup> Defendants, commenced construction of buildings on his plot No 2184 and cut down a fence and claimed 5 meters of parcel LOC14/KAIRO/2183 and 2185. That the 2<sup>nd</sup> Defendant encroached and excised 0.3 acres of parcel 2177 and annexed it to his parcel LOC14/KAIRO/2178. The Plaintiffs sought the following orders;

a. Re-survey of the parcels/plots LOC 14 KAIRO/2177, 2178, 2182, 2183, 2184, 2185, 2187 and 2188 so that the sizes indicated in the official searches to agree on the ground.

b. Costs of the appeal be provided for.

6. The Plaintiff's claim was resisted by the Defendants who asserted that the resurvey was carried out with the consent and involvement of the Plaintiffs, their father and the clan.

7. The hearing proceeded with both parties calling witnesses. The Learned Magistrate delivered his decision on the 2/11/12 in favour of the Respondents as follows;

a. That a declaration be and is hereby issued that the purported resurvey of land parcels LOC14/KAIRO/2181, 2182, 2183, 2184, 2184, 2186, 2187, 2188, 2176,2177,2178, 2179 & 2180 on 29/6/04 and or thereafter is null and void.

b. That the land taken over from the Plaintiffs by the Defendants be recovered.

c. A permanent injunction be and is hereby issued against the Defendants their servants, agents or whomsoever else from entering remaining in the building or interfering with the Plaintiffs' quiet possession of the land parcels No. LOC 14/KAIRO/2185, 2183 and 2177.

d. The cost of the suit is awarded to the Plaintiffs.

8. Aggrieved and dissatisfied with the decision of the Honorable Court aforementioned, the Appellants proffered this appeal on the following grounds that the Learned trial Magistrate erred in law and fact in ;

a. Failing to adjudicate on the discovered discrepancies on the sizes of the land on the grounds vis a vis the titles.

b. Failing to hold that a resolution had been arrived by the Court (unclear?) to solve the issues involved in respect to the parcels of land in this case.

c. Basing his ruling on the repealed Registered Land Act Cap 300.

d. In holding that the Land Control board could have been involved in the exercise without any application made by a party.

e. Failing to arbitrate as a Court of equity and determine the case as criminal tribunal (?).

f. Failing to uphold the overriding objective to the Civil Procedure Act and Civil Procedure Rules in failing to facilitate the just and appropriate resolution of the civil disputes governed by Civil Procedure Act.

9. The Appellants sought orders to set aside the judgment and the decree of the Court.

10. The parties elected to prosecute the appeal by way of written submissions.

11. The Appellants submitted that the original land LOC14/KAIRO/756 was subdivided by the proprietor, Onesmus Njuguna Ngaru into 13 plots and transferred to his children. Later the Appellants complained that their parcels were smaller than indicated in the titles. A number of meetings were held involving the family and the clan. The parties agreed to call each a surveyor to resurvey the whole land. That when the resurvey was set for registration the Respondents rushed to Court and denied any involvement in their resurvey. They sought the prayers as set out in their memorandum of appeal.

12. The Respondents submitted and gave the background of the dispute. That the lower Court found that all the parties may have participated in the deliberations of the 2<sup>nd</sup> subdivision of the plots. However the process was not anchored in law. That the chairman of the clan informed the Court that none of the minutes in respect to the deliberations of the clan meeting to resolve the land issue were signed by the parties.

13. In respect to grounds 1, 2, 5 and 6 the Respondents submitted that the Appellants did not approach the Court with any counterclaim in respect to the adjudication of the discrepancies in the acreage of the land if any. In any event no material was placed before the Court to support any resurvey.

14. In respect to grounds 3 and 4 of the appeal, the Respondents submitted that going by section 2, 23 (2) and (3) of the Interpretation and General Provisions Act cap 2 the Court did not err in considering the provisions of the Registered Land Act in respect to the process of land subdivision. The Respondents relied on the case of the **Commissioner of Income Tax Vs Pan African Paper Mills E.A Limited (2018) ECLR.**

15. That the purported correction by the Appellants of the boundaries was contrary to section 19 of Registered Land Act which provided that for every correction of the register the land Registrar must approve the mutation duly signed by the proprietor of the land. Section 6 of the Land Control Board Act makes it mandatory for to obtain land board consent.

16. This being the first appellate Court my role will be to re-examine the evidence placed before the trial Court and see if I would have arrived at a different verdict. However, I must take into account that the trial Court had the opportunity to examine and assess the witnesses appearing before it, which advantage I do not have.

17. Having considered the pleadings, the evidence, the written submissions and all the material placed before me the issues that fall for determination are as follows;

- a. Whether there was a valid subdivision of the suit lands.
- b. Whether there was encroachment of the suit lands by the Appellants.
- c. Whether the trial Court failed to arbitrate the matter before it (Grounds 1, 2, 5 & 6).
- d. Whether the trial Court faltered in placing reliance on the Registered Land Act in arriving at its decision.
- e. Who meets the costs of the Appeal?

**Whether there was a valid subdivision of the suit lands.**

18. The Defendants claim that the 2<sup>nd</sup> subdivision was carried out with the involvement of the surveyors from each divide. The 2<sup>nd</sup> survey was triggered by the Defendants alleged discovery that their parcels were small on the ground. They had on 29/6/2004 brought a surveyor who informed them that there was an excess 1.4 acres that needed to be redistributed amongst the plots to rectify the error on the ground. The Defendants then involved their late father who called all his children and the clan to resolve the matter. It is their evidence that their surveyor was Mucheke, now deceased while the Plaintiffs surveyor was Mark Mwangi Giteru. That the resurvey was carried out in the presence and with consent of the Plaintiffs, their father and the clan. The 1<sup>st</sup> Plaintiff initially wanted the resurvey to be carried out by a Government Surveyor, however, the District surveyor advised him to obtain a Court order to authorize the subdivision. He informed the Court that he did not pursue the Court order. According to the Appellants the Respondents got their own surveyor namely Mark Mwangi Giteru to represent them. This evidence was not rebutted by the Plaintiffs and the Court takes it to be plausible.

19. From the evidence of the Respondent's and that of DW1 and DW2, the Plaintiffs were present and involved in the resurvey of the plots. The 1<sup>st</sup> Plaintiff stated that after the resurvey was completed on the 31/8/04, he was unhappy because the Defendants had encroached on their parcels to the extent of 5 meters and on LOC14/KAIRO/2183 and 2185 and excised 0.3 acres from 2177. This triggered a series of actions on the part of the Plaintiffs such as filing of LDT land dispute on the 6/9/04, complaint letter to then District Commissioner on 31/8/04 which led to letters to the local District officer and the Chief instructing them to stop any alterations and development on the disputed lands. On the 10/9/04, the Plaintiffs filed suit and moved the Court for injunctive reliefs to stop the Defendants in implementing the new re-survey.

20. It is the finding of the Court that the Plaintiffs participated in the resurvey of the plots but in the end disagreed with the outcome of the same.

21. The trial Court faulted the resurvey for lacking legitimate legal basis (in the words of the Honourable Senior Principle Magistrate). The provisions of survey where there is a dispute on boundaries and acreage are captured in the provisions of Section 21 of the Registered Land Act. The Land Registrar has the statutory mandate under Section of the 21 of the Registered Land Act as thus;

“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.”

22. The position has not been altered upon enactment of the new land legislation. I make reference to section 15 -19 of the Land Registration Act, 2012 which provides for the preparation by the office or authority responsible for the survey of land and maintenance of a map or series of maps for every registration unit. Section 16 of the Act provides for the amendment and/or alteration of boundary lines and the preparation of new editions on the instructions of the registrar in writing in the prescribed form in case of any error in regard to the records held and/or fault in respect of the survey of any parcel of land. Sections 18 and 19 of the Land Registration Act 2012 gives power to the Land Registrar to have the boundary of any parcel of land established and fixed in the event of any dispute and in carrying out such exercise the Land Registrar is at liberty to receive such evidence as to the situation of the land parcel boundaries as may be necessary.

23. Similarly, in the case of **Samuel Macharia & Anor –Vs- Kenya Commercial Bank Limited and & 2 Others (2012) EKLR** the Court held that the provision of section 18(2) of the Land Registration Act serves to restrict the jurisdiction of the Court by committing boundary disputes to the Land Registrar for determination in the first instance. It is only after the Land Registrar has determined the dispute that the matter is escalated to this Court. The jurisdiction of the land registrar is limited to land that has not been ascertained, that is to say land whose boundaries are general in nature.

24. In the case of **Esther Njoki Rurigi v Patrick Gathanya [2005] eKLR** Munyao J held that :

“Where the Registrar is maintaining the registry map, or in any case he may, require the Director of Surveys to, correct the line or

position of any boundary shown on the registry map with the agreement of every person shown by the register to be affected by the correction, but no such correction shall be effected except on the instructions of the Registrar in writing in the prescribed form, to be known as a mutation form, and the mutation form shall be filed".

Further that the land registrar's mandate is limited to correction of line boundaries and as can be discerned from the words of the section the correction can only be done with the consent of every person affected by the correction and only when the Land Registrar has authorized the correction in a mutation form. (emphasis is mine).

25. In the case of **Peter Rugu Gikanga & Anor v Hellen Muringe Kabutha [2018] Eklr Oundo J** outlined the process of subdivision and also noted the importance of the land registrar in the dealings. The Court noted that :

“ .....The Registry Index Map is used for subdivision of registered land the surveyor has to consult in order to guard against encroachment to other lands and also to help him in his planning for the layout of new subplots in relationship to roads of access and water.

87. The process of amending the Registry Index Map thus follows that the surveyor first prepares the mutation form in triplicate and on it he indicates all the measurements and areas of the resultant subplots. In case a landowner has commissioned a licensed surveyor, that surveyor sends the form to the District Surveyor who checks it with regard to the accuracy in measurements, calculation of areas as well as its plot ability for the amendment of the map. He then issues new numbers to the subplots and cancels the old number and presents the form to the Land Registrar for registration and issue of new title deeds. After this, the land Registrar retains (files) one copy and forwards two copies to the District Surveyor or in some cases the Director of surveys to use in the amendment of the Registry Index Map Without following this procedure, any amendment of the map as a result of sub division is void. It should be noted that any other change on the Registry Index Map should also be supported by a mutation form.

88. Section 18 of the Registered Land Act vests in the Director of Surveys the power to prepare and thereafter maintain the registry map for every registration district. Similarly he has the power to alter the registry map and to prepare new editions if required so to do by the Registrar and with the agreement of all parties concerned.

The Court held in the upshot that .... for Director of Surveys to make adjustments on the RIM, there must be instructions by the Registrar in the form of mutation forms. Secondly, the alterations envisaged must relate to correction of the line or position of any boundary shown on the registry map. Thirdly, any correction that is likely to affect any person's interest shown by the register can be affected only with the agreement of that person.

26. The procedure under Registered Land Act is replicated under sections 15-21 of the Land Registration Act, 2012. The procedure that necessitates subdivision of land is that the owner has to consent through signing the mutation form. Alongside the mutation form is the consent of the Land Control Board to approve the subdivision. These are then submitted to the Land Registrar for approval. In the instant case none of the steps were taken and therefore the resurvey was still at its infancy and therefore the acts of the Defendants in purporting to encroach and excise the 5 meters and 0.3 acres of land belonging to the Plaintiffs was without any legal justification. The fact that the said aborted exercise was carried out with the apparent participation of the Plaintiffs did not denote consent. I say so because the suit lands are registered in the names of the Plaintiffs and any alteration resurvey had to be done with their express consent denoted in the mutation form.

27. It is pertinent to note that the results of the resurvey were not presented to the Court. The surveyors report was not presented by the Defendants and therefore their invasion encroachment and excision of the Plaintiff's land was unauthorized and illegal, null and void.

28. The trial Court was right in its holding that the resurvey was null and void.

#### **Whether there was encroachment of the suit lands by the Appellants?**

29. The Defendants did not rebut the evidence that they indeed encroached on the Plaintiff's land. The Court takes the evidence of the Plaintiff as unchallenged.

#### **Whether the trial Court failed to arbitrate the matter before it. (Grounds 1, 2, 5 & 6)?**

30. In answer to the above issue, it is on record that the Defendants did not file a counterclaim seeking an alternative way to resolve the matter. They did not plead nor lay evidence before the Court to warrant the Court to address any other way of arbitrating the matter. I find no reasons to fault the trial Court in the manner that it determined the case.

#### **Whether the trial Court faltered in placing reliance on the Registered Land Act in arriving at its decision?**

31. The suit was filed in 2004 and determined in 2/11/12. The Land Registration Act came into operation in the 2/5/12. Section 106 & 107 of the Land Registration Act makes provisions for the transition between the repealed Act and the new Act. It states that any rights liabilities and remedies shall be exercisable and enforceable in accordance with the law that was applicable immediately before the registration of the land under the new Act. A review of the provisions of the repealed Registered Land Act and the new Land Registration Act are similar so much so that it would not have made any difference if the learned Magistrate had applied the provisions of Registered Land Act or Land Registration Act. This ground is rejected.

32. In the upshot the Appeal lacks merit. It is dismissed with costs to the Respondents both in the lower Court and on appeal.

#### **Orders accordingly**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 25<sup>TH</sup> DAY OF JULY 2019**

**J.G. KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Appellant: 1 – Absent

2 – Present in person

Maina HB for Mbuthia for the 1<sup>st</sup> & 2<sup>nd</sup> Respondents

Irene and Njeri, Court Assistants