



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELCA NO. 24 OF 2018

JOSEPH KARANJA MABULA.....APPELLANT

VS

JOHN MUCHOKI MWANGI.....RESPONDENT

(An appeal arising from the Ruling and orders of the Hon G Omodho SRM delivered on the 24/10/18 in CMCC 465 of 2006 Thika).

RULING

1. The background of this case is that the Appellant filed suit in the lower Court against the Respondent claiming that the Respondent had illegally trespassed and encroached on his land Parcel No MITUBIRI/WEMPA BLOCK2/1151 (suit land). The Respondent is the registered owner of plot no 614 (now 1150) which borders the suit land. He sought inter alia a declaration that the Respondent's encroachment of the suit land is illegal, a permanent injunction restraining the Respondent from interfering with the Appellants quiet enjoyment and user of the suit land and costs of the suit.

2. The Respondent denied the Appellants claims and counterclaimed against the Appellant and claims that it is the Appellant that has trespassed on his land 1150 and sought the orders inter alia, declaration that the Appellant has encroached onto his land, the Appellant to vacate his land, a permanent injunction restraining the Appellant from interfering with his quiet possession user of his land, mesne profits together with costs of the suit.

3. The Appellant filed a Notice of Motion on the 13/4/18 seeking inter alia that the matter be referred to the Land Registrar for the determination of the physical boundaries of the two suit lands 1150 and 1151 and secondly that the said Land Registrar to make a report on the findings within 90 days or such other period as the Court may deem reasonable and adequate for the report to be adopted as the findings and orders of the Court.

4. In opposing the application, the Respondent deponed that vide a consent of the parties entered into in 2009 the District Land Registrar, Thika, was to visit the disputed suit lands and establish the boundaries of the suit lands and file a report within 21 days. That indeed a report dated 26/11/10 was filed in Court and therefore the application as filed is res judicata. In response the Appellant refuted that the report was in compliance with the Section 18 of the Land Registration Act and further that the same was not conducted under the direction and involvement of the Land Registrar.

5. The Learned Magistrate determined the application and rendered his ruling on the 24/10/18 in the following terms;

“ in the spirit of the consent already entered into I will allow the application dated the 10/4/18 so that a 2nd report be done by the Registrar of Lands , Thika as to who is encroaching on the following conditions;

a). the process shall have both parties or their Advocates participate.

b). That if the said report shall have a similar finding as the surveyor's report then the matter shall stand fully determined with no orders as to costs.

c). that there shall be any variations in outcome then each of the parties shall be allowed to adduce oral evidence on 12/11/2018 to full conclusion.

d). the costs of the process shall be facilitated by the Applicant herein who shall ensure that the report is filed by 7/11/2018 failure to which the suit shall automatically stand dismissed”.

6. Aggrieved by the above ruling the Appellant has preferred this appeal on the following grounds; That the Learned Magistrate erred in law and fact in;

a. Misdirecting herself in finding that failure by the Plaintiff to file Land Registrar report by 7/11/2018 the suit would stand dismissed.

b. In imposing strict timelines for compliance with the order in a above which made it impossible for the parties to comply thus compromising the Appellants right to be heard.

c. In failing to appreciate that there was an error on the record which necessitated the Appellant to seek the Courts direction before serving the Land Registrar Murang'a with the Court orders.

d. Failing to appreciate that the Appellant sought a mention vide a letter dated the 24/10/18 for directions for extension of time to enable the Land Registrar to prepare the report.

e. Failing to consider the facts of the case as enumerated in the Appellants letters dated the 25/10/18 and 2/11/18 respectively

f. In dismissing the Appellants suit despite the fact that the Appellant had sought a mention date for directions before summarily dismissing the Appellants case.

g. In failing to exercise her discretion judiciously in the interest of fairness and justice.

7. The Appellant sought orders that the ruling delivered on the 24/10/18 be set aside, the appeal be allowed and the suit be reinstated and heard and determined on merit and finally costs of the appeal be provided.

8. Parties elected to canvas the appeal by way of written submissions.

9. In respect to grounds Nos. 1 & 2, the Appellant submitted that the ruling directed the Land Register Thika to undertake the site visit instead of the Land Registrar Murang'a where the land is situate and that by the time the same was rectified on the 29/10/18 the Appellant had lost 5 days off from the time ordered by the Court. That the orders were extracted on the 31/10/18 and served on the Land Registrar on the 1/11/18 which left the register only 7 days to file the report. On realising the difficulty in meeting the datelines set by the Court the Appellant sought a mention date vide a letter dated the 2/11/18 which letter the Court did not give consideration. As a result, the Appellants suit in the lower Court stood dismissed on the 7/11/18 when he failed to file the site report. That the dismissal was of no fault of the Appellant.

10. In respect to grounds 3, 4, 5, and 6, the Appellant submitted that by dismissing the case without considering the counterclaim of the Respondent the learned magistrate occasioned miscarriage of justice to him vis a vis his defence to the counterclaim. That the strict deadlines occasioned an injustice which he invited this Court to remedy by setting the dismissal aside.

11. In respect to grounds 7, 8, 9, and 10 the Appellant submitted and faulted the learned magistrate for misapplying his discretion to have a feasible suit dismissed without being heard and determined on merits. That the learned magistrate should have extended time to enable the district Land Registrar to file the site report, an action which would not have prejudiced any party. He implored this Court to set aside the dismissal orders so that the case may be reinstated heard and determined on merits.

12. In opposing the appeal, the Respondent submitted that the application was resjudicata because the surveyors report had been filed which indicated that the Appellant encroached on the land of the Respondent.

13. Further the Respondent submitted that the Court has no jurisdiction to hear the appeal on account that the Appellant filed the appeal more than 30 days without seeking leave of the Court to file it out of time. That the appeal having been filed out of time is improperly before the Court. He relied on the case of **Patrick Kiruja Kithinji Vs Victor Mugira Marete (2015) EKLR** where the Court held that It is trite that this Court has jurisdiction to entertain appeals filed within the requisite time and/or appeals filed out of time with leave of the Court. To hold otherwise would upset the established clear principles of institution of an appeal in this Court. Consequently, we find that an appeal filed out of time is not curable under Article 159. The upshot is to allow the application and hereby strike out the Respondents appeal."

14. Did the Court issue strict time frames for the compliance of the orders? The Respondent submitted that the Appellant had asked the Court to order the Land Registrar to file his report within 90 days or such other period as the Court deemed reasonable and /or adequate for the report and cannot now be seen to cry foul when the Court ordered that same be filed in 14 days from the date of the ruling. The Court deemed 14 days to be reasonable. The Land Registrar did not file any document to indicate that the 14 days was not adequate to comply with the orders.

15. That the Appellant did not show the Court when the orders were served on the Land Registrar, Murang'a and further failed to proof that the said Land Registrar was unable to comply with the said orders within the time directed by the Court. The claim that the time frame was impractical remain allegations which the Appellant has not proved. He submitted that there would have been no issue if the said Land Registrar, Thika had visited the locus and filed a report in any event the suit was filed in Thika law Courts in the first instance. That the delay of 5 days was occasioned by the Appellant who insisted that the Land Registrar be from Muranga County and not Thika as decreed by the Court. It is his submission that the actions of the Appellants are geared towards delaying the suit which was filed in Court way back in 2006.

16. Did the Appellant seek extension of time to enable the site report to be filed? The Respondent submitted that Order 50 of the Civil Procedure Rules provides a remedy of extension of time which the Appellant did not explore instead they ignored and instead sent a letter to the Court seeking a mention date without moving the Court in the right manner and serving the Respondent. He failed to move the Court.

17. Further that the surveyors report filed in 2009 had found that the Appellant has trespassed onto the suit land of the Respondent, a fact that

the Court took cognizance of when it declined to set aside the consent order recorded by the parties in 2008. Further the Appellant did not challenge the report either. This informed the decision of the Court in giving the Appellant another chance and in default of filing the report within the stipulated time, the suit to stand dismissed. Having considered the report, the Court did not see any prejudice if the case was dismissed even without the report of the Land Registrar Muranga. He submitted that his counterclaim in the lower Court has not been determined because the file was placed before this Court for the hearing of the appeal herein.

18. The key issue in this appeal is whether this Court has jurisdiction to entertain this appeal.

19. Before I delve in the issue, I wish to make some observations about the case in the lower Court. The parties appeared before the Learned Magistrate and recorded an order by consent to the effect that the District Surveyor Thika do visit the scene of the disputed plots and establish who between the Plaintiff and the Defendant is encroaching on the plot. That the said district surveyor do file in Court within 21 days of the date hereof and that the parties hereto do share the expenses of the said exercise equally. The order is dated the 7/7/09.

20. The Surveyor did file a report on the 26/11/2009 interalia that the Appellant had encroached on the Respondents land.

21. It is evident from the pleadings that this is a boundary dispute which was settled by the surveyors report aforesaid. The only matter that remained in Court was the other prayers of the plaintiff as well as the defendants counterclaim. That notwithstanding the learned Magistrate appeared to have said as much in his ruling but gave further directions which appear to have caused a contradiction of the matter as at that time. That said, the magistrate gave orders for compliance by the Plaintiff which inherently may not cause any prejudice to the parties in the suit. These orders were not complied with so much so that they lapsed by affluxion of time on the 7/11/2018 as a result of which the suit stood dismissed as at 7/11/2018 as ordered. Nonetheless, the counterclaim has not been determined and therefore is still valid and available for determination.

22. The plaintiff being aggrieved by the dismissal was entitled to file an appeal within 30 days from the date of the ruling that is to say the 24/10/18. The appeal was filled on the 28/11/18, outside the stipulated period. Such action places the Court outside its jurisdiction to hear and entertain the appeal.

23. The appropriate action to take is to down tools without having to look at its merits.

24. The final orders are; the appeal is struck out with costs to the Respondents.

25. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 23rd DAY OF SEPTEMBER 2019.

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Kabata HB for Njoroge Kugwa for the Appellant

Mugo HB for Mutuku for the Respondent

Irene and Njeri, Court Assistants