



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT NO. 149 OF 2009 (FORMERLY)

E LC No. 231 OF 2013 (CURRENTLY)

WILLIAM YATOR KAINO.....PLAINTIFF

VERSUS

MASAI CHEBOL.....1ST DEFENDANT

BENJAMIN KIBET.....2ND DEFENDANT

CHRISTOPHER KIPTOO.....3RD DEFENDANT

THE UASIN GISHU DISTRICT LAND REGISTRAR.....4TH DEFENDANT

JUDGMENT

By an originating Summons dated 28th August 2009 the plaintiff listed the following questions for determination by the court:

1. The determination, positioning, notes and decision of the 4th defendant made on 30th July 2009 and thereafter to date on the disputed boundary between the plaintiff's parcel of land namely No. MOIBEN/MOIBEN BLOCK 3 (KAPSILIAT)/94 and the 1st, 2nd and 3rd defendants' parcel of land namely No. MOIBEN/MOIBEN BLOCK 3 (KAPSILIAT)/86 affecting the boundary, situation of and the plaintiffs parcel of land namely MOIBEN/MOIBEN BLOCK 3 (KAPSILIAT)/94 be and are hereby set aside forthwith by the High Court.
2. The Original and fixed boundary, beacons, Marks, situation and other measurements both on the ground and on the registry Index Map in respect of the plaintiffs parcel of land namely MOIBEN/MOIBEN BLOCK 3 (KAPSILIAT)/94 and the 1st, 2nd, and 3rd defendants' parcel of land namely MOIBEN/MOIBEN BLOCK 3 (KAPSILIAT)/86 in existence up to and on 30th July 2009 before the 4th defendant made any decision be and are hereby ordered to remain unaltered/intact should this Honourable court grant prayer 1 above.
3. Costs and interest to the plaintiff.
4. Any other or further relief in favour of the plaintiff.

Parties agreed to proceed by way of written submissions which submissions were duly filed.

Plaintiff's Submissions

The plaintiff stated that they were given a notice dated 29th June 2009 by the 4th defendant which notice was addressed to the 1st defendant and copied to the 4th defendant's surveyor and the Area chief. That the boundary dispute was in respect of title No. MOIBEN/MOIBEN BLOCK 3 (KAPSILIAT)/94 and title No. MOIBEN BLOCK 3 (KAPSILIAT)/86 whereby the parties were summoned to appear, call witnesses and give evidence before the 4th defendant on 30th July 2009 at the place of the disputed boundary.

It was the plaintiff's case that all the parties were present at the scene whereby the 4th defendant took measurements of the plaintiff's land and confirmed the position of the plaintiffs boundary beacon/mark on the ground. That the 2nd and 3rd defendants raised objections to such

measurements on the ground and created disturbances on seeing that such measurements on the ground were correct.

The plaintiff averred that the objections and disturbances created by the 2nd and 3rd defendants on 30th July 2009 made the 4th defendant to take second round of measurements from the plaintiffs neighbour Yano Kibiwot Lokabel's parcel of land which was not part of the subject matter of the 4th defendant's notice dated 29th June 2009 which measurements overlapped on the plaintiff's land. Further that the plaintiff raised objection to the 4th defendant's second round of ground measurements taken from the plaintiff's neighbour's land as a solution to the boundary dispute.

2nd & 3rd Defendants' Case.

It was the 2nd and 3rd defendants' case that there have been several attempts to ascertain the boundary between the said parcels of land by the Land Registrar which failed to take off until 30th July 2009 when it was successful, albeit complaints by the plaintiff. It is also their case that they started fencing off MOIBEN/MOIBEN BLOCK 3 (KAPSILIAT)/86 on 30th July 2009 after the ascertainment exercise and that they were guided by the point of reference given by the Land Registrar as the correct position of the boundary between the said parcels of land.

The defendants contend that they never caused any disturbance during the said exercise and further that they did not influence the establishment of the boundary in dispute in any way whatsoever. The defendants stated that if the plaintiff was aggrieved by the decision of the Land Registrar then he should have appealed to the Chief Land Registrar and thereafter (in case of further discontentment by the plaintiff) to the Land Disputes Tribunal which had jurisdiction to deal with the dispute then.

The 2nd and 3rd defendants stated that they were satisfied with the outcome of the 4th defendant's determination of the boundary between the two (2) parcels of land on 30th July 2009 and they therefore wish to rely on the report compiled by the 4th defendant as the correct position. It is the 2nd and 3rd defendants' submissions that the 4th defendant cannot be faulted for having done the right thing as fixing of boundaries is the mandate of the 4th defendant (and the surveyor) and further that the 4th defendant did not act contrary to its mandate. The 2nd and 3rd defendants urged the court to dismiss the plaintiff's case with costs.

4th Defendant's Case.

It was the 4th defendant's case that it heard the boundary dispute over Title Nos. MOIBEN/MOIBEN BLOCK 3 (KAPSILIAT)/94 and MOIBEN/MOIBEN BLOCK 3 (KAPSILIAT)/86 at the site and made a determination of the correct position of the boundary between the two parcels of land. That after having given the parties an opportunity to be heard, the parties agreed to the use of a map to determine the correct position of the boundary. That upon the said determination, any aggrieved party had 30 days right of appeal to the Chief Land Registrar, which right was not exercised at all by the plaintiff.

It is further the 4th defendant's case that the challenge being against an administrative action ought to have been instigated by way of Judicial Review. The 4th defendant compiled a report as regards the said exercise of 30th July 2009 which was annexed to the 4th defendant's replying affidavit filed in court on 7th March 2018. The 4th Defendant urged the court to dismiss the plaintiff's suit with costs.

Plaintiff's Submissions.

Counsel for the plaintiff submitted that proceedings of 30th July 2009 led to the institution of this suit in the High Court which has the jurisdiction to entertain and determine the dispute between the suit parties in respect of the determination of the disputed boundary between the parcels of land namely No. MOIBEN/MOIBEN BLOCK 3 (KAPSILIAT)/94 and title No. MOIBEN/MOIBEN BLOCK 3 (KAPSILIAT)/86.

Counsel cited Court of Appeal Civil Appeal No. 10 of 1980 between Mwalagaya versus Bandali (1984) KLR page 750-760 to support his assertion that the correct procedure was followed by filing this case in this court. Further that the Land Registrar's report dated 30th July 2009 should not be used to alter the original and fixed boundary plaintiff's boundary. Counsel further submitted that the decision of the 4th defendant was pursuant to section 21(2) of the Registered Land Act (Cap 300) (now repealed) as per the letter dated 29th June 2009 and the jurisdiction of this court is conferred under section 159 of the Registered Land Act (Cap 300). Counsel therefore urged the court to allow the plaintiff's claim and set aside the decision of the Land Registrar dated 30th July 2009.

2nd & 3rd Defendants' Submissions

Counsel for the 2nd & 3rd defendants filed submissions and listed the following issues for determination by the court namely:

- a) Whether or not the 4th defendant was empowered and/or mandated to act as he did on 30th July 2009 as regards the fixing and/or defining and/or determining and/or establishing of the boundary (ies) between Title No.s MOIBEN/MOIBEN BLOCK 3 (KAPSILIAT)/94 and MOIBEN/MOIBEN BLOCK 3 (KAPSILIAT)/86.
- b) Are there any good reasons to warrant the bringing of the 4th defendant's works to nothing and/or to warrant the interference of the 4th defendant's exercise of powers as given under the laws?

c) Who should be condemned to pay costs?

Counsel submitted that the applicant relied on sections 21(2), 22, 149 and 159 of the Registered Land Act (now repealed) in taking out the summons.

Section 21 (2) of the said Act then provided:-
"(2) Where any uncertainty or dispute arises as to the position of any boundary, the Registrar, on 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."(Emphasis ours.)

Section 22 then provided:-

"22(1) If the Registrar in his discretion considers it desirable to indicate a filed plan, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if any interested person makes application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries."

22(2) The Registrar, shall, after giving all persons appearing by the register to be affected an opportunity to be heard, cause to be defined by survey the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and thereupon the plan shall be deemed to define accurately the boundaries of the parcel.

22(3)Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the Director of Surveys, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section."(Emphasis ours.)

Mr. Wafula submitted that from the foregoing provisions of the Registered Land Act (now repealed), the 4th defendant was empowered to define, determine, establish and fix boundaries where there is a dispute and or uncertainty as to the same- just as it did in the instant case. That further that the 4th defendant not only undertook its obligations as provided for under the cited sections of said Act, but it also followed the due procedure as provided thereunder. And that is also the requisite procedure as provided for under section 19 of the Land Registration Act.

Counsel cited an excerpt from the report which reads:-

"...it is true that the disputed boundary had no beacon or beacon destroyed and the parties do not know the position. The parties agreed to the use of the map to indicate the position of the boundary... The surveyor using the map picked the common boundary using the map scale and it came to that the two parcels are actually smaller on the ground as compared with the map. It overlapped by about 38 metres. The surveyor apportioned the overlapped portion between the two parcels using the ratio of each distance then fixed a common boundary"

Counsel therefore submitted that from the report it is clear that the exercise was carried out as agreed by the parties herein- the use of a map to position the correct boundary and it is not indicated in the report the 4th defendant conducted two exercises on that day as alleged by the plaintiff in his supporting affidavit. That the 4th defendant to apportioned the overlapping portion between the two (2) parcels of land whereby the 2nd and 3rd defendants also lost about 0.8 acres of their land.

Mr. Wafula also submitted that the process of defining and establishing the boundary in question having been procedurally and fairly carried out as was required under the Registered Land Act (repealed) and now the Land Registration Act, 2012, therefore no good reasons at all has been advanced to warrant the interference of the 4th defendant's exercise of its powers given under the laws of the land. He further submitted that in the alternative and without prejudice to the foregoing, if there were any reasons at all warranting the interference of such exercise then the same ought to have been raised in a different forum and not before the High Court or this Honourable Court.

Counsel cited the provisions of section 149 of the Registered Land Act which provided that:-

"Whenever any question arises with regard to the exercise of any power or the performance of any duty conferred or imposed on him by this Act, may state a case for the opinion of the High Court, and thereupon the High Court shall give its opinion thereon, which shall be binding upon the Registrar." (Emphasis ours.)

Counsel submitted that the above section categorically outlined that only the Registrar and not anyone else (including the plaintiff), was mandated to state a case for the opinion of the High Court. That the court had no jurisdiction to entertain the plaintiff's case as it had special jurisdiction on an appeal from the Chief Lands Registrar and not as purported by the plaintiff in this suit.

That the plaintiff failed to appeal to the Chief Land Registrar as any aggrieved party was required to do within 30 days after the said exercise was carried out. Further that the plaintiff ought to have taken the dispute to the Land disputes Tribunal which was mandated to determine boundary disputes at the time the suit was filed. Section 3(1) of the said Act provided that the Lands Disputes Tribunal had powers to determine:-

- a) The division of or the determination of boundaries to land including land held in common.
- b) A claim to occupy or work land, or

c) Trespass to land.

Counsel cited the case of **Republic Vs. the Land Disputes Tribunal, Kajiado North Exparte Rachael Gathoni Mbai & Anor (2012) eKLR** where the issues that arose concerned a boundary dispute and trespass and the court essentially held that where one written law amends another written law, the amending written law shall so far as it is consistent with the tenor thereof and unless a contrary intention appears, be construed as one with the amended law. The court further held:-

"Since the Land Disputes Tribunal Act came into force much later than the Registered Land Act and provided for the land disputes relating to determination of boundaries to be dealt with by tribunals established under it, it must then follow that the jurisdiction of the registrar under the Registered Land Act over such matters must have been ousted and or interfered with. When enacting the Land Disputes Tribunals Act, Parliament must have been aware of the provisions of section 21 of the Registered Land Act. It must then have donated the Land Registrar's powers in that regard to the tribunals established under the Land Disputes Act. I think that by Parliament not directly or expressly repealing section 21, it intended that the Land Registrar would determine a boundary where none had been fixed and noted in the register. In this case the boundary having been fixed and registered, any consequential dispute arising there from can only be dealt with by the respondent. The issue of determination of boundaries falls squarely within the purview of the respondent according to section 3 (1) thereof."(Emphasis ours.)

Counsel also submitted that it is trite law that where an Act of Parliament grants a specific jurisdiction and prescribes procedures, then the same has to be followed unless the Act itself says otherwise does so. See the case of **STEPHEN MRING'A & 2 OTHERS VS. COUNTY COUNCIL OF TAITA & 2 OTHERS (2016) eKLR** where the court asserted that the courts have consistently held that:-

"where there is an alternative remedy provided by an Act of Parliament which remedy is effective and applicable to the dispute before court, the court ought to ensure that the dispute is resolved in accordance to the relevant statute...for where the law provides for a procedure to be followed, the parties are bound to follow the procedure provided by the law before the parties can resort to a court of law as the court would have no jurisdiction to entertain the dispute."(Emphasis ours.)

Counsel therefore urged the court to dismiss the plaintiff's suit with costs to the defendants.

Counsel for the 4th Defendant did not file any submissions.

Analysis and Determination

This is an old matter which was at one time listed for dismissal for want of prosecution twice in 2015 and 2017 respectively. The issues for determination are as to whether the court should interfere with the Land Registrar's decision dated 30th July 2009 on the boundaries that were fixed in respect of the suit land.

Section 22 of the repealed Registered land Act provides as follows in respect of the Registrar's mandate on fixing of boundaries:

22(1) If the Registrar in his discretion considers it desirable to indicate a filed plan, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if any interested person makes application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries."

22(2) The Registrar, shall, after giving all persons appearing by the register to be affected an opportunity to be heard, cause to be defined by survey the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and thereupon the plan shall be deemed to define accurately the boundaries of the parcel.

22(3)Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the Director of Surveys, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section."

It is not disputed that the Land Registrar gave notice to the parties in respect of the boundary fixing process dated 29th June 2009 for the exercise to take place on 30th July 2009 which was acknowledged by all parties. It is also on record that the exercise was undertaken in the presence of all the parties. It is further on record that the plaintiff was dissatisfied with the outcome of the process which gave rise to this case.

The question is if a party is aggrieved by the process undertaken by the Land Registrar are there laid down procedures for redress? Section 149 provided that:

149. Whenever any question arises with regard to the exercise of any power or the performance of any duty conferred or imposed on him by this Act, the Registrar may state a case for the opinion of the High Court; and thereupon the High Court shall give its opinion thereon, which shall be binding upon the Registrar

This power is conferred to the Registrar to state a case for the opinion of the High Court whereby the High court shall give its opinion which shall be binding on the Registrar. This did not happen in this case. Further Section 150 provides for appeals when a party is aggrieved by the decisions of the Registrars as follows:

150. (1) If a person is dissatisfied by the refusal of the Deputy Chief Land Registrar, a Land Registrar or an Assistant Land

Registrar to effect or cancel any registration, he may, within thirty days of the refusal, appeal in the prescribed form to the Chief Land Registrar, and the Chief Land Registrar may direct that the registration be effected or cancelled, as the case may require, or may uphold the refusal.

(2) The Minister or any person aggrieved by a decision, direction, order, determination or award of the Chief Land Registrar may, within thirty days of the decision, direction, order, determination or award, give notice to the Chief Land Registrar in the prescribed form of his intention to appeal to the High Court against the decision, direction, order, determination or award.

The plaintiff had an option of filing an appeal within 30 days in the prescribed form to the Chief land Registrar having been aggrieved by the decision of the Land Registrar but he never did so. The plaintiff opted to file this suit in court. When there are laid down procedures then they must be adhered to as they are not put in place in vain. The plaintiff did not exhaust the procedures before moving to court. At that point in time the Land Disputes Tribunal had jurisdiction to handle boundary disputes which the plaintiff ignored and rushed to the High Court.

I have analyzed the evidence on record and the submissions filed together with the relevant authorities and find that the plaintiff's case lacks merit and is dismissed with costs to the 2nd and 3rd defendants.

DATED and DELIVERED at ELDORET this 8th DAY OF October, 2019.

M. A. ODENY

JUDGE

JUDGMENT read in open court in the presence of Mr.R.M.Wafula for 1st to 3rd Defendants and Miss.Kibichy holding brief for Mr.Cheptarus for the Plaintiff.

Mr.Mwelem – Court Assistant