



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

THIKA ELC APPEAL NO.14 OF 2017

(FORMERLY NAIROBI HCCA NO.176 OF 2009)

MWANGI KARANJA.....APPELLANT

-VERSUS-

DOMINIC MACHARIA KARANJA.....RESPONDENT

JUDGEMENT

(Being an Appeal from the Ruling of the Senior Resident Magistrate issued on 17th March 2009 in LDT Case No.27 of 1987)

This suit was filed in court on **1st December 1987**, for the purpose of reading the Award of the Land Disputes Tribunal. Having read the said Award on **1st December 1987**, and there being no Appeal after 30 days, the Court entered Judgement in terms of the D.O Award to the effect that land parcel **No.Loc.1/Kihumbuini/118**, be subdivided and the Plaintiff/

Applicant therein **Mwangi Karanja** was to get 1.7 acres and the Defendant/Respondent then was **Loice W. Karanja** was to get 1.6 acres out of the suit property **Loc.1/Kihumbuini/118**. It is also instructive to note that the parties were mother and son and they are now both deceased but substituted by the current parties.

After the adoption of the said Award as the Judgement of the court, several interlocutory applications were filed in an attempt to enforce the Judgement of the court. Of significance importance is the Order issued on **4th April 1989**, wherein the Court directed that the Executive Officer of this Court do sign all the necessary documents to effect the transfer of 1.7 acres to the Plaintiff/Applicant out of the suit land **Loc.1/Kihumbuini/118**. Following the above stated order, the Land Control Board Forms were signed on **15th May 1989**, and Mutation Forms on **2nd February 1990**. Therefore with the signing of the Mutation Forms, it meant the land was to be subdivided as per the attached Mutation Forms.

Again, the Applicant did approach the court on **6th April 2000** with an allegation that the District Surveyor had refused to subdivide the land as per the Court Order earlier issued. From the court record, it is apparent that on **11th July 2000**, the Court ordered that the Plaintiff's land be surveyed using new forms and the Plaintiff's **1.7 acres** was to remain where he had built and his mother's parcel of land was to remain where she had built. The new Mutation Forms were subsequently signed. However, these orders were set aside by the court on **2nd September 2004**, and these orders were specifically on the mode of subdividing the land. However, what remained unchanged is that the Plaintiff was entitled to 1.7 acres and the Defendant 1.6 acres from the suit land **Loc.1/Kihumbuini/118**, as per the D.O Award which was later adopted as the order of the court.

Thereafter, **Dominic Macharia Karanja** who had been substituted as the Defendant instead of **Loice W. Karanja**, filed an application dated **29th April 2005**, under Section 3 of the Civil Procedure Act and Section 104 of the Registered Land Act (both repealed) and sought for the following orders:-

- a) That the land parcel No.Loc.1/Kihumbuini/118 be partitioned as per the annexed Mutation Form.**
- b) That the Executive Officer of the court be authorized to sign the Mutation Form and the transfer document to effect the partition.**
- c) Costs of the application be provided.**

It was premised on the grounds that, there was a Court Order to the effect that land parcel **No.Lo.c1/Kihumbuini/118** be shared out so that

Mwangi Karanja (Plaintiff) to get 1.7 acres and **Loice W. Karanja** (now substituted with **Dominic Macharia Karanja**) to get 1.6 acres. Further that the said **Mwangi Karanja** had refused and/or neglected to partition the said land fairly and in a just manner as the said Respondent (**Mwangi Karanja**) intended to subdivide the land in such a manner that the Applicant was to be left with an area which he could not construct and was of little economic value.

The Plaintiff/Respondent then (**Mwangi Karanja**) opposed the above application and averred that the land should not be divided again because it had already been divided vide documents signed by the Executive Officer of the court as per the Court Order of **4th April 1989**, and that the subdivision was consented by the Land Control Board on **4th July 1989**. The said Plaintiff (**Mwangi Karanja**) also argued that the fact that the

former Defendant, **Loice Wangari Karanja**, had been substituted with **Dominic Mwangi Karanja**, did not warrant review of the case and re-doing of all that had been done. He therefore opposed the grant of an order for the Executive Officer to sign other documents.

This application was argued in court on **11th November 2008** and the Court did deliver its Ruling on **17th March 2009**, wherein the Learned Trial Magistrate held that:-

“The application does not set out anything new. It mainly seeks an order for enforcement. The Respondents do not contest the Order. I see no basis to granting the orders prayed in the application dated 29th April 2005, which I hereby dowith no orders as to costs”.

The Appellant herein was aggrieved by the above orders and he filed a **Memorandum of Appeal** on **7th April 2009** and stated as follows:-

- 1) The Learned Magistrate erred in granting new orders which has earlier been granted in the prayers to the application dated 1st August 1988.**
- 2) The Learned Magistrate erred in giving duplicate orders in the same file first because a new party had been made to substitute the Defendant in the case.**
- 3) The Learned Magistrate erred in giving new orders when similar orders given earlier in the same case has been executed and subdivision carried out.**
- 4) The Learned Magistrate erred in giving new orders without going through the entire file which is quite old.**
- 5) The Learned Magistrate did not give the correct order.**

The Appellant prayed for the Appeal to be allowed and the Ruling of the Lower Court be set aside with costs to the Appellant.

The Appeal is opposed, and **Dominic Macharia Karanja**, the Respondent herein filed **Grounds of Opposition** on **26th July 2017** and stated as follows:-

- a) That the Appeal is misconceived and it is not capable of being granted as prayed.**
- b) That the Appeal is bad in law as the Ruling that was delivered on 17th March 2009, did not grant new orders but only allowed enforcement in an application dated 29th April 2005.**
- c) That the Ruling in contention was one delivered by Hon. J.B.L. Muturi and not by Hon. Mrs. L. M. Wachira.**
- d) That the Appeal raises no matter of law or fact.**
- e) That the Appeal is an abuse of court process and same should be struck out with costs to the Respondent.**

This Appeal was canvassed by way of written submissions. The Law **Firm of Karuga Wandai & Co. Advocates** for the Appellant filed the written submissions on **7th August 2017** and submitted that the Appellant made an application in court that the Executive Officer of the court be authorized to sign all the necessary documents for the subdivision to take place in compliance with the Order of the court. That the said application was allowed on **15th May 1989**, while **Loice Wangari Karanja** was still alive. He submitted that the said Order was carried out and the land was subdivided as per the Court Order. However on **17th March 2009**, the Learned Trial Magistrate issued a new order for subdivision vide the contested Ruling whereas she had no powers to change the orders of another Magistrate. It was submitted that the earlier subdivision should not be replaced with the later decision of the Learned Magistrate issued on **17th March 2009**. The Court was urged to quash the said orders and/or set them aside.

The Respondent through the **Law Firm of J. K. Ngaruiya & Co. Advocates** filed the written submissions on **1st November 2017** and submitted that the Grounds of Appeal lack merit and should be dismissed.

Further, it was submitted that the Memorandum of Appeal does not state which order was duplicated and the said orders are not annexed. It was also submitted that the Learned Magistrate did not err in her Ruling of **17th March 2009** in ordering that the suit land be partitioned as

per the Mutation Form presented before the court by the Respondent as there were no orders issued by the court on **15th May 1989** on how subdivision was to be effected. It was further submitted that the Order of the court issued on **27th January 2004** directing the Land Surveyor, Thika to visit and subdivide the suit land and Executive Officer of the court to sign the documents was set aside on **2nd July 2004**, by the Court and therefore that Order does not exist.

The Respondent further submitted that the Order of the court issued on **17th March 2009**, was only on how the land was to be subdivided and that Order did not contract any other orders issued earlier

by the court towards enforcement of the Award made in the **D.Os Case No.27 of 1987**. Therefore the Respondent urged the Court to dismiss the instant Appeal as it lacks merit and raises no issues of law or fact.

The above is the background and pleadings of this matter, this Court will now carefully consider them in determination of this Appeal. The Court is duly bound to reconsider the evidence, re-evaluate the same and draws its own conclusion. The Court will also be cautious that it never saw nor heard the witnesses and therefore the findings of the trial court must be given due deference unless it fell fowl of proper evaluation of the evidence on record or the Trial Magistrate acted on wrong principles in arriving at her findings. See the case of **Selle...Vs...Associated Motor Boat Co.(1968)EA 123. (Further in the case of Kenya Ports Authority...Vs...Kriston (Kenya) Ltd 2009 2EA 212)**, where the Court of Appeal held interalia that:-

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it had neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the Court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in evidence”.

This Court has now carefully considered the Grounds of Appeal and the Grounds in Opposition thereto, the written submissions by the respective Counsels and the proceedings in general, together with the appealed Ruling and the Court makes the following findings:-

There is no doubt that there is a ‘Judgement’ of the Court emanating from the Order of the **D.O Case No.127 of 1987** wherein it was held that the land parcel **No.Loc.1/Kihumbuini/118**, be subdivide so that the Plaintiff (**Mwangi Karanja**) to get 1.7 acres and the Defendant (**Loice Wangare Karanja**) to get 1.6 acres. That Judgement was never appealed and it is therefore valid. The bone of contention was how the said land was to be sub-divided so that each of the party was to get his/her acreage as per the Court Order. It is evident that several interlocutory applications were filed in court in a bid to try and enforce the said Court Order. Indeed the court did order that the Executive Officer was to sign the documents relating to the said submissions. It seems that the said subdivisions has never been fully effected and that is why the Respondent filed the Notice of Motion application wherein the Ruling to the same has been impugned by the Appellant herein.

The issues now for determination are:-

- i. Did the trial Magistrate err in granting new orders which had earlier been granted in the application dated 1st August 1988?***
- ii. Did the trial Magistrate give duplicate orders because the party had been substituted?***
- iii. Did the Magistrate issue new orders while similar orders had been executed and subdivision carried out?***
- iv. Did the Learned Magistrate give correct orders?***
- v. Is the Appeal herein merited?***
- vi. What orders should issue as to costs.***

i) Did the trial Magistrate err in granting new orders which had earlier been granted in the application dated 1st August 1988?

It is the Appellant who lodged this Appeal and it was upon him to prove the allegations made therein on the required standard. The Appellant alleged that the trial Magistrate erred in granting new orders which had earlier been granted through the application dated **1st August 1988**. The Court has considered the Record of Appeal and has not seen the certified copy of the order appealed against. Further the Court has not seen a copy of the prayers to the application dated **1st August 1988**. This Court therefore cannot determine from the Records of Appeal that the orders issued by the Learned Magistrate has been issued through the prayers to the application dated **1st August 1988**. However, the Court has gone through the original file and noted that vide an application dated **1st August 1988**, the Plaintiff had sought for an order that the Executive Officer of the court be allowed to sign all the necessary documents to effect transfer of 1.7 acres out of land parcel **No.Loc.1/Kinumbuini/118**.

Further, the court record shows that on **4th April 1989**, the Court issued an order that the Executive Officer of the Court do sign all the necessary documents to effect transfer of 1.7 acres to the Applicant (Plaintiff) out of the suit land **Loc.1.Kihumbuini/118**. However it is not evident whether the said order was enforced as no evidence of such subdivision has been availed by the Appellant in the Record of Appeal. It is also evident that the Plaintiff had filed an application seeking for orders that the District Land Surveyor, Thika be ordered to subdivide title **No.Loc/1/Kihumbuini/118** as per the Mutation Forms signed by the court. Though the said orders were issued on **27th January 2004**, they were later reviewed and set aside by the court on **2nd September 2004**. Therefore, it is apparent that the suit land was never subdivided as directed by the court on **11th July 2000**. This Court therefore finds that the order issued by the Learned Magistrate on **17th March 2009**, was issued for the purpose of enforcing the Court Order but were not new orders which had already been granted in the prayers for

application dated 1st August 1988.

ii) Did the Magistrate give duplicate orders because the party had been substituted?

As the Court observed earlier, the Appellant did not attach a copy of the Order being appealed against. That is indeed a serious omission. See the case of Murishiram & Company...Vs...Soda Water Factory (1934) 16 (1) LRK 50, where the Court held that:-

“It is mandatory that every Memorandum of Appeal must be accompanied by a copy of the Decree or the Order appealed from. If not the Appeal is not properly before the court and must be dismissed”

However, since the above step was not considered during the taking of directions, the Court will now determine the issue framed herein. I have seen the Ruling of the Learned Magistrate given on **17th March 2009**. It was indicated that the application date **29th April 2005**, was only meant to enforce the Order of the court. The Magistrate did not indicate that the Orders were issued because the party had been substituted. Further, the application appealed against was seeking prayers for the Applicant to be allowed to partition the suit property as per the copy of the Mutation Forms attached. Such Mutation Forms had not been attached before and therefore the Orders granted were not a duplication of earlier Orders.

iii) Did the Magistrate issue new orders while similar orders had been executed and subdivision carried out?

It is the Appellant who has alleged and the onus was upon him to prove his allegations. The Appellant had a duty to prove the existence of similar orders to the new orders that he had alleged were issued. These Orders were not attached to the Record of Appeal. Similarly there was no evidence available to prove or confirm that subdivision had been carried out. The Court finds that this ground was just a mere allegation with no proof of the same.

iv) Did the Learned Magistrate give correct orders?

The bone of contention was on how to subdivide the suit property into two portions one measuring 1.7 acres for the Plaintiff and the other 1.6 acres for the Defendant. The Orders allowed by the Learned Magistrate was to the effect that the suit land should be partitioned as per the copy of the attached Mutation Form. The said prayers sought did not at all change the initial order but were meant to enforce the execution of the earlier Court Order issued on **7th January 1988**.

Consequently, this Court finds that the Learned Magistrate gave correct Orders under the circumstances given that the Orders of **1988** had never been fully executed.

iv) Is the Appeal herein merited?

As the Court had earlier observed, the Appellant failed to attach the Order that is being appealed against. He also failed to attach the similar Orders that he alleged were duplicated and evidence of the alleged subdivision. Failure to attach the Order appealed against rendered the Appeal incompetent and thus not merited. See the case of James Obere Ockotch...Vs...East African Building Society & Others, Civil Appl.No.2 of 1996, where the Court held that:-

“If the Record of Appeal does not contain a certified copy of Decree, the same is fatally defective”.

Further in the case of R...Vs...District Commissioner, Machakos Civil Appeal No.121 of 1992, the Court held that:-

“If the Record of Appeal does not contain a certified copy of the Decree, the Appeal is incompetent...”

Therefore from the above decisions of the Court of Appeal, and given that the Appellant failed to attach a certified copy of the Order appealed against, the Court finds that the Appeal herein is incompetent and therefore not merited.

vi) What Orders should issue as to costs?

Ordinarily costs do follow the event. The Appellant's Appeal has been found not merited. Therefore the Respondent is the successful litigant and he is consequently entitled to cost of the Appeal herein.

Having now carefully considered the instant Appeal as filed by the Appellant, the Court finds it not merited and the same is dismissed entirely with costs to the Respondent herein.

It is so ordered.

Dated, Signed and Delivered at Thika this 19th day of June 2018.

L. GACHERU

JUDGE

In the presence of

Mr. Waweru holding brief Mr. Karuga Wandai for Appellant

M/S Kinyua for Respondent

Lucy - Court clerk.

L. GACHERU

JUDGE

Court – Judgement read in open court in the presence of the above advocates.

L. GACHERU

JUDGE

19/6/2018