



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 09 OF 2015

(BEING AN APPEAL FROM THE JUDGMENT OF E.W WAMBUGU R.M IN CMCC NO. 129 OF 2011)

MOSES KIRIIRI MUTHIRU.....APPELLANT

VERSUS

KIMATHI MUTHIRU.....1ST RESPONDENT

KAIRIRA MUTHIRU.....2ND RESPONDENT

KARANI MUTHIRU..... 3RD RESPONDENT

JUDGMENT

Introduction

1. The appellant was the defendant while the respondents were the plaintiffs in the lower court case. (CMCC 129 of 2011). In that case the plaintiffs had claimed that Kimathi Muthiru was the recorded owner of parcel no. 1970 measuring 0.5 acres, that Kairira Muthiru was the recorded owner of land parcel no. 1186 measuring 0.5 acres while Karani Muthiru was the recorded owner of land parcel no.1827 measuring 0.19 acres, whereby all the parcels are situated within Uringu 1 adjudication section (see- paragraph 5 of the plaint).

2. The plaintiffs also pleaded that defendant is the recorded owner of parcel No. 1969 measuring 1.5 acres also situated within Uringu 1 adjudication section. The plaintiffs claimed that the defendant had interfered with boundary marks between his parcel of land and the plaintiffs' parcels of land.

3. The plaintiffs further claimed that they reported the issue to the district land adjudication and settlement officer (DLASO) Tigania, to resolve the boundary dispute whereby the DLASO embarked on the process of resolving the dispute. However, defendant apparently brought people who disrupted the process and he also threatened the DLASO such that the resolution of the dispute aborted.

4. The plaintiffs had sought for an order that the boundaries of the land parcels number 1969, 1970, 1186 and 1827 be measured determined and fixed by the DLASO and the District land surveyor. The plaintiffs also prayed for the eviction of the defendant from plaintiffs parcels of land no. 1970, 1186, and 1827 all situated within Uringu Adjudication Section.

5. Defendant, before the lower court had generally denied the plaintiffs claim.

6. It emerged during the trial that parties to the suit are brothers.

The Evidence

7. The 2nd plaintiff Kairira Muthiru testified as PW 1. He stated that his land parcel is 1186. He averred that when the dispute arose they sought to have the boundary dispute resolved through the offices of the land department but defendant made this impossible. According to PW 1 the defendant interfered with the boundary around the year 2010 while the attempted dispute resolution process occurred in 2011. PW1 wondered why the defendant was opposing the process of ascertainment of the boundary. PW 3 Francis Karani Muthiru was also praying that the boundaries of the parcels of land be ascertained.

8. PW 4 one Amos Muli Musyoka introduced himself as the DLASO of Tigania East and West Districts during the relevant period. He testified that there was a boundary dispute between the parties, whereby he received the complaint on 20th April 2011 from the plaintiffs concerning parcels of land no. 1969,1970,1186 and 1827 in Uringu II adjudication section.

9. The plaintiffs were apparently complaining that the common boundary had been tampered with. PW 4 embarked on the process of resolving the dispute by sitting with the land adjudication committee, the demarcation officer and the parties. Their investigations revealed that the defendant may have tampered with the boundary from its original position either after demarcation or during the demarcation period. The DLASO wanted a ground visit. This however was not possible because defendant scuttled the process. Defendant had threatened the DLASO saying that the latter would not come back alive if he visited the land. Apparently the DLASO had had an experience whereby he had been threatened if he visited another parcel of land in Tigania and when he made that decision to visit the place he was attacked. This is why this time round he advised the plaintiffs to seek redress in court.

10. PW 4, the DLASO produced a letter dated 1st April 2011 as an exhibit, which captures the particulars of the complaint lodged by the plaintiffs.

11. Moses Kiriiri Muthiru testified as DW1 where he confirmed that indeed his land parcel measures 1.5 acres, while the plaintiffs have parcels of land neighboring his land. He avers that in 2010 Kairira Muthiru had summoned him into the lands office, whereby Kairira wanted to confirm the boundaries of his land. The area demarcation officer went with his committee members to the land and confirmed the boundaries between parcels of land no. 1970 and 1186. They also confirmed the boundaries between land parcels no. 1186 and 1969 as well as the boundaries between parcel no. 1827 and 1969. DW 1 stated that all parties were present and everyone was satisfied.

12. DW 1 further stated that there after Kairira Muthiru approached another demarcation officer i.e. Mr. Musyoka who went through the demarcation map and was satisfied.

13. While being cross examined DW 1 stated that he would not suffer any prejudice if the court and an expert went to the land and ascertained the boundary. He also avers that he never chased Mr. Musyoka and his team away.

14. DW 2 was one Stephen Kithure Murimi Ambutu, who testified that he is a committee member of Uringu I land committee. He avers that the objections in Uringu 1 were concluded in year 2007. He says that the plaintiff did lodge a boundary dispute claim with the committee and therefore he went to the site with demarcation officer and his fellow committee members and they looked at the map from the land office which map had been used to fix beacons.

15. DW 1 claims that it is thereafter that the deputy DLASO, Mr. Musyoka came and informed them that there was a case between the parties. DW 2 further stated that there is no problem if boundaries are to be re-fixed if any one interferes with them after demarcation.

16. DW 3 was one Jeremiah Mworira Muthiru who is a brother of the litigants. He testified that the boundary has been intact sine the date of demarcation which was 1994. He doesn't therefore understand why the plaintiffs filed the present suit.

17. In the Judgment delivered on 29th January 2015 the court found that the plaintiffs had proved their case on a balance of probabilities and proceeded to enter judgment as follows:

(i) The boundaries to the land parcels no. 1969, 1970, 1186 and 1827 situated in Uringu I adjudication section be measured determined and fixed by the DLASO and the land surveyor.

(ii) Upon execution of order (i) above if the defendant has encroached on any part of land parcel nos. 1970, 1186 and 1827 in Uringu 1 adjudication section, the defendant shall within 30 days vacate the encroached land.

(iii) The plaintiff will have the cost of suit with interests.

The memorandum of appeal

18. The present appeal was prompted by the aforementioned judgment. The memorandum of appeal was filed on 18th February 2015 and contains six grounds.

(i) That the learned trial magistrate erred in law and in fact in holding that she had jurisdiction to hear and determine the matter before her.

(ii) The learned trial magistrate erred in law and fact in her interpretation of the land adjudication Act and the land consolidation act and as a result came to wrong conclusions.

(iii) The learned trial magistrate erred in law and fact in that she failed to evaluate the material evidence placed before her and came to wrong conclusions.

(iv) The judgment of the learned resident magistrate is against the weight of evidence.

(v) The learned magistrate erred in law and fact in ignoring and failing to sufficiently consider the appellant's case and the evidence that was adduced.

(vi) The judgment of the learned resident magistrate is bad in law.

19. This Court is conscious of its role as the first appellate court as stated in **SELLE vs. ASSOCIATED MOTOR BOAT CO. LTD. [1965] E.A. 123**, and the court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own

conclusions in the matter. This court must, however bear in mind the fact that it neither saw nor heard the witnesses and to make due allowance for that.

20. On 12.10.2017 the court gave directions for the appeal to be canvassed by way of written submissions. Such submissions have duly been filed.

Appellant's submissions

21. The appellant has submitted that the consent given by the DLASO under section 8 of the Land consolidation Act was given to the High Court Meru and not the chief magistrate court.

22. It is also submitted that the title deeds have been issued in respect of the suit parcels and therefore the DLASO lacked jurisdiction to deal with the disputes. On this point the appellants cited the case of Peter Kimandiu versus DLASO Tigania West District and 4 others Nyeri court of Appeal Civil Appeal NO. 28 of 2015.

23. The appellant has also submitted that the maps which had been produced by the defendant clearly indicated that the committee had decided and fixed the boundaries during A/R Objection stage.

Respondent's submissions

24. The respondents have submitted that a consent was duly filed when the suit was instituted by the present respondent in the lower court. The defendants had apparently raised a preliminary objection against the entire suit for want of consent.

25. The preliminary objection was dismissed by the trial court and thereafter the defendant being dissatisfied with that ruling appealed to this court vide ELC Appeal No. 25 of 2012. This appeal was dismissed. The respondents contend that the issue of consent is res judicata.

26. The respondents have submitted on ground 2-6 together, and they aver that they were not challenging the adjudication register under section 26, 27 and 28 of the land consolidation act. What they were seeking is the fixing of the boundaries. They aver that the DLASO Mr. Musyoka attempted to resolve the dispute but was prevented from doing so by the appellant.

27. On the issue that the parcels of land are now registered and that the land consolidation act is not applicable, the respondent aver that such issues were not part of the judgment and therefore cannot be part of the appeal. The respondent's states that they only desire the surveyor to visit the concerned land parcels and fix the boundaries.

Determination

28. Ground 1 (on consent).

As rightly submitted by the respondents, it is evident that a Preliminary Objection was raised by the present appellant before the lower court, whereby he was challenging the consent that had been availed when the suit was filed. A ruling to that effect was delivered by the Magistrate where by the preliminary objection was dismissed. An appeal was thereafter lodged by the appellant in ELC Case no. 25 of 2012 which file I have had a chance to peruse. In a ruling delivered by Judge Njoroge on 20th February 2013, that appeal was dismissed. I therefore find that indeed the issue of consent is res judicata.

29. I will deal with ground 2 - 6 together. I find it necessary to first deal with the issue of the applicable law. In the appellants reply to the respondents submissions (filed on 4.4.2018), it is submitted that all the respective parcels of land have been registered under the land registration act. He has also annexed a copy of title deed for his parcel number Nyambene/Uringu1/1969 which indicates that Moses Kiriiri Muthiru became the registered owner of this land on 12th January 2014. The said parcel measures 0.62 ha.

30. I find that the issue of registration of parcels of land under the land registration act was never raised by any of the parties before the trial court. The trial magistrate could not therefore determine an issue that she was not aware of. What is apparent is that the suit before the lower court was filed on 19.5.2011, and by then no title deeds had been issued. It follows that the land registration act was not applicable during the trial before the Magistrate.

31. It has emerged that the law applied in the adjudication process in Uringu 1 adjudication section was the land consolidation act. The appellant claims that the respondents did not file any objection as provided for under the act. However it has emerged in the evidence of one of the appellant's witnesses (DW 2 – Stephen Kithure) that the objections in this part of the land were concluded in the year 2007. The respondent's case was that the appellant had encroached on their parcels of land in the year 2010. It follows that the respondents could not have pursued the dispute resolution mechanism under section 26 of the land consolidation act.

32. Since the time for filing objections had lapsed and yet the title deeds had not been issued, a question then arises as to how land disputes like the one the parties had were to be resolved during this intervening period. DW 2 had stated that there was no problem in the re-fixing of boundaries if such boundaries are being interfered with.

33. The trial magistrate had in her judgment captured the following pertinent information **“the defendant during cross examination admitted that he doesn't stand to suffer any prejudice if the boundaries are ascertained. DW 2 in cross examination agreed that the lands may be re-measured if there was interference after demarcation was concluded. The court cannot shut its eyes in such a case where action has not been taken to resolve a dispute”**.

34. I am inclined to find that the trial magistrate properly evaluated the evidence presented before her and arrived at the correct conclusion. Even as at now there is no plausible explanation as to why the appellant is averse to the resolution of the dispute. On the other hand it is apparent that what the respondent's desire is to have the dispute resolved.

35. It is noted that the appellant has availed only his title deed. It is not certain whether title deeds in respect of the other suit parcels have been issued. The respondents claim that they are not aware as to whether the other suit parcels are now registered or not. I am of the view that the land is now in transition from the former tenure system under adjudication statutes to the registered system under the land registration act.

36. In the circumstances the court proceeds to uphold the judgment of the trial magistrate delivered on 29th January, 2015 With the following moderations:

(i) The boundaries to land parcels no 1969, 1970, 1186 and 1827 situated in Uringu 1 adjudication section are to be measured, determined, and fixed by the joint collaboration of the district land registrar, the district land surveyor and the district land adjudication and settlement officer.

(ii) Upon the execution of order 1 above if the appellant (formerly defendant) is found to have encroached on any part of land parcel no. 1970, 1186 and 1827 in Uringu 1 adjudication section, he should within 30 days vacate the portion he has encroached on.

(iii) The appeal is dismissed whereby appellant is condemned to pay the costs of the appeal as well as the costs in the lower court.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 11TH DAY OF JULY, 2018 IN THE PRESENCE OF:-

Court Assistant: Janet/Galgalo

Munga for appellant

Miss Wambugu holding brief for Wanjohi for respondent

HON. LUCY. N. MBUGUA

ELC JUDGE