



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

CIVIL APPEAL NO. 191 OF 2013

SETH MBITHE KIOKOAPPELLANT

VERSUS

BERNARD WAMBUARESPONDENT

(Being an Appeal from the Ruling of Machakos Chief Magistrate's Court in Civil Misc. No. 60 of 2006 delivered on 20th September, 2013 by Hon. P.N. Gesora, Senior Principal Magistrate)

JUDGMENT

1. On 11th December, 2012, Hon. P.N. Gesora allowed the Appellant's Application dated 19th June, 2012 in which she had sought that the District Land Registrar be ordered to issue a Title Deed for parcel of land known as Mitaboni/Mutituni/1423 and that the boundary between parcels of land known as Mitaboni/Mutituni/1376 and 1423 be reinstated.
2. However, on 20th September, 2013, the same court set aside the orders of 11th December, 2012. The orders setting aside the orders of 11th December, 2012 are the subject of the present Appeal.
3. In her Memorandum of Appeal, the Appellant has averred that the learned Magistrate erred by setting aside her orders of 11th December, 2012; that the Magistrate erred by disregarding the Award of the Disputes Land Tribunal and that the Magistrate erred by ignoring the Confirmation of Grant and the Report of the Surveyor, one Getrude K. Ngumbi and accepted the report of C.M. Musau.
4. The Appeal seeks to have the Ruling of the Magistrate made on 20th September, 2013 set aside.
- 5 The Appeal proceeded by way of written submissions.
6. The Appellant submitted that she lodged a claim for her late husband's land through the Central Division Disputes Tribunal Board claiming that the Respondent had encroached on parcel of land known as Mitaboni/Mutituni/1425; that the Tribunal ordered the Machakos District Surveyor to go and reinstate the boundary between plots 1423 and 1376 and that the said Award was confirmed as the Judgment of the court on 25th July, 2003.
7. The Appellant submitted that vide an Application dated 23rd November, 2010, the court directed the surveyor to establish the boundary between plots 1423 and 1376, which order was complied with and that the Respondent cannot deny her the land that she has used all along.
8. The Appellant submitted that the Ruling of the lower court of 20th September, 2013 should be quashed.

9. On her part, the Respondent's advocate submitted that notwithstanding the fact that the court had become *functus officio*, the Appellant filed in the lower court an Application seeking "*reinstatement of the boundary between the two parcels of land; that a sketch map was annexed on the said Application and that the court allowed the Application.*"

10. The Respondent's counsel submitted that under Section 7 (2) of the Land Disputes Tribunal Act (*repealed*), the Magistrates' court was only allowed to enter Judgment in accordance with the Tribunal's Awards; that the process of execution of the lower court's decree was completed on 8th March, 2011 and that the court corrected its subsequent error *vide* the Ruling appealed from.

11. It is not in dispute that on 27th March, 2006, the Central Division Lands Disputes Tribunal delivered its Award in Case No. 1 of 2005.

12. In that matter, the Appellant had sued the Respondent claiming that during the demarcation process, the Respondent encroached on her land and that her late husband was the registered proprietor of parcel of land No. Mitaboni/Mutituni/1425 and 1423 which borders the Respondent's land being Plot No. 1376.

13. The Respondent denied that he had encroached on plot number 1423 as alleged.

14. After hearing the parties, the Tribunal concluded as follows:-

"1. The Machakos District Surveyor should go and reinstate the common boundary for land parcel 1376 and the surrounding as were fixed during the demarcation period.

2. Mrs. Seth Mbithe Kioko should get letters of administration in order for her to establish and claim for her late husband's land parcel No. Mitaboni/Mutituni/1423.

3. Each party to meet its own costs for this case."

15. The Tribunal's Award was adopted by the Magistrate in Civil Miscellaneous Case No. 60 of 2006.

16. The record shows that on 23rd November, 2010, the Appellant filed an Application in which she sought for the enforcement of the Award and the Judgment of the court. In the Application, the Applicant prayed for the following orders:

"1. The District Land Surveyor be and is hereby ordered to reinstate the common boundary surrounding Mitaboni/Mutituni/1376 and Mitaboni/Mutituni/ 1423 as were fixed during demarcation period.

2. Costs of the Application be provided for."

17. The record shows that the District Surveyor prepared a report dated 11th May, 2012 in which she stated that "*the common boundary was re-established as per the preliminary index diagram map number 11...*". The sketch map was annexed on the said report.

18. After the said report was filed in court, the Appellant filed another Application dated 19th June, 2013 in which she sought for an order directing the District Land Registrar to issue her with the Title Deed for parcel of land number Mitaboni/Mutituni/1423 on map 11. That Application was allowed by the learned Magistrate on 11th December, 2012.

19. The Respondent was aggrieved with the Ruling of 11th December, 2012. On 11th July, 2013, the Respondent filed an Application seeking for a review of the orders of 11th December, 2013.

20. The Respondent's Application was premised on the grounds that plot No. 1423 and 1376 do not share a boundary; that two parcels of land are on different sheet maps and that the joint surveyor's reports

confirmed that fact.

21. It was the Respondent's case that the orders of 11th December, 2012 do not accord with the Award of the Tribunal.

22. The lower court agreed with the Respondent's arguments and set aside its orders of 11th December, 2012.

23. I have perused the Award of the Tribunal which I have reproduced above. I have also perused the reports of the surveyors that were filed in the lower court.

24. Section 7(2) of the Land Disputes Tribunal Act (*repealed*) allowed the Magistrate's court to enter Judgment in accordance with the Tribunal's Award, and to issue a decree thereon, which would then be executed in accordance with the provisions of the Civil Procedure Act.

25. The Award of the Tribunal was that the Machakos District Surveyor should reinstate the common boundary for land parcel 1376 and the surrounding parcels as were fixed during the demarcation period.

26. The Tribunal did not at any particular point state that plot number 1376 had a common boundary with plot 1423 or that indeed plot number 1423 was on registry map number 10 or 11.

27. The District Surveyor complied with the order of the court and reproduced a sketch showing the common boundaries of parcel number 1376. The sketch plan that was annexed on his report clearly shows the neighbouring plots. None of the neighbouring plot is plot number 1423.

28. Indeed, the report of the District Surveyor shows that plot number 1376 is found on sheet number 11.

29. Consequently, it was erroneous for the Magistrate to have found and held that there is a boundary between the two parcels of land, when that was not the position.

30. In the circumstances, and having realized the error on the face of the record, the learned Magistrate correctly set aside the order of 11th December, 2012 in her Ruling of 20th September, 2013.

31. For those reasons, I find that the Appellant's Appeal is unmeritorious and I dismiss it with costs.

DATED AND DELIVERED AT MACHAKOS THIS 3RD DAY OF MARCH, 2017.

OSCAR A. ANGOTE

JUDGE