



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC APPEAL NO. 33 OF 2014

ALEX GICHIRA MWATHA.....APPELLANT

VERSUS

SAMUEL MWANGI SHABANA.....RESPONDENT

(BEING AN APPEAL FROM THE JUDGMENT DELIVERED ON 16TH MAY, 2013 BY HON. S. JALANG'O – Ag. S.R.M AT BARICHO PRINCIPAL MAGISTRATE'S COURT CIVIL CASE NO. 10 OF 2013)

JUDGMENT

The Appellant is the owner of the land parcel No. KIINE/KIBINGOTI/NGUGUINE/2529 while the Respondent is the owner of land parcel No. KIINE/KIBINGOTI/NGUGUINE/2528.

By a plaint filed in the **PRINCIPAL MAGISTRATE'S COURT BARICHO Civil Case No. 10 of 2013**, the Appellant sought orders that the Court determines and rectifies the border between the above parcels of land. The matter did not however proceed to full trial because by a ruling delivered on 16th May 2013, the trial magistrate **S. JALANG'O** Acting Senior Resident Magistrate struck out the plaint citing lack of jurisdiction in the matter since the boundary between the two parcels of land had not yet been determined as provided under **Section 21 (4) of the repealed Registered Land Act**.

Aggrieved by that ruling, the Appellant filed this appeal and has put forward the following grounds:

- 1. That the learned Ag. Senior Resident Magistrate erred in law and in fact in failing to make a finding of fact and law on key ingredients of determination and rectification of already existing Border as inserted by the surveyor in mutation form dated 19.06.2002.***
- 2. That the learned Ag. Senior Resident Magistrate erred in law and fact by failing and/or ignoring to scrutinize the contents of the plaint and list of documents annexed thereof to discover that the Border marks are intact and in place set by registered surveyor in mutation form dated 19.06.2002 only that they have been interfered with by the Respondent herein.***
- 3. That the learned Ag. Senior Resident Magistrate erred in law and fact by misleading himself as he decline to enter judgment in favour of plaintiff thereof in his prayers determination and/or rectification of Border marks already existing by quoting irrelevant registration of Land Act.***
- 4. That the learned Ag. Senior Resident Magistrate erred in fact and law by referring to Section 142 (1) of Registration of Land Act No. 3 of 2012 which Act referred correctly to determination and as rectification of Border marks which Border were already put in place and exist by Registrar of Land under the cited Act.***

5. *That the learned Ag. Senior Resident Magistrate completely erred in law and fact by deliberately mixing issues contested in that he asserts that “in the present case, the Court has no jurisdiction to deal with issues of rectification under Section 21 (4) of the Registered Land Act unless the boundaries have been determined which in the suit in question were already determined and inserted on 19.06.2002 by Registrar of Land under the said Act”.*

6. *That the learned Ag. Senior Resident Magistrate erred in fact and in law by misleading himself in failing and/or ignoring to realize that the defendant thereof did not contest and/or object the rectification of the one existing Border mark but rather the entire original piece of land KIINE/NGUGUINE/266 approximately 2.14 Ha Registry map 7 and 9.*

7. *That the learned Ag. Senior Resident Magistrate erred in fact and law by failing and/or ignoring to recognize that Photostat copies of part of map sheet No. 7 and 9 of contested existing Border marks were filed in Court showing existence of Border marks.*

8. *That the learned Ag. Senior Resident Magistrate erred in law and fact by not fully considering the plaintiff's prayers in the plaint that the same prayers were rectification of already existing Border marks as opposed to his ruling in reference to the erroneous Section 142 (1) of the Registration of Land Act No. 3 of 2012.*

9. *That the learned Ag. Senior Resident Magistrate erred in law and fact by failing to recognize the fact that the Registrar of Land Kerugoya on many occasions had attempted to rectify the already existing Border makes interfered with by the defendant but rather the defendant has always made it virtually impossible for the said Registrar to rectify the said existing Border marks without a Court order to do so.*

10. *That the learned Ag. Senior Resident Magistrate erred in law and fact by failing to realize that the defendant did not state his objection in his memorandum of defence, did not state the dismissal of the suit nor did the defendant object to any triable reasons in his incoherent defence. The Ag. Senior Resident Magistrate therefore unfortunately arrived at the wrong decision and/or ruling.*

As the parties are acting in person, the appeal was canvassed orally although the Appellant had already filed written submissions.

This appeal can easily be determined by considering whether or not the trial magistrate erred in law by ruling that he had no jurisdiction to handle this dispute.

As indicated above, the dispute between the parties in the subordinate Court was the determination of the boundary between their two parcels of land mentioned above. In the course of hearing an application by the Appellant that the Respondent's defence be struck out and judgment be entered for the Appellant as prayed in the plaint, the trial magistrate was of the view that **Section 21 (4) of the repealed Registered Land Act** did not grant him jurisdiction to determine the dispute since the boundary to the two parcels of land had not been determined as required by that section which reads:

“No Court shall entertain any action or other proceedings relating to a dispute as to boundaries of registered land unless the boundaries have been determined as provided in this section”

A similar provision is found in **Section 18 (2) of the new Land Registration Act 2012** which reads:

“The Court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section”

In his appeal, the Appellant appears to take issue with the fact that the trial magistrate made a decision to down his tools on grounds not raised in the defence. An issue of jurisdiction ought to be disposed of at

the earliest opportunity and the Court can even act suo motto without having to wait to be moved by any of the parties to a litigation before it. In the case of **OWNERS & MASTERS OF THE MOTOR VESSEL "JOEY" VS OWNERS & MASTERS OF THE MOTOR TUG "BARBARA" AND "STEVE B" (2008) 1 E.A 367**, the Court of Appeal expressed itself as follows:

"The question of jurisdiction is a threshold issue and must be determined by a Judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it"

The Court then went on to add that:

"It is for that reason that a question of jurisdiction once raised by a party or by a Court on its own motion must be decided forthwith on the evidence before the Court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the Court" Emphasis added

In the case subject of this appeal, the trial magistrate, citing the case of **OWNERS OF THE MOTOR VESSEL "LILLIAN S" VS CALTEX OIL KENYA LTD 1989 K.L.R 1** and also having referred to **Section 21 (4) of the repealed Registered Land Act** rightly held that he had no jurisdiction and downed his tools by striking out the plaint. The trial magistrate neither erred in law or fact in arriving at that decision and this Court must up-hold him. From the record, it is clear that the boundary between the two parcels of land had not been determined by the Registrar as required by **Section 21 (2) of the repealed Registered Land Act** which provides that:

"Where any uncertainty or dispute arises as to the position of any boundary, the Registrar, on the 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".

The Appellant in ground 4 of his memorandum of appeal suggest that the Border marks had already been put by the Registrar of Land. But the evidence on record suggests otherwise. Part of the record is a letter dated 19th December 2012 by the District Surveyor Kirinyaga and addressed to the parties herein. The relevant portions of that letter read as follows:

"BOUNDARY DISPUTE SUMMONS

TITLE NO. KIINE/KIBINGOTI/NGUGUINE 2529

The proprietor of that piece of land comprised in the above title Mr/Mrs ALEX GICHIRA MWATHA.

Has applied to me under Section 21 (2) of the Registered Land Act to determine the disputed boundary between his/her and your land which is title No. KIINE/KIBINGOTI/NGUGUINE/25288.

I shall therefore visit the disputed boundary to determine and indicate its position on 22nd day of January 2013 at 12 .00 noon"

There is no evidence in the file, and obviously none was placed before the trial magistrate, to demonstrate that the determination of the boundary was done on 22nd day of January 2013 as had been arranged by the District Surveyor. If that was done, then the onus was on the Appellant to avail such evidence to the trial magistrate or even this Court. In the circumstances therefore, the trial magistrate was justified in declining jurisdiction in the matter before him.

The up-shot of the above is that the appeal is devoid of merit. It is accordingly dismissed with costs.

B.N. OLAO

JUDGE

28TH JULY, 2017

Judgment delivered, dated and signed in open Court this 28th day of July 2017

Appellant absent

Respondent present

Right of appeal explained.

B.N. OLAO

JUDGE

28TH JULY, 2017