



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC APPEAL NO. 44“A” OF 2014

JOSEPH GITONGA WANYEKI.....APPELLANT

VERSUS

CHRISTOPHER KINYORO KIHIA.....RESPONDENT

AND

EPHANTUS WACHIRA KITHAKA.....1ST INTERESTED PARTY

MERCY WAIRIMU WACHIRA.....2ND INTERESTED PARTY

PURITY NJAMBI MURIITHI.....3RD INTERESTED PARTY

JAMES ITEMO NGIGI.....4TH INTERESTED PARTY

KAROGOI CHOMBA.....5TH INTERESTED PARTY

PHOEBE NJERI KARIITHI.....6TH INTERESTED PARTY

MARY WAMBUI WANGUI.....7TH INTERESTED PARTY

REGISTERED TRUSTEE

METHODIST CHURCH KENYA-MWEA TOWN.....8TH INTERESTED PARTY

CHRISPIN NJUE MBOGO.....9TH INTERESTED PARTY

ANTONY MUCHAI MUIRURI.....10TH INTERESTED PARTY

TERESIA MUTHONI NGARI.....11TH INTERESTED PARTY

(BEING AN APPEAL FROM THE RULING DELIVERED ON 22ND MAY, 2014 BY HON. S. NGII – R.M AT WANG’URU PRINCIPAL MAGISTRATE’S COURT CIVIL CASE NO. 100 OF 2013)

RULING

JOSEPH GITONGA WANYEKI (The Appellant herein) was the defendant in **WANGURU PRINCIPAL MAGISTRATE'S COURT CIVIL CASE No. 100 of 2013** where he had been sued by **CHRISTOPHER KINYORO KIHIA** (the Respondent herein) who was seeking judgment in the following terms:

(a) A permanent injunction restraining the defendant, his agents, servants and/or anyone else claiming on his behalf from interfering with the plaintiff's land parcel No. MWEA/TEBERE/B/2189 measuring 0.10 Hectares.

(b) An order for demolition of the perimeter wall erected by the defendant on the plaintiff's land parcel No. MWEA/TEBERE/B/2189.

(c) General damages for trespass.

(d) Costs of this suit together with Auctioneers fees.

(e) Any other relief that this Honourable Court may deem fit and just.

The Appellant filed an amended defence in which he stated that he had erected a stone wall on his part of the access road and therefore the Court should not grant the order of permanent injunction nor one for the demolition of the wall. He also denied having trespassed onto the Respondent's land. He also then made this interesting pleading in paragraph 7 (b) of the amended defence:

7 (b) "That the defendant wishes to include other adjacent neighbours as interested parties of land parcel No. MWEA/TEBERE/B/2186, MWEA/TEBERE/B/2187, MWEA/TEBERE/B/2188, MWEA/TEBERE/B/2191, MWEA/TEBERE/B/2192, MWEA/TEBERE/B/2193, MWEA/TEBERE/B/2194, MWEA/TEBERE/B/2195, MWEA/TEBERE/B/2196, MWEA/TEBERE/B/2197, MWEA/TEBERE/B/2198 and MWEA/TEBERE/B/2189 to enable this Honourable Court to ascertain the discrepancy in boundaries is arising and prays that measurements be taken to ascertain correctness of the boundaries"

By an application dated 20th March 2014, the Appellant citing the provisions of **Section 3A of the Civil Procedure Act** moved to Court seeking the following orders:

1. That this Court do order the District Surveyor Kirinyaga County to survey land parcels No:

MWEA/TEBERE/B/2186,

MWEA/TEBERE/B/2187,

MWEA/TEBERE/B/2188,

MWEA/TEBERE/B/2189

MWEA/TEBERE/B/2190

MWEA/TEBERE/B/2191,

MWEA/TEBERE/B/2192,

MWEA/TEBERE/B/2193,

MWEA/TEBERE/B/2194,

MWEA/TEBERE/B/2195,

MWEA/TEBERE/B/2196,

MWEA/TEBERE/B/2197,

MWEA/TEBERE/B/2198 being sub-divisions of land parcel No. MWEA/TEBERE/B/522 and ascertain the boundaries on the ground and file the report in Court within 30 (thirty) days.

2. That OCS Wanguru Police Station do provide security during the exercise.

3. That costs of this application be provided for.

That application was based on the main ground that there are discrepancies over the boundaries of land parcels No. MWEA/TEBERE/B/2186 and MWEA/TEBERE/B/2198.

According to the submissions filed by the Appellant's counsel, that application was opposed though I have been un-able to trace the replying affidavit in the file. That is not of importance for purposes of this ruling. What is important is that by a ruling dated 22nd May 2014, the trial magistrate **HON. S. NGII** – Resident Magistrate dismissed that application thus provoking this appeal.

The following grounds of appeal have been raised:

1. That the trial magistrate erred in law and in fact to hold that the resurvey of the land would assist the Court in arriving at a just conclusion of the case.

2. That the trial magistrate erred in law and fact in holding that the application was frivolous and that the Appellant was fishing for evidence.

3. That the trial magistrate erred in law and in fact in failing to appreciate that though the Respondent and the Appellant's land being MWEA/TEBERE/B/2189 and MWEA/TEBERE/B/2190 had originated from land parcel No. MWEA/TEBERE/B/522 and it was clear there was over-lapping between all the plots in that line being sub-divisions of land parcel No. MWEA/TEBERE/B/522.

4. That the trial magistrate erred in law and fact in failing to allow measurements to be taken for the suit land yet the eleven interested parties were joined in this case due to overlapping of their plots and they had not opposed the application.

5. That the trial magistrate erred in law and in fact in failing to appreciate that a dispute of encroachment/trespass could not be determined when there was a dispute as to size of the ground and measurements as to area encroached/trespassed needed to be established.

6. That the trial magistrate erred in law and in fact in holding that the parties could rely on a Land Registrar's Report yet the said report was disputed at it had no measurements, was done without hearing the parties and was vague and ambiguous.

7. That the trial magistrate erred in law and fact in holding that parties should rely on the report of the Land Registrar.

8. That the trial magistrate erred in law and fact in dismissing the Appellant's application.

The Appellant therefore prays that the said ruling be set aside and be substituted with an order allowing the application dated 20th March 2014. The Appellant also prays for costs of the appeal.

On 24th October 2016, I directed that the appeal be canvassed by way of written submissions and although **MS THUNGU** advocate for the Appellant filed and served her submissions on counsel for the Respondent **MR. KAIMA**, no reply had been filed by the Respondent by 15th December 2015 and this

Court directed that ruling would be on notice.

I have considered the appeal and the submissions by the Appellant.

It is important at this stage to observe that in the course of the proceedings in the trial Court, the parties by consent referred the dispute to the District surveyor Kirinyaga to establish the respective beacons of land parcels No. MWEA/TEBERE/B/2189 and MWEA/TEBERE/B/2190. However, the report that was subsequently filed was inconclusive and did not aid the Court at all.

In my view, this appeal can easily be determined on grounds 1, 2 and 5 of the memorandum of appeal. The issues raised therein are that the trial magistrate erred in law and in fact in failing to hold that re-survey of the land would assist the Court, that the Appellant was fishing for evidence and that a dispute of encroachment/trespass could not be determined when there was a dispute as to size of the ground.

It is clear to me that by his application dated 20th March 2014, the Appellant was clearly jumping the gun. It is the Respondent who had sued him seeking the various remedies described above. The burden of proving those allegations was always going to be on the Respondent and not on the Appellant. **Section 107 of the Evidence Act** provides as follows:

107 (1) "Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist"

107 (2) "When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person".

Surely, it was going to be the duty of the Respondent (as the plaintiff in the trial Court) to prove that the Appellant had built a wall on his (Respondent's) land parcel No. MWEA/TEBERE/B/2189 which should therefore be demolished and that the Appellant was therefore liable to pay the Respondent damages for trespass. It is therefore not clear to this Court why the Appellant found it necessary to seek the Court's assistance in having the District surveyor determine the boundaries at the land parcels listed in the application dated 20th March 2014. The Appellant was clearly on a fishing expedition and sought the Court's assistance in that regard. The trial Court rightly rejected the invitation to do so. The role of the Court is to adjudicate on the issues presented to it by the parties. And the parties carry the burden of adducing evidence in proof of their respective cases. It has never been the business of the Court to descend into the arena of conflict because to do so will blur its vision and prevent it from delivering justice which is its core function.

Further, it is clear to me that the Appellant appears to think that the dispute between the parties is a boundary dispute. From the plaint filed in the trial Court, the Respondent has made it clear that the Appellant has encroached onto his land parcel No. MWEA/TEBERE/B/2189 and built a perimeter wall thereon which should be demolished and general damages paid for trespass. That presupposes that the boundaries to the parties' respective parcels of land have already been determined by the Land Registrar. If that has not been done, then it would mean that the Respondent's case in the trial Court is pre-mature and may be caught up by the provisions of **Section 18 (2) of the Land Registration Act** which reads:

"The Court shall not entertain any action or other proceeding relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this Section".

However, as I have already stated above, the plaint in the trial Court does not plead any boundary dispute. If there is a boundary dispute between the parties, then the Respondent will be well advised to reconsider his claim in the trial Court in view of the aforesaid provisions of the **Land Registration Act**.

The up-shot of the above is that this appeal is wholly un-meritorious. It is hereby dismissed with costs. This matter be mentioned before the Principal Magistrate at Wanguru Court on 24th July 2017 for directions as to the hearing of the main suit.

It is so ordered.

B. N. OLAO

JUDGE

14TH JULY, 2017

Ruling delivered, dated and signed in open Court this 14th day of July 2017

Mr. Ngigi for Mr. Kiama for Respondent present

Mr. Munene for Ms Thungu for Appellant present.

B. N. OLAO

JUDGE

14TH JULY, 2017