



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELCA NO. 23 OF 2014

KARIUKI ICHURA.....APPELLANT

VERSUS

KARIUKI WANJOHI..... RESPONDENT

JUDGMENT

1. The genesis of this appeal is an award of the Tetu Land Dispute Tribunal made on 8th April, 2003 in Tetu Land Dispute Tribunal Case No.12 of 2002.
2. In that claim, the appellant had moved the Tribunal for determination of a boundary dispute that existed between him and the respondent.
3. Upon hearing the respective cases of the parties herein, the Tribunal held:

“This tribunal with all due considerations, it has found it prudent to recommend that a Government surveyor visit the disputed boundary and rectify it. Any party found to have encroached inside the other’s land will pay the cost of this suit as well as any damage caused. This may be through the destroying of the birbed wire or vutting down trees.”
4. By a chamber summons dated 14th April, 2003 the appellant moved the lower court to wit Nyeri Principal Magistrate’s Court vide Nyeri PMC’s Land Award Case No. 10 of 2003 urging the court to enter judgment in terms of the award of the Land Disputes Tribunal.
5. By an order issued on 9th May, 2003 by consent of the parties, judgment was entered in terms of the award of the Land Disputes Tribunal.
6. On 26th April, 2010 the parties herein in a bid to give effect to the decree of the court issued pursuant to the above judgment recorded a consent in the following terms:

“This matter coming up for mention before the Honourable Senior Resident Magistrate Ole Keiwua on 26.4.2010, AND after hearing counsel for the Plaintiff and for the defendant;

IT IS HEREBY ORDERED BY CONSENT:

- 1. That the district land registrar nyeri do visit and fix the correct boundary with assistant of the district surveyor.**

2. Each party at liberty to appoint a private surveyor to accompany the district land registrar.

3. Report to be filed in court.”

7. By a notice of motion dated 14th January, 2012 the respondent moved the lower court *inter alia* seeking to set aside the consent orders referred to in paragraph 6 above on the grounds that it was at variance with the award, that the award expressly recommended that the Government Surveyor visit the disputed boundary and rectify it but not the Land Registrar and that the Government Surveyor had complied with the order adopting the award and the subsequent order made on 12th January, 2006.

8. The motion referred to in paragraph 7 above was allowed by Hon. E.K Makori PM, prompting the filing of this appeal.

9. The appeal is premised on the grounds that the Trial Magistrate (TM) erred by allowing the application without regard to the nature of the order sought to be reviewed; that TM erred by failing to take into account the appellant's replying affidavit; that the TM failed to take into account that the law in existence at the time of the order had been repealed thus coming to the wrong conclusion and that the TM erred by allowing the application which purported to set aside a consent order, thus wrongly setting a side the consent order.

10. The appeal was disposed of by way of written submissions.

11. On behalf of the appellant, it is pointed out that the order set aside by the impugned orders was a consent order and submitted that the respondent did not satisfy the conditions for setting a side the consent order. In that regard reference was made to the cases of **Flora Wasike v. Destimo Wamboko (1988)e KLR** and **James Mwashori Mwakio v. Kenya Commercial Bank Ltd (1998)e KLR**.

12. Explaining that the variation between the award and the judgment effected in respect thereof and the consent order reviewed was meant to cloth the judgment with legality and finality, counsel for the appellant submitted that under the Registered Land Act, Cap 300, it is the Land Registrar as opposed to the District surveyor who has the mandate to fix boundaries.

13. On behalf of the respondent, it is reiterated that the varied court order was at variance with the award and submitted that the court was right to set it aside. It is also reiterated that the judgment of the court that had been entered in terms of the award had not been set aside and had been implemented by the surveyor.

14. According to counsel for the respondent nothing new will come out of the appeal if the court upholds the consent order sought to be restored (at page 58 of the record of appeal).

Analysis and determination

15. As pointed out herein above, the appeal herein relates to the Order of Hon. E.K Makori made on 30th April, 2012 allowing the respondent's application dated 14th January, 2012 vide which the respondent sought to set aside the consent orders the parties to the application had recorded on 26th April, 2010 to the effect that **“the District Land Registrar do visit the disputed boundary between parcel nos. Degeke/Kahora/304 and indicate the correct boundary; District Land Registrar to be accompanied by the District Surveyor. Each party to be at liberty to appoint its own surveyor to accompany the officers mentioned above. The report to be availed to court within 60 days of the order.”**

16. The court record shows that when the application for setting aside the above consent order came up for hearing, the Trial Magistrate was informed that the respondent, though absent, had filed a response.

17. The court record shows that whereas the appellant had opposed the application, no reasons were given by the Trial Magistrate for disregarding the appellant's objection to the application while allowing the application. In this regard see the proceedings for the day in question which are as follows:

“The matter is for application. Ndirangu has filed reply. No appearance from respondent. we will seek that the application be allowed....

Court: Ruling at 11 a.m.

I have perused the record. Application dated 14th January, 2012 be and is hereby allowed with costs.”

18. By failing to give reasons for his decision to allow the application the Trial Magistrate breached **Order 21 Rule 4** of the Civil Procedure rules which provides as follows:

“Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.”

19. The order sought to be set a side having been a consent order, the Trial Magistrate ought to have satisfied itself that such conditions as would justify setting aside a consent order existed.

20. As the court did not give reasons for allowing the application, it is not easy to tell the grounds upon which the trial court set aside the consent order hereto.

21. Being of the view that the consent order was meant to give effect to the judgment by having it implemented in a manner consisted with the applicable law to such a process and in particular **Section 18** of the Registered Land Act (Cap 300 repealed).which vested the mandate of fixing boundaries on the Land Registrar as opposed to the District Surveyor and there being no evidence that the impugned order prejudiced or was prejudicial to any of the parties to the dispute, I find and hold that the variation of the consent orders in the circumstances of this case was not justifiable.

22. It is my considered view that implementation of the award in the manner crafted would have amounted to violation of **Section 21(2)** of Cap 300 (repealed) which vested the mandate of fixing the boundary dispute on the Land Registrar as opposed to the District Surveyor. In this regard see the said section of the law which provides as follows: **“21(2) 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.”**

23. In view of the foregoing, I agree with counsel for the respondent that the judgment hereto could not be lawfully complied with without involving the Land Registrar, who is not only an important player in the process but the key player.

24. I fail to comprehend how the respondent hoped to implement the decree obtained pursuant to the award of the Tribunal without involving the Land registrar who ultimately is required to mark the boundary as having been fixed. In this regard see **Section 21(3)** of Cap 300 (repealed) which provides as follows:

“21(3) Where the Registrar exercises the power conferred by subsection (2), he shall make a note to that effect on the registry map and in the register and shall file such plan or description as may be necessary to record his decision”

25. The upshot of the foregoing is that the appeal herein has merit and is allowed as prayed.

Dated, signed and delivered in open court at Nyeri this 14th day of November, 2017.

L N WAITHAKA

JUDGE

Coram:

Ms Mwangi h/b for Mr. Andrew kariuki for the appellant

N/A for the respondent

Court assistant - Esther