



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 717 OF 2014

EDMUND MWANGI WAWERU.....PLAINTIFF

-VERSUS-

GABRIEL WANJOHI WAWERU.....DEFENDANT

KENYA FOREST SERVICE.....3RD PARTY

JUDGMENT

Introduction

1. Edmund Mwangi Waweru, the plaintiff herein, who has described himself as Holder of General Power of Attorney from Jane Njoki Mbiyu dated 20th May, 2004, brought the suit herein seeking an order of eviction against the defendant, Gabriel Wanjohi Waweru, from the parcel of land Known as L.R **Narumoru/Block/Muriru/752** (hereinafter referred to as the suit property) among other reliefs.
2. The suit property is owned by the donor of the Power of Attorney held by the plaintiff, Jane Njoki Mbiyu, who bought it from the defendant sometime in 1992. It measures approximately 3.301 hectares.
3. According to the pleadings filed in this matter and the evidence adduced in respect thereof, the suit property borders Mt. Kenya Forest which is managed by the 3rd Party herein, Kenya Forest Service.
4. The plaintiff's case is that the defendant without any colour of right, unlawfully and wrongfully trespassed into a portion of the suit property and despite having been required to vacate refused to do so.
5. Through his statement of defence filed on **7th July, 2004** the defendant denies having trespassed into the suit property and contends that the plaintiff has no legal capacity to institute the suit; that the plaintiff's claim is time-barred, incompetent, misplaced, misguided and misconceived on account of misjoinder.
6. The defendant further contends that the plaintiff's claim is premature as there exists an unresolved boundary dispute between the owner of the suit property and the 3rd party and that this court lacks jurisdiction to hear and determine the dispute preferred before it to arbitrate.
7. Pursuant to leave granted to the defendant to issue a third party notice on the 3rd party herein, the third party through the office of the Attorney General, filed the statement of defense dated **30th November, 2009**.

8. In its statement of defence referred to above, the third party *inter alia* contends that the portion of the suit property in question is public forest land; that the real dispute between the parties herein is not ownership of land but a boundary dispute; that the defendant is a licensee of the interested party.

9. Like the defendant, the third party contends that the suit property raises no reasonable cause of action against the defendant.

EVIDENCE

The plaintiff's case

10. When this matter came up for hearing, the plaintiff informed the court that the suit property which is at the boundary of Nyeri County and Mt. Kenya Forest, was purchased by his sister Jane Njoki Mbiyu from the defendant in 1992 at a cost of Kshs. 400,000/= inclusive of the developments thereon.

11. His sister took possession of the suit property in December 1993.

12. The plaintiff further informed the court that the portion of the suit property in dispute measures $\frac{3}{4}$ of an acre and it borders Burguret river.

13. Explaining that the portion of the suit property in dispute was part of the suit property, the plaintiff informed the court that in the year 2004, the defendant sent his workers to clear the disputed portion. He (plaintiff) went to the site and stopped the workers.

14. He further explained that earlier on and in particular 2002, the defendant had yet again trespassed into the portion of the suit property in dispute prompting his sister to seek the services of the District Surveyor to determine the boundary of her land. The District Surveyor determined that the river was the boundary of the suit property.

15. After the defendant trespassed on the suit property, he sought help from various Government offices, OCPD Nyeri, D.O Narumoru and District Forest Officer Nyeri (DFO) Nyeri in vain.

16. Based on a letter from the office of District Surveyor Nyeri, dated 1st January, 2002 and 24th April, 2004 to the effect that the portion in dispute lies in the suit property, the plaintiff disagrees with the contention by the defendant and the third party that the portion of the suit property in question is not part of the suit property owned by his sister.

17. Explaining that the second letter was written pursuant to a court order, the plaintiff contends that he is not aware of any other court order issued in respect of the suit property which can form the basis of the subsequent letters relied on by the defendant and the third party in support of their contention that there was a change in the course of the river that forms the boundary of the suit property.

18. Explaining that he has never had any problem with the third party, the plaintiff urges the court to grant the orders sought against the defendant.

19. In cross examination, the plaintiff admitted that there have been issues between his sister and the third party concerning the boundary of the suit property which dispute has never been settled by the land registrar or the District Forest Officer (DFO).

20. He stated that is not aware that the District Surveyor withdrew the letters referred to herein above after receiving a complaint from the department of forests.

21. He explained that he is aware that the defendant operates a hotel known as Mountain Rock on land leased from the third party.

22. Explaining that he is not aware that he cannot bring a claim for trespass against the defendant before

the boundary dispute between him and the third party is resolved by the Land Registrar, the plaintiff conceded that he has never claimed that the defendant gave his sister less land than due from him.

23. He also confirmed that the defendant has no land across the river.

24. He admitted that the final Power of Attorney was not registered in Kenya.

25. He stated that he was not aware that the boundary of Mt. Kenya forest was determined in 1943.

26. He conceded that the sale agreement executed between the defendant and his sister does not state where the beacons are located or the extent of the land.

27. Concerning the letter from the District Surveyor withdrawing the earlier letters from the same office, he stated he was seeing the letter dated 11th October 2011 for the first time.

28. In re-examination, the plaintiff stated that there was no dispute between his sister and the 3rd party in 1943.

29. Concerning the letter of 11th October 2011, the plaintiff maintained that he was not made aware of the letter and pointed out that it does not bear the stamp of the court.

30. He further maintained that the suit property relates to events of 2004 and that he never dealt with any other person in connection with those events.

31. The plaintiff availed a land surveyor, **Gabriel Ngure Thamaine**, who informed the court that he is the author of the report filed in court on 17th November, 2015.

32. He explained that the boundaries to the suit property were pointed out to him by the plaintiff.

33. According to him, if the disputed area is removed from the suit property, the suit property would be less than that captured in the title issued to the plaintiff's sister.

34. In cross examination, P.W.2 admitted that he is not a registered/licensed surveyor.

35. He also admitted that the boundary to the suit property has not been fixed by the Government of Kenya and that the boundary of the suit property shown to him by the plaintiff is disputed.

36. He further admitted that only the Land Registrar and District Surveyor can resolve the boundary dispute.

37. He explained that he prepared his report merely for advice of his client.

38. He further explained that from the observations he made when he visited the suit property, he concluded that the use of the portion in dispute is different from that of the suit property.

39. In re-examination, he stated that though not registered, he is qualified to make the report he produced. Concerning the fence line contained in his report, he stated that it is inside the suit property.

The defence case

40. The defendant who testified as DW-1, confirmed that he sold the suit property to the plaintiff's sister in 1992.

41. He informed the court that the suit property is next to the leased land where he runs a hotel business in the name of mountain rock.

42. He informed the court that the land where he carries out the business is leased to him by the third party.
43. He further informed the court that the parcel of land in dispute measures ½ acre and is found between the forest and the land he sold to the plaintiff's sister.
44. According to the defendant, the parcel of land in dispute was curved out when a road was being constructed to divert the river from its original course for the purpose diverting the river to avoid damage to the road.
45. He informed the court that they have used the parcel of land in dispute since 1978.
46. He maintained that the parcel in dispute is not part of the land he sold to the plaintiff's sister.
47. Explaining that he was using the parcel of land in dispute before he sold the suit property to the plaintiff's sister, he contended that the plaintiff's sister never lodged any suit against him claiming that he sold to her a smaller parcel of land than he ought to have sold to her.
48. He stated that he is aware that the plaintiff's sister engaged a private surveyor who told her that the parcel of land in dispute belonged to her which position was changed after the 3rd party's surveyors intervened.
49. He admitted having received a notice to vacate the suit property from the plaintiff's sister and her advocate.
50. He produced a number of letters and documents concerning the area in dispute and contended that it is clear from those letters and documents that he had not trespassed onto the suit land.
51. Arguing that he is wrongly sued, he explained that there is no land in his name.
52. In cross-examination, he admitted having sold the suit property to the plaintiff's sister as per the sale agreement dated 22nd November, 1993. He, however, disowned the annexures to the sale agreement especially those at page Nos.50-52 of the plaintiff's list of documents.
53. He stated that his hotel, Bantu Mountain Rock, borders the suit property but on the other side of the river.
54. He lamented that the plaintiff has sued him in his personal capacity as opposed to a director of the company he runs.
55. He stated that he is aware that the court had ordered the District Surveyor to visit the suit property and file a report but he is not aware whether the District Surveyor visited the suit property and filed a report as ordered by the court.
56. Regarding the documents he produced as Dextb 5 and 6 (licensees issued to the company he runs), he stated that he does not know their relevance to the instant case.
57. Concerning the documents he produced as Dextb 15 and 16, he stated that it is only his advocate and experts who can interpret them.
58. Explaining that he did not sell any portion of forest land to the plaintiff's sister, he stated that he showed her the boundaries of the parcel of land he sold to her.
59. He maintained that the course of river Burguret was changed a long time ago for the reasons given.
60. Terming the dispute herein as between the plaintiff's sister and the third party, he stated that the

developments in question are in the forest land.

61. In re-examination, he explained that he sold the suit property in the same state he obtained it from the previous owners, without subtracting any portion there from.

62. He explained that he is the proprietor of the hotels mentioned in his statement. The hotels though given different names refer to one and the same company, only the names had changed overtime.

63. He stated that he has operated the hotels in the land belonging to the 3rd party since 1977.

64. **D.W.2, Nkunda M. Twerandu** who has being an employee of the defendant at Bantu Mountain View lodge for over 30 years, informed the court that the land the plaintiff is claiming belongs to the 3rd party.

65. Like DW-2, he stated that the course of the river was altered.

66. In cross examination, he stated that he witnessed the road and the bridge being built.

67. **D.W.3, Harrison Mugecha Ngochorai** an employee of the defendant, informed the court that he used to work on the suit property before it was sold to the plaintiff's sister. According to him, the plaintiff's sister was shown the boundary to the suit property which exists to date.

68. Like D.W.1 and D.W.2, he stated that the course of the river was diverted when the road and bridge were being built.

69. According to D.W.3, even without the diversion of the river, the suit property would still belong to the 3rd party.

70. Although he could not remember when the river course was diverted, he explained that by the time the defendant sold the suit property to the plaintiff's sister, the river had been diverted.

71. In re-examination, D.W.3 stated that he is able to identify the boundary between the land belonging to the plaintiff's sister and the 3rd party using beacons marking the boundary which beacons according to him, still exist.

72. **D.W.4, Ibrahim Kiarie Kibiru**, confirmed having written the letter dated 11th October, 2011 varying the contents of his letter dated 24th April, 2009 concerning the boundary of the suit property. He explained that he changed his initial report concerning the boundary of the suit property because according to the recordings made by the 1st surveyor, the river bends towards the suit property yet on the ground, the river moves in a straight direction; the small valley mentioned in his letter of 2011 perfectly corresponds with the drawing by the 1st surveyor and the present position of the river as it crosses Nyeri-Nyandarua road is not as was surveyed in 1959.

73. He maintained that the current course of the river is not as was surveyed in 1959.

74. In cross examination, he admitted having made the report of 2009 pursuant to a court order. When he visited the suit property to make the report, he was accompanied by the plaintiff and the defendant.

75. He explained that he made the second report after the defendant's advocate brought to his attention that the documents available in the offices of the Director of Survey differed from what he had relied on earlier.

76. Explaining that the earlier report was erroneous, he stated that based on information he obtained from the defendant's advocate to the effect that the earlier report had not been adopted, he visited the suit property with another surveyor and made the new report.

77. He admitted that there was no new court order allowing him to revisit the suit property and that the new report was not filed in court.

78. Explaining that he was not called upon to produce the earlier report in court, he stated that the filing of the report of 2011 was not as a result of collusion between his office and another person but borne out of the desire to correct an error that had been noted about their report.

79. **D.W.5, Christopher Muturi Tatua, a photogram- metric**, informed the court that there are two river courses in the suit property and that the correct river course is the old one.

80. Going by the old river course, he stated that the portion of the suit property in dispute belongs to the 3rd party.

81. He stated that he is aware that his report was made after a report had been filed by the District Surveyor pursuant to a court order and admitted that he had not obtained leave of the court to file a further report.

82. **D.W.6, Evans Kegode Alunda**, confirmed D.W.1's testimony to the effect that the old course of the river was diverted to protect the road and bridge constructed thereon.

83. Like the other defence witnesses, he stated that the parcel of land in dispute belongs to the 3rd party.

Submissions

84. At the close of hearing, parties to this dispute filed submissions which I have read and considered.

85. From the pleadings and the submissions by the respective parties to this dispute, I find the issues for determination to be:

(i) Whether the plaintiff has the legal capacity to bring this suit?

Subject to the outcome of (i) above, whether this court has jurisdiction to hear and determine the dispute brought before it?

Subject to the outcome of (ii) above, whether the plaintiff has made up a case for being granted the orders sought?

What is the order to costs?

86. On whether the plaintiff has legal capacity to sue; because the plaintiff never sought or obtained leave of the court to act for his sister, it is submitted that he lacked the capacity to sue. In that regard, reference was made to **Order 9 Rule 2(a)** of the Civil Procedure Rules (CPR) and the case of **Carolyn Mpenzwe Chipande v. Wanje Kazungu Baya** (2014) e KLR.

87. In the case of **Carolyn Mpenzwe Chipande v. Wanje Kazungu Baya** (supra), **Meoli J.**, *inter alia* stated:

"...Order 9 rule 1 Civil Procedure Rules is in following terms:

"[Order 9, rule 1.] Applications, appearances or acts in person, recognized agent or by advocate.

1. Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the by time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf:

Provided that—

(a) any such appearance shall, if the court so directs, be made by the party in person;”

12. Order 9 Rule 2 of the Civil Procedure Rules on the other hand describes categories of recognized agents to include:

“a) Subject to approval by the court in any particular suit, persons holding powers of attorney authorizing them to make such appearances and applications and do such acts on behalf of the parties;

b.;

c.;”

There are two prerequisites under the rule: The recognized agent should hold a power of attorney, and secondly, can only act subject to the approval of the court. The appellant has strongly argued that the appellant was entitled by virtue of holding the POA to file the suit, without necessarily seeking prior approval by the court.

d. Fortunately, the proper construction of the above provision is not an unexamined question. Mwongo J. grappled with the proper application of order 9 rule 2 of the Civil Procedure Rules in Jack J. Khanjira and Anor v Safaricom Ltd [2012] eKLR. In that case a suit had already been filed by the two plaintiffs when one of them appointed an attorney to act as his recognized agent. An objection was raised to the effect, *inter alia*, that the power of attorney held by the agent could not confer on the donee, as an unqualified person the right to act as an advocate, thereby overriding the provisions of Section 85 of the Advocates Act. Although the objection related to the scope of authority of a donee who is otherwise unqualified to act as an advocate, the court’s consideration of the matter before it has many parallels with the case before us.

e. I am persuaded as Mwongo J. was that the starting point in interpreting Order 9 rule 2 of the Civil Procedure Rules is to consider the provision of Order 9 rule 1 which limits the scope of the recognized agent to application, act or appearance authorized by law to be done by a party “except where otherwise expressly provided for by any law for the time being in force...” Also of significance to the matter before us is the proviso to Order 9 rule (1) which states that:

“Provided that –

a. Any such appearance shall, if the court so directs, be made by the party in person...”

15. The above proviso is in tandem with Order 9 rule 2 (a) Civil Procedure Rules. A recognized agent makes application, appears or acts, subject to the approval of the court. This provision cannot be read to mean that the power of attorney itself (as suggested by the respondent) ought to be approved by the court, even though such power of attorney may of necessity be reviewed by the court while dealing with the question of whether or not to approve the donee’s application for purposes of acting in the suit.

16. In this regard, can do no better than quote Mwongo J’s reasoning as to why this prior approval is necessary:

“Clearly, the essential characteristic of a person acting as a recognized agent is that he or she acts, appears or makes any such applications, acts or appearances subject to the approval of the court.

The above provision is important because by the very nature of the instrument of their appointment, it may donate to them powers which are, in law, untenable. So that, it appears to me that when exercising their functions in court, they must periodically obtain the approval of the court to do such acts. It is for the court to oversee the scope and extent of the functions of a recognized agent, and to assure itself that they are not overstepping the bounds of the law. In my view, it is not the fact of being an agent that renders a donee of a power as recognized; it is the extent or scope of their agency that is recognized. That is to say, a recognized agent can perform only that which he is recognized or authorized to do in law.

In this regard, I would go as far as to say that, for orderly representation in court, every appearance, act or application by a recognized agent should be subjected to the approval of the court as and when sought to be done.”

17. I fully adopt the above reasoning in this case and add that an agent cannot do the act and then retrospectively seek the court’s approval. This provision is not a technical requirement of procedure as suggested by the appellants but one that goes to the root of the capacity of the recognized agent to bring the suit or to act on behalf of the real party. What might qualify as a procedural matter would be the mode of seeking such approval. To my mind this will depend on the nature of the intended act, appearance or application.

18. In the present case, the donee to the POA filed a substantive suit on behalf of the real plaintiff. This is a practice that has gained currency in our courts until now. Mwongo J’s decision as reinforced by Mulla on Civil Procedure 12th Edition (Commentary on Indian equivalent of Order 9 rule 1 of the Civil Procedure Rules) raises serious questions as to whether the scope of the recognized agent is limited directly by the technical wording of Order 9 rule 1 and 2 to exclude filing of suits among acts that an agent can perform, or whether such agent is at liberty to do any and every kind of act, including filing pleadings, giving evidence, cross-examining witnesses etc.

19. The foregoing issue was not canvassed before me and there is not sufficient material to enable me draw any conclusions. Be that as it may, the wording of Order 9 rule 1 and 2 of the Civil Procedure Rules leaves no doubt that the court has wide discretion in determining whether or not to allow an agent to appear or do any act in a suit. That discretionary power must be invoked by way of an application and is exercised judicially. No party should presume to act or appear before the court merely on the basis of the power of attorney without first obtaining the court’s approval, howsoever sought. The appellant believed himself properly authorized by the power of attorney alone to act on behalf of the donor. That was an erroneous understanding of the rules.

20. For all these reasons, I do agree with the reasoning of the learned magistrate and her conclusion that the donee under a power of attorney cannot act without first seeking the court’s approval. As to the consequence of default by a donee in seeking such approval, I would not go as far as concluding that an act, appearance or application would be rendered fatally defective. Rather that the impugned application, appearance etc would have been irregularly done. In a proper case, the court might invoke its discretion under proviso (a) of Order 9 rule 1 of the Civil Procedure Rules by directing the actual party to appear or act in person rather than strike out the impugned process. Each case must be considered within its own circumstances.”

88. Whilst the legal position relied on by the defendant is categorical on the need of a person holding a Power of Attorney to seek approval of the court before he can be deemed to be a recognised agent of another for purposes of doing the acts specified in **Order 9 Rule 1** of the CPR, I agree with **Meoli J.**, that failure to seek approval of the court to do the acts specified in that section of the law does not necessarily render the act or appearance fatally defective.

89. On whether failure by the plaintiff to seek the approval of this court to file and prosecute the suit herein deprived him the capacity donated to him by his sister to institute and prosecute the suit, I begin by pointing that the Power of Attorney granted to the plaintiff authorised him to sell, make legal claims, maintain and exercise all of her rights as owner of the property in all capacities.

90. Although the initial Power of Attorney granted to the plaintiff was limited in duration, I note that it was severally renewed until a general power not limited in duration was issued in 2006.

91. Despite the fact that the approval of this court was not sought before the plaintiff instituted this suit, there being no prejudice caused on the defendant on account of that failure, I find and hold that the failure did not affect the respondent's capacity to sue on account of the general Power of Attorney given to him by his sister.

92. On whether this court has jurisdiction to hear the dispute preferred before it, on behalf of the defendant, it is contended that the dispute between the plaintiff's sister and the third party concerning the boundary of the suit property has never been fixed by the Land Registrar as required by **Section 21** of the Registered Land Act, Cap 300 (repealed) Laws of Kenya and submitted that this court lacks power to hear and determine the dispute preferred before it on account of the unresolved boundary dispute.

93. With regard to this question, whilst the claim by the plaintiff is based on alleged trespass to a portion of the suit property, during trial, it emerged that the claim by the plaintiff relates to the location of the boundary between the parcel of land held by the plaintiff and that held by the third party.

94. Although the court ordered the District Surveyor to visit the suit property and file a report, during trial, it emerged that the dispute concerning the location of the boundary between the parcel of land held by the plaintiff's sister and the 3rd party has never been fixed by the Land Registrar as provided under **Section 21** of Cap 300 Laws of Kenya (now repealed).

95. As pointed out in the submissions by the defendant, **Section 21(4)** of Cap 300 (now repealed), deprived this court the power to entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in that section.

96. **Section 18(2)** of the successor to Cap 300 to wit, the Land Registration Act, 2012 (LRA), similarly prohibits this court from entertaining any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in that section. In that regard see the said section which provides as follows:

“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.

97. Under **Section 19** of LRA, 2012 the duty to fix boundaries to registered land is vested in the Land Registrar. In this regard see the said section which provides as follows:

“19. (1) If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.

(2) The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.

(3) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section.

98. There being no evidence that the dispute to the properties held by the plaintiff's sister and the 3rd party has been determined in accordance with either of the provisions of the above cited provisions of the law, I agree with the submissions by the defendant that this court's lacks jurisdiction to hear and determine the dispute brought before it to determine.

99. As without jurisdiction this court cannot make any further step concerning the dispute preferred by the plaintiff before it, I dismiss the suit with costs to the defendants.

100. Even assuming that this was purely a case of trespass for which this court would have had jurisdiction to hear and determine, I would still have found the plaintiff to have failed to discharge the burden of proving that the defendant trespassed on his parcel of land. I say so because the evidence adduced before this court shows that the plaintiff has never been in use and possession of the portion in dispute.

101. From the evidence adduced in this matter, the plaintiff's case appears to be that he was given less land than he bought rather than that the defendant trespassed into the parcel of land owned by his sister.

102. The evidence adduced in this matter is to the effect that the portion in dispute belongs to the third party and to that extent, there is no way the plaintiff's claim can succeed because the portion in dispute does not belong to him or the defendant.

103. Be that as it may, the plaintiff is advised to take the steps contemplated in **Section 18** of the LRA, 2012 in resolving the dispute.

104. Orders accordingly.

Dated, signed and delivered in open court at Nyeri this 8th day of November, 2017.

L N WAITHAKA

JUDGE

Coram:

Mr. Kingara for the plaintiff

Waweru Macharia for the 1st defendant

Mr. Nderitu h/b for Mr. Muthuuri for the 2nd defendants