REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC APPEAL NO. 7 OF 2015

MICHAEL E.G. MUHINDI.....APPELLANT

VERSUS

JOHN NGURE MUREKIO.....RESPONDENT

(BEING AN APPEAL FROM THE RULING DELIVERED ON 15TH JANUARY, 2015 BY HON. S. JALANGO – Ag. S.R.M AT BARICHO PRINCIPAL MAGISTRATE'S COURT L.D.T CASE NO. 11 OF 2008)

JUDGMENT

Before its repeal by the enactment of the ***Land Registration Act 2012, Section 149 of the Registered Land Act*** provided as follows:

> ***"Whenever any question arises with regard to the exercise of any power or the performance of any duty conferred or imposed on him by this Act, the Registrar may state a case for the opinion of the High Court; and thereupon the High Court shall give its opinion thereon which shall be binding upon the Registrar"***

The Registrar being referred to was defined in ***Section 3 of the repealed Act*** as the Chief Land Registrar or the Deputy Land Registrar or a Land Registrar or Assistant Land Registrar authorized by the Chief Land Registrar under ***Section 7 (4)*** to exercise or to perform all or any of the powers or duties conferred upon the Chief Land Registrar.

Section 86 (1) of the new Land Registration Act 2012 is wide in scope in that apart from the Registrar, it also allows ***"any aggrieved person***" to seek the opinion of the Court. It reads:

> ***"If any question arises with regard to the exercise of any power or the performance of any duty conferred or imposed on the by this Act, the Registrar or any aggrieved person shall state a case for the opinion of the Court and thereupon the Court shall give its opinion, which shall be binding upon the parties"***

The dispute subject of this appeal revolves around the boundary to land parcels No. KIINE/KIANGAI/2048 and KIINE/KIANGAI/195 and was filed by the Respondent herein (**JOHN NGURE MUREKIO**) against the Appellant herein (**MICHAEL E.C. MUHINDI)** at the **BARICHO LAND DISPUTES** (The Tribunal) under the then ***repealed Land Disputes Tribunal Act*** which was the law applicable at that time. After hearing the parties, the Tribunal made the following award:

> ***"The District Land Registrar and the District Land Surveyor to visit the site and with the help of demarcation map to mark the boundary between KIINE/KIANGAI/2048 (163) and***

KIINE/KIANGAI/195 and both parties should plant the boundary marks jointly to end this dispute"

That award was filed in Court and a decree was issued by **HON. J.N. MWANIKI** – Resident Magistrate - in those terms on 5th November 2008 with any aggrieved party being informed of the right to appeal within 30 days. No appeal appears to have been filed against that award and in terms of ***Section 7 (1) of the repealed Land Disputes Tribunal Act,*** this matter ought to have come to an end because the role of the Magistrate was restricted to reading and adopting the award.

However, the matter did not end there and some six (6) years later on 16th January 2014, the parties again appeared in Court this time before **HON. S. JALANGO** – Acting Senior Resident Magistrate. The record shows that the Court directed the Land Registrar to re-visit the land in dispute and mark the boundary because the previous report filed by him was inconclusive with regard to the boundary. On 3rd July 2014, **HON. S. JALANGO** made the following orders:

"The report filed in Court by the Land Registrar is inadequate and clear indication that he didn't comply with the Court order. Parties are not allowed to mark their boundaries. In that regard, I do hereby direct that the Land Surveyor go back to the suit property and mark boundary. The parties are in (sic) liberty to engage private surveyor to be present during the exercise and file their report. The Land Registrar to file a comprehensive report and the exercise undertaken and step taken to fix the boundary question. The report to be filed on or before the 4th September 2014. The Registrar to appear in Court on the said date. The O.C.S Baricho Police Station to provide security".

However, when the parties appeared before **HON. S. JALANGO** on 2nd October 2014 after the District Land Registrar **MR. C.M. KIRONJI** had filed a report dated 25th September 2014 confirming that he had identified the boundary features one being a "**MUKUNGUGU"** tree and the other a man made stone to which he had added more features, the Respondent was satisfied with the boundary as fixed. The Appellant was not satisfied arguing that the boundary was not fixed. Faced with those competing claims, the magistrate decided to deliver a ruling which he did on 15th January 2015. The ruling which is the subject of this appeal is a short one and I will reproduce it:

"The report dated 25th September 2014 from the District Land Registrar indicates that he visited the site of land boundary dispute in company of the District Surveyor on the 3rd September 2014. That along the disputed boundary there are two main boundary features namely big "Mukungugu" plant on one end and a man made stone on the other end. The Land Registrar declared the same to be the right position of the boundary.

The objector questioned the methodology used by the Land Registrar. He stated that no measurements were taken and that there was no reference to any title deed or map.

In response to the issues raised by the objector, the Land Registrar and surveyor stated that the map doesn't have measurement and that it is not an authority to determine boundary.

It is my considered view that once the boundary is fixed as per the Land Registrar report dated 25th September 2014, this Court mandate comes to an end. I therefore find the matters settled and any aggrieved party has 30 days right to appeal".

Aggrieved by that ruling, the Appellant filed this appeal seeking its setting aside and substitution with an order for the boundary to be determined in accordance with the decree dated 5th November 2008. The following six (6) grounds of appeal were raised:

1. That the learned Senior Resident Magistrate erred in law in adopting the District Land Registrar's report dated 25th September 2014 which was not in accordance with the decree by the

same Court dated 5th November 2008.

2. That the learned Senior Resident Magistrate erred in law and in fact in not considering the objection raised by the Appellant concerning the methodology used by the District Land Registrar in disregarding reference to any title or map of the suit lands.

3. That the learned Senior Resident Magistrate erred in law in failing to indicate the parcels in dispute whose boundary determination he was dealing with.

4. That the learned Senior Resident Magistrate erred in law in admitting a report by the District Land Registrar which had no reference to any title deed or map as settling the dispute between the Appellant and the Respondent.

5. That the learned Senior Resident Magistrate erred in law and fact in determining as settled the boundary purportedly declared by the District Land Registrar as being indicated by two main boundary features namely a big 'Mukungugu' plant on one end and a man made stone on the other end, when the report filed was lacking in details of how, who or when the said boundary features had been placed.

6. That the learned Senior Resident Magistrate erred in law in failing to find that the implementation of the boundary dispute as directed by the District Land Registrar would arbitrarily deprive the Appellant of his property in land parcel KIINE/KIANGAI/2048 while unjustly enriching the Respondent which was contrary to Article 40 of the Constitution of Kenya.

The appeal was canvassed by way of written submissions which were duly filed by **P.M. MUCHIRA** advocates for the Appellant and **MAGEE WA MAGEE** advocates for the Respondent.

I have considered the appeal and the submissions by counsel.

I should first consider whether this Court has the requisite jurisdiction to entertain this appeal. This is because, as was held in the case of ***THE OWNERS OF THE MOTOR VEHICLE LILIAN 'S' VS CALTEX KENYA LTD 1989 K.L.R 1,*** a question of jurisdiction must be decided at the earliest opportunity because without jurisdiction, the Court must down its tools. In questioning this Court's jurisdiction, counsel for the Respondent has cited the provisions of ***Sections 21 (2), 22 (5) and 149 of the repealed Registered Land Act.*** Similar provisions exist in ***Sections 18, 19 and 86 of the new Land Registration Act.*** In making that submission, counsel for the Respondent states:

"We therefore submit that the subordinate Court in this case had no jurisdiction to alter the decision of the Land Registrar. Further that this Honourable Court lacks the jurisdiction to alter the determination of the Land Registrar since it has not been approached under Section 149 of the Registered Land Act Cap 300".

However, this appeal is not about altering the determination of the Land Registrar. This appeal is against the ruling of the Senior Resident Magistrate dated 15th January 2015 in which he refused to interfere with the decision of the Land Registrar fixing a boundary between two parcels of land. ***Section 13 (4) of the Environment and Land Court Act*** clothes this Court with the jurisdiction to determine this appeal. It states:

"In addition to the matters referred to in Sub-sections (1) and (2), the Court shall exercise appellate jurisdiction over the decision of subordinate Courts or local tribunals in respect of matters falling within the jurisdiction of the Court"

I therefore find and hold that I have the jurisdiction to determine this appeal.

In my view, this appeal can easily be determined by answering the question whether or not the trial

magistrate had any jurisdiction to entertain any challenge to the Registrar's report.

Before I do so, however, there is one important issue that needs to be settled. This dispute, as I have indicated above, commenced as a boundary dispute before the Tribunal established under the now ***repealed Land Disputes Tribunal Act*** which filed its report at the Resident Magistrate's Court Baricho. That report was read to the parties on 5th November 2008 and was adopted as the Court's judgment and a decree was extracted as indicated above. In terms of ***Section 7 (2) of the repealed Land Disputes Tribunals Act,*** the role of the trial magistrate came to an end and all that remained was for any aggrieved party to move to the Appeals Committee as provided under ***Section 8 of the repealed Act.*** Thereafter, any appeal would be to the High Court on points of law. No such appeal was filed and the dispute came to an end thirty (30) days after 5th November 2008.

It is therefore not clear why on 16th January 2014, this dispute was again placed before **HON. S. JALANGO** Acting Senior Resident Magistrate who thereafter proceeded to make orders referring the dispute to the Land Registrar. This was not a pending dispute. The dispute had ended with the decree issued on 5th November 2008 from which no appeal was filed. Once the magistrate received the award from the Tribunal, he was under a statutory duty to enter judgment in terms of the award and it was not open to him to alter, amend, question or set it aside. That is the plain meaning of ***Section 7 (2) of the repealed Land Disputes Tribunals Act*** which reads:

> "***The Court shall enter judgment in accordance with the decision of the Tribunal and upon judgment being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act"***

That duty of the trial Court has been re-affirmed in many cases including ***CHEGE MACHARIA VS FRANCIS KIMANI KIRIMIRA C.A CIVIL APPEAL No. 20 of 2015 (2015 e K.L.R).*** That is precisely what **HON. J.N. MWANIKI** Resident Magistrate did on 5th November 2008 and in my view, and subject to the right of appeal which was not exercised, this matter came to a close as far as the subordinate Court was concerned. All the proceedings that followed thereafter, so long as they were not in furtherance of any decree that was subsequently drawn, were superfluous and of no effect.

I am however called upon to determine this appeal that arose from the ruling of **HON. S. JALANGO** Acting Senior Resident Magistrate when he declined to review the orders of the Land Registrar who by his report dated 25th September 2015 had fixed the boundary between the two parcels of land. Counsel for the Respondent has submitted, and rightly so in my view, that once the Land Registrar had made his decision and filed a report with the Court, the only way that decision could be challenged was through ***Section 149 of the repealed Registered Land Act*** which I referred to at the commencement of this judgment and which is similar to ***Section 86 (1) of the new Land Registration Act 2012*** that was the applicable law when this dispute was again referred to the Land Registrar on 6th February 2014 after the Court had found yet another report dated 5th December 2013 wanting in various respects. It is clear from the provisions of ***Section 86 (1) of the Land Registration Act 2012***, (or ***Section 149 of the repealed Registered Land Act),*** that a review of the decision of the Land Registrar could only be considered by this Court or, as was the position prior to 2011, the High Court. Of course ***Section 2 of the Land Registration Act*** which defined Court to mean the ***Environment and Land Court*** has since 21st September 2016 pursuant to the ***Land Laws Amendment Act No. 28 of 2016*** been expanded to mean:

> ***"the Environment and Land Court established by the Environment and Land Court Act 2011 and other Courts having jurisdiction on matters relating to land".***

Therefore, prior to September 2016, a subordinate Court could not review the decision of the Land Registrar with regard to the determination of a boundary. As the challenge to the decision of the Land Registrar was made before **HON. S. JALANGO** Acting Senior Resident Magistrate in October 2014, it is clear that the trial magistrate had no jurisdiction to determine that issue.

In support of that submission, counsel for the Respondent has referred to the Court of Appeal decision in

MURIITHI GACEWA VS FRANCIS MWANGI & OTHERS C.A CIVIL APPEAL No. 108 of 2007 where the circumstances were not too dissimilar from those obtaining in the case. In considering whether the subordinate Court could entertain a challenge to the decision of the Land Registrar upon a determination of a boundary dispute, the Court of Appeal expressed itself as follows:

> ***"A good starting point is to ascertain whether the Superior Court had jurisdiction to entertain the appeal and whether the Senior Resident Magistrate Court had jurisdiction to entertain the challenge.***
>
> ***We think that the provisions of Section 149 bars the Court from entertaining a challenge against the Registrar except where the Registrar's decision states a case for the opinion of the High Court".***

Counsel for the Appellant has urged this Court to distinguish the case of ***MURIITHI GACHEWA*** (supra) on several grounds including that in that case, the boundary determination had not originated from a Land Disputes Tribunal but was by the Registrar, that in this case, the dispute emanated from the Court, that similarly, in this case, the dispute had been referred to the District Land Registrar and the District Surveyor by a decree of the Court and finally that neither ***Section 149 of the repealed Registered Land Act*** nor ***Section 88*** (counsel must have meant ***Section 86 (1)*) of the Land Registration Act)** were applicable because the boundary determination was in accordance with the ***repealed Land Disputes Tribunals Act*** and lately ***Section 30 of the Environment and Land Court Act***. Those submissions cannot be correct for several reasons. Firstly, as I have already found above, although this case commenced as a boundary dispute under the repealed Land Disputes Tribunals Act, it was effectively determined under that Act on 5th November 2008 when the Tribunal's award was adopted as a judgment of the Court and a decree was drawn from which no appeal was filed. Secondly, the fact that the dispute was referred to the District Land Registrar and the District Surveyor by a decree of the Court is really neither here nor there. The fact is that what was eventually presented to the Court was a report dated 25th September 2014 from **C.M. KIRONJI** the District Land Registrar who could only therefore have prepared the same pursuant to the provisions of ***Sections 18 and 19 of the Land Registration Act*** which empowers the Land Registrar to fix boundaries. The determination was therefore in accordance with the ***Land Registration Act*** which was the law then applicable and therefore the relevant provision is ***Section 86 (1)*** thereof which as at 2015, reposed the jurisdiction to review the decision of the Land Registrar in this Court. That being the case, the submissions by counsel for the Appellant that the Land Registrar did not apply the provisions of ***Section 24 of the Survey Act Cap 299 Laws of Kenya*** or that the trial magistrate erred in failing to find that the boundary was fixed arbitrarily and capriciously or that the trial magistrate erred in law in failing to indicate the parcels of land in dispute whose boundary determination he was dealing with or that the report dated 25th September 2014 was not comprehensive nor in accordance with the decree dated 5th November 2008 etc do not really aid the Appellant for the simple reason that it was not within the jurisdiction of the subordinate Court to review or question the Land Registrar's report in view of the clear provisions of the law cited above.

Counsel for the Appellant has also referred me to the case of ***MARGARET NYARIARA KIMANI VS JOSEPH NJOGU NGOYA 2013 e K.L.R (NAIROBI ELC CASE NO. 217 of 2010*** which was considering the application of ***Section 18 (2) of the Land Registration Act***. That case does not aid the Appellant because it was a case of trespass filed directly to the Environment and Land Court following a determination of the boundary by the Land Registrar. The Court up-held the determination of the Land Registrar as having been done in compliance with the law. That case is distinguishable from this case where what is before me is a challenge of the ruling of a subordinate Court's refusal to review the decision of the Land Registrar which ruling, as it must now be clear, cannot be faulted because the trial magistrate correctly declined the jurisdiction to do so. In his ruling, the trial magistrate was clear that he had no mandate to question the Land Registrar's report. There was no error on his part in arriving at that decision which I must therefore up-hold.

The up-shot of the above is that this appeal is devoid of merit. It is hereby dismissed with costs to the Respondent.

B.N. OLAO

JUDGE

3RD NOVEMBER, 2017

Judgment delivered, dated and signed at Kerugoya in open Court this 3rd day of November 2017

Mr. Muchira for Appellant present

Mr. Magee for Respondent present

Appellant also present

Respondent present

Right of appeal explained.

B.N. OLAO

JUDGE

3RD NOVEMBER, 2017