REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C.A CASE NO. 5 OF 2014

MATENGURI KARENGE..……..APPELLANT

VERSUS

FESTUS NJERU KIRAGU ……..……RESPONDENT

(Being an appeal from the Ruling/order of honourable Mr. Robert M. Oanda Ag Principal Magistrate dated 14th December, 2012 delivered by Hon. Mr. R.O. Oigara Senior Resident Magistrate, in Embu Chief Magistrate's Court Civil Case No. 245 of 1988)

JUDGEMENT

1. The parties to the appeal appear to be close family members. They have been litigating in court for close to 30 years over *Title No. Ngandori/Kirigi/3247*. It would appear that when they finally agreed on the sharing of the suit property, they could not agree on the mode of sub-division thereof, including the size of an access road to serve the resultant subdivisions. They could also not agree on how the Appellant would have access to a river abutting the said property since he had developed a portion of land which was far from the river.

2. It would appear from the record of appeal that on or about 13th January 2005 the parties recorded the following consent in Embu SPMCC No. 245 of 1998;

> *i. The District Surveyor do accompany both the counsels and their respective clients to parcel No. Ngandori/Kirigi/3247.*
>
> *ii. The District Surveyor do prepare a report on the best manner to sub-divide parcel No. Ngandori/Kirigi/3247.*
>
> *iii. The report be filed in court.*

3. It would further appear from the record that the parties or, some of them, did not facilitate the process until four (4) years later when the District Surveyor visited the suit property. The record indicates that the parties could not agree on the mode of sub-division during the first site visit on 17th April 2009 and the said surveyor had to give them about 59 days to attempt an agreement. The parties still failed to agree in consequence of which the District Surveyor prepared and filed a report on his proposed mode of subdivision. The Appellant was opposed to that mode of sub-division but the Respondent had no problem with it.

4. The record further indicates that vide an application dated 17th august 2010 the Respondent moved the court for adoption of the report of the District Surveyor. The said application apparently proceeded in the

absence of the Appellant's advocate who did not attend court despite service. The court consequently granted the said application and directed that the sub-division be undertaken in accordance with the District Surveyor's said report. That application was granted on or about 12 May 2011.

5. The Appellant being aggrieved by the said orders of 12th May 2011, filed an application dated 20th July 2011 for review and setting aside of the orders granted. The grounds of the said application were summarized as follows:

i. That he was never informed of the hearing date of the said application for adoption.

ii. That his views on the proposed sub-division were not sought.

iii. That the proposed 9m wide access road was an unnecessary wastage of land.

iv. That the proposed sub-division would deny him access to the river.

6. In a short ruling dated 14th December 2012, the learned trial magistrate dismissed the said application for review on the basis that there was proper service upon the Appellant's advocate and that there was no reason to vary or set aside his earlier orders. That is the decision which provoked the instant appeal.

7. The Appellant raised eleven grounds of appeal against the order of the trial court made on 14th December 2012. These grounds were:

i. The learned magistrate erred in law and fact in not setting aside the order made on 12th May, 2012 in civil case No. 245 of 1988 in the Chief Magistrate's Court at Embu when there were very good grounds to do so.

ii. The learned magistrate erred in law and fact in not finding that the Appellant herein was never heard and/or given an opportunity to be heard before the order dated 12th May, 2011 was made adopting the report dated 26th May 2009 by the Embu District Land Surveyor on the proposed sub-division of land parcel No. Ngandori/Kirigi/3247.

iii. The learned magistrate erred in law and fact in not finding the failure by the Appellant's advocate then on record, to inform the Appellant of the hearing of the application dated 17th August, 2010 pursuant to which the order dated 12th May, 2011 was issued, was a mistake on the part of the said advocate that should not have been visited on the Appellant.

iv. The learned magistrate erred in law and facts in not addressing all the issues raised in the application dated 20th July, 2011, in his ruling dated 14th December, 2012.

v. The learned magistrate erred in law and facts in not dealing with the issue of the numbering of the three portions that would result from the sub-division of land parcel number Ngandori/Kirigi/3247 as "A", "B" and "C" and the fact that it had been erroneously indicated in the surveyor's report dated 26th May, 2009 on the proposed sub-division that the Appellant was supposed to get the portion marked "A" next to the river as opposed the portion fronting the main road on the upper part of the said land marked as "C" in the said report, despite the fact the respondent admitted the said error in the numbering of the portions that would result from the sub-division of the said land.

vi. The learned magistrate erred in law and fact in not finding that the order dated 12th May, 2011 should not be implemented the way it is before correction on the numbering of the resultant portions from the sub-division of land parcel number Ngandori/Kirigi/3247 is made and the fact the Appellant is supposed to get the portion on the upper part of the said land next to the existing road and not the portion fronting the river is also made clear.

vii. The learned magistrate erred in law and fact in not finding that the Appellant as one of the beneficiaries of land parcel number Ngandori/Kirigi/3247 has a right be heard on the mode of sub-division of the said land and that failure to hear the appellant was prejudicial to him.

viii. The learned magistrate erred in law and fact in not finding that the proposed sub-division and specifically the 9m wide access road would cause unnecessary wastage of land parcel number Ngandori/Kirigi/3247 as the said road was too wide yet it was only for access of two proposed sub-divisions of land parcel No. Ngandori/Kirigi/3247 which land is only one and a half acres approximately.

ix. The learned magistrate erred in law and fact in not finding that proposed sub-division would also deny the Appellant access to the river fronting land parcel number Ngandori/Kirigi/3247 on the lower side, which is an important source of water.

x. The learned magistrate erred in law and fact in not finding that the best mode of sub-division of land parcel number Ngandori/Kirigi/3247 was as per the sketch on proposed sub-division of the said land dated 6th June 1996.

xi. The learned magistrate erred in law and fact in not finding that there were good grounds and/or reasons for reviewing and setting aside the orders made on 12th May, 2011 and that the Respondent would not suffer any prejudice if the said orders were set aside and if all parties were heard before any orders on the proposed sub-division of land parcel number Ngandori/Kirigi/3247 are made.

8. The Appellant therefore prayed for the following orders;

i. That this appeal be allowed.

ii. That the ruling/order dated 14th December, 2012 in civil case number 245 of 1988 dismissing the application dated 20th July, 2011 be quashed and/or set aside.

iii. That the said ruling/order be substituted with an order allowing the application dated 20th July, 2011 in terms of prayers (d), (e) and (f) to wit;

i. That the orders issued by the Chief Magistrate's Court in civil case number 245 of 1988 adopting the Embu District Land Surveyor's report dated 26th May, 2009 on the proposed sub-division of land parcel number Ngandori/Kirigi/3247 be reviewed and set aside.

ii. The land parcel number Ngandori/Kirigi/3247 be sub-divided as per the sketch of the proposed sub-division dated 6th June, 1996 annexed to the supporting affidavit to the application dated 20th July, 2011 and marked as annexture MK2.

iv. That alternatively, the application dated 20th July, 2011 be heard afresh inter-partes.

v. That the applicant be awarded costs of this appeal.

9. By consent of the parties, it was agreed that the said appeal would be disposed of the way of written submissions. The Appellant filed his submissions on 19th December, 2014 whereas the Respondent filed his on 9th March 2015.

10. The court has considered the entire evidence on record and the submissions of the parties herein. The main question in controversy is whether the trial court erred in law in declining the Appellant's application for review and setting aside of the orders made on 12th May 2011 adopting the report of the District Surveyor. That is the basis of the appeal which has been split into eleven (11) different points.

11. The court shall deal with the 1st, 2nd and 3rd grounds of appeal since they are related. According to the record, the Appellant's counsel did not attend court for the hearing of the application dated 17th August 2010 despite service. There was no reason given to the trial magistrate in the application for review why there was no attendance. It was not possible for the court to know whether such failure was due to inadvertence or some excusable error or mistake. The mere fact that the client was not notified of the hearing date by his own advocate is not necessarily a good ground for review.

12. In my view, the learned magistrate had no material before him on the basis of which he could have exercised his discretion in favour of the Appellant in order to review or set aside his earlier orders. The court therefore finds no merit in the 1st, 2nd and 3rd grounds of appeal and the same are dismissed.

13. The 4th ground of appeal faults the trial magistrate for failing to consider and address all the issues raised in the application for review dated 20th July 2011. It is evident from the record that the trial magistrate did not identify the issues for determination and make pronouncements thereon as contemplated under the Civil Procedure Rules. However, for the reasons given above and the reasons to be given hereafter, such failure did not occasion a miscarriage of justice.

14. The 5th and 6th grounds of appeal relate to the erroneous numbering of plots A and C in the District Surveyor's report dated 26th May 2009. The existence of an error in the said report is evident. The Respondent has rightly conceded in the affidavits on record that the Appellant's parcel should be plot 'C' and not plot 'A'. That is an error which was noted by all concerned parties and the trial magistrate ought to have corrected the same without setting aside his orders of 12th May 2011 in their entirety. The 5th and 6th grounds of appeal have merit and the court shall order a correction of the obvious error.

15. The court finds no merit in the 7th ground of appeal. Although the parties to the dispute were entitled to have an input on the mode of sub-division of the property in dispute, they were unable to agree on the mode for many years. It is on record that when the District Surveyor eventually visited the site on 17th April 2009, he gave all the concerned parties another chance to agree on the issue without success. They were given about 59 days to do so. The Appellant, of course, had a final chance to be heard by the trial magistrate on the issue before adoption of the surveyor's report but neither he nor his advocate attended court on the material date. The court is not satisfied that the failure to hear the Appellant or his counsel on this issue occasioned a miscarriage of justice.

16. The 8th ground of appeal attacks the proposal by the surveyor to propose a 9 metre wide access road and the failure by the learned magistrate to find that such a big road would cause unnecessary wastage of land. The court was not technically suited to challenge the size or width of the access road. The mandate of proposing a suitable sub-division scheme had been vested upon the District Surveyor as an expert vide the consent order dated 13th January 2005. In my opinion, the trial magistrate had no basis for questioning the size of the access road proposed by a surveyor in the absence of a contrary survey report from another expert. The court, therefore, finds no merit in this ground of appeal and the same is dismissed.

17. The court has considered the 9th ground of appeal and finds no merit in the same. The consent of the parties made on 13th January 2005 mandated the District Surveyor to prepare a report on the best manner of subdividing the suit property. I am not aware of any law in Kenya which requires that every property owner must have a direct access to a river. In my opinion, it is possible for a professional surveyor to propose a viable scheme of sub-division which does not provide a direct access to a river to all concerned parties. The 9th ground of appeal therefore fails.

18. The 10th ground of appeal faults the trial magistrate for not finding that the best mode of sub-division of the disputed property was contained in a certain sketch dated 6th June 1996. The court finds no merit in this ground of appeal. In my opinion, it was not the business of the trial magistrate to meddle with the consent of the parties recorded in court on 13th January 2005 on the basis of a sketch dated 6th June 1996.

If it was the intention of the parties to employ that mode of sub-division, it was incumbent upon them to include it in the consent of 13th January 2005. It is clear that the surveyor was mandated to come up with the best mode of sub-division and not merely to replicate the proposal contained in the earlier sketch plan. The 10th ground of appeal is therefore dismissed.

19. The 11th ground of appeal is a general one which faults the trial magistrate for failing to review and set aside the orders made on 12th May 2011. Save for the corrections to the numbering of the plots considered in grounds 5 and 6 of the appeal, the court finds no fault with the ultimate decision of the court to dismiss the application dated 20th July 2011.

20. The upshot of the foregoing is that save for the corrections to be made to the numbering of the plots, the Appellant's appeal is hereby dismissed. In my opinion, the following orders are appropriate in the circumstances of this appeal.

i. The Appellant's appeal succeeds only to the limited extent of correcting the naming of the plots in the order dated 12th May 2011 so that the plot of the Appellant, Karenge Matenguri, is numbered 'C' whereas plot 'A' is to be transferred to Festus Njeru Kiragu.

ii. The rest of the appeal is hereby dismissed.

iii. Each party shall bear own costs.

21. It is so decided.

JUDGEMENT DATED, SIGNED and **DELIVERED** in open court at **EMBU** this **2nd** day of **NOVEMBER, 2017**

In the presence of Mr Okwaro for the Appellant and Mr Njoroge for the Respondent.

Court clerk Njue/Leadys.

Y.M. ANGIMA

JUDGE

02.11.17