



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC APPEAL NO. 19 OF 2014**

**JESSE MUTHIGA ALBERT.....APPELLANT**

**VERSUS**

**DAVID MWANIKI CHEGE.....1<sup>ST</sup> RESPONDENT**

**CHARLES MAINA CHEGE.....2<sup>ND</sup> RESPONDENT**

***(APPEAL AGAINST THE RULING OF THE LAND REGISTRAR MURANG'A IN A BONDARY DISPUTE INVOLVING LAND PARCEL NO. LOC.8/KIONJOINE/408 AND LOC.8/KIONJOINE/675 DELIVERED ON 30<sup>TH</sup> APRIL, 2014 (BUT ISSUED ON 14<sup>TH</sup> MAY, 2014)***

**JUDGMENT**

This appeal is against the ruling of the Land Registrar Muranga following a boundary dispute involving the appellant's land parcel No. LOC 8/KIONJOINE/408 and the respondent's land parcel No. LOC 8/KIONJOINE/675 which was delivered on 30<sup>th</sup> April 2014.

The genesis of this dispute is that the parties were heard by N.N. Njenga, the District Land Registrar Muranga who deliberated over their boundary dispute in the company of two surveyors namely ELIZABETH WANJERI and SUSAN MBOGO, the area Chief JOSEPH K. MBOGO and the County Assistant Commissioner EDWARD VOKO. After hearing the parties, the said Land Registrar proceeded to fix the boundary as required.

Being dissatisfied with that ruling, the appellant filed this appeal on 19<sup>th</sup> May 2014 in which he raised the following six (6) grounds:-

- 1. The Land Registrar erred in law in hearing and determining the dispute afresh after it had been determined by her colleague Mr. M. Wanjama on 9<sup>th</sup> October 2013. This amounted to sitting on appeal from another Land Registrar of the same station instead of advising the respondent to seek relief by way of appeal.***
- 2. The Land Registrar erred in law by deciding the already determined dispute without giving valid reasons for arriving at her decision.***
- 3. The Land Registrar erred in totality ignoring the Registry Index Map which although it is not an authority on boundaries, nonetheless is indicative whether boundaries are straight or are curved and the general shape of a parcel of land. Her failure on this account led her to unreasonably hive off from the appellant's land a triangular portion measuring approximately 0.09 acres and also to distort the shape of the appellant's land from a regular rectangle to a wedge shape.***

4. *The land Registrar erred in failing to take down evidence of witnesses even though they were present at the hearing.*
5. *The Land Registrar correctly observed that the two parcels of land were the result of subdivision of two parcels of land and then erred in not using the respective mutation forms to decide the boundary dispute since these were not boundaries set by the Land Consolidation Department but boundaries set by the survey of Kenya.*
6. *The ruling of the Land Registrar is un-reasonable, unjust and unfounded on any valid evidence and otherwise an affront of justice.*

The appellant therefore prays that:-

- a. *This appeal be allowed with costs against the respondents jointly and severally.*
- b. *The ruling of the Land Registrar Muranga delivered on 30<sup>th</sup> April 2014 on the dispute involving land parcels No. LOC. 8/KIONJOINE/675 and LOC 8/KIONJOINE/408 be quashed and set aside.*
- c. *The respondents be condemned in the costs of this appeal.*
- d. *Such further or other orders and reliefs be granted as are just.*

The appeal was canvassed by way of written submissions filed both by Waiganjo Gichuki advocate for the appellant and A.N. Chomba advocate for the respondents which I have considered.

Grounds 1 and 2 of the memorandum of appeal can be disposed off together. It is pleaded that the Land Registrar erred in law in hearing a dispute that had earlier been determined by another Land Registrar namely Mr. M. Wanjama on 9<sup>th</sup> October 2013 and without giving valid reason for her decision. The ruling subject of this appeal was made by the District Land Registrar Muranga N.N. Njenga following proceedings conducted on 30<sup>th</sup> April 2014 but the ruling is dated 14<sup>th</sup> May 2014. Those are the only proceedings availed to this Court. No other proceedings or ruling have been placed before the Court to confirm the allegation that this dispute

had earlier been determined by Mr. M. Wanjama on 9<sup>th</sup> October 2013 and although the record contains summons issued to the parties on 2<sup>nd</sup> September 2013 to the effect that the District Land

Registrar would visit the site at 10.00 a.m. on 9<sup>th</sup> October 2013, the only way to prove that infact the District Land Registrar visited the site and determined the boundary dispute on 9<sup>th</sup> October 2013 would be by availing the proceedings of that day and the ruling made. Even if the Land Registrar Mr. Wanjama visited the site, it was the duty of the appellant to show that indeed the dispute was determined during that visit. The onus of that proof lay with him under **Sections 107 to 109 of the Evidence Act** which 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 exists***

***(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.***

***108 The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.***

***109 The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is proved by any law that the proof of that fact shall lie on any particular person"***

The appellant having alleged therefore that this boundary dispute had been determined by Mr. M. Wanjama on 9<sup>th</sup> October 2013, the burden of proof was on him to prove that allegation and he could only have done so by availing the determination. In his submissions on behalf of the appellant, counsel has

submitted as follows:-

***“On the appointed date Land Registrar Mr. Wanjama went to site and conducted a hearing and made a decision and returned the boundary to its correct position (page 8 lines 5 - 6) but the 2<sup>nd</sup> respondent says he was not satisfied by that decision”***

I have looked at the proceedings conducted by the Land Registrar N.N. Njenga on 30<sup>th</sup> April 2014 and specifically page 8 line 5 – 6 referred to by counsel for the appellant. The relevant portion of those proceedings read as follows as per the testimony of the 2<sup>nd</sup> respondent:-

***“Last year, the plaintiff came from your office with the Land Registrar Mr. Wanjama and shifted the boundary of which we refused.***

***After that, the plaintiff came with his team and put a boundary at night but they were seen and we reported them to the police but they were never prosecuted”***

In my view, that testimony only demonstrates an attempt by Mr. Wanjama and another team to establish the boundary but which was frustrated. It does not amount to hearing and determining the dispute as envisaged under **Section 19 (2) of the Land Registration Act**. The Land Registrar N.N. Njenga gave reasons for her ruling delivered on 30<sup>th</sup> April 2014 which are clear from the record. Accordingly Grounds 1 and 2 of the appeal fail.

In Ground 3, it is alleged that the Land Registrar ignored the Registry Index Map thereby hiving off 0.09 acres from the appellant’s land and as a result distorted its shape. **Section 19 (1) of the Land Registration Act** provides as follows:-

***“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 boundaries”***  
emphasis added

It is therefore the discretion of the Land Registrar to decide how to proceed once the boundary dispute is reported for determination. In this case, the Land Registrar who was accompanied by two surveyors during the hearing saw no need to measure the land since the other boundaries had no dispute. She then proceeded to fix the boundary after the surveyor aligned it. I see no reason to fault that process.

In Ground 4, the appellant stated that the Land Registrar erred in failing to take down evidence of witnesses though they were present during the hearing. I have looked at the record of the proceedings of 30<sup>th</sup> April 2014 which shows that both the appellant and the 1<sup>st</sup> respondent were present during the hearing. The record shows that the 1<sup>st</sup> respondent had eight (8) witnesses present while no witnesses were recorded as present for the appellant. That can only mean that the appellant did not call any witnesses. He cannot therefore be heard to say that his witnesses were present and were not heard unless he is suggesting that the record is not a true reflection of what transpired on that day. In any event, even the 1<sup>st</sup> respondent’s witnesses who were present did not testify. The record shows that both parties were heard in support of their respective claims before the Land Registrar arrived at the decision

subject of this appeal. **Sections 19 (2) of the Land Registration Act** says that the Registrar shall, ***“after giving all persons appearing in the register an opportunity to be heard”*** proceed to fix the boundary. In my view, there was compliance with the law because the parties were both heard and none had any advantage over the other as far as witnesses were concerned. Indeed, as indicated above, even though the 1<sup>st</sup> respondent brought witnesses, they did not testify. That ground of appeal similarly fails.

In Ground 5 and 6, it is claimed that the Land Registrar erred in not using the respective mutation forms

to decide the boundary dispute and therefore the ruling is un-reasonable, un-just and unfounded. It must be recognized that the Land Registrar is an expert in his field and that is why the law mandates him to hear

and determine boundary disputes. In doing so, he is entitled to consider whatever relevant documents he wishes to refer to. All that is within his discretion and if there is sufficient evidence before him to enable the determination of the dispute, the decision arrived at cannot be faulted merely because some other document was not considered. In this case, the surveyor not only heard the parties and visited the scene, but he was also accompanied by two surveyors who aligned the boundary. There was substantial compliance with the law in the manner in which the exercise was conducted and I see no reason to find that the ruling of the Land Registrar is un-reasonable, un-just or unfounded.

I accordingly find that there is no merit in this appeal which I dismiss with costs to the respondents.

**B.N. OLAO**

**JUDGE**

**4<sup>TH</sup> DECEMBER, 2015**

COURT: Judgment delivered, dated and signed this 4<sup>th</sup> day of December, 2015 in open Court.

Mr. Miano for Mr. Gichuki for Appellant present

1<sup>st</sup> Respondent present in person

Right of appeal explained.

**B.N. OLAO**

**JUDGE**

**4<sup>TH</sup> DECEMBER, 2015**