



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, KIAGE & MURGOR, JJA)

CIVIL APPEAL NO. 274 OF 2011

BETWEEN

PETER KAMONDIA NJUGUNA.....APPELLANT

AND

PAUL NG'ANG'A GACHIERESPONDENT

(Being an appeal from the judgment and decree of High Court at Nairobi (Angawa, J.) dated 13th October 2017 in HC Civil Appeal No. 327 of 2007

JUDGMENT OF THE COURT

The appellant, **Peter Kamondia Njuguna**, has brought this appeal against the judgment of the High Court (Angawa, J) that upheld the Kiambu Land Registrar's order for the boundaries in respect of Land parcel no. Kiambaa/ Kanunga/789 (*the subject land*) to be ascertained.

By the time of hearing the appeal, both Peter Kamondia Njuguna (*the appellant*) and Paul Ng'ang'a Gachie (*the respondent*), the original parties had passed on. They were both represented by their personal representatives, Mr. Daniel Njuguna, and Mr. David Gachie Ng'ang'a respectively, both of whom submitted in person. We will nevertheless retain the description of the parties, as the appellant and the respondent.

The brief facts of the appeal, as can be discerned from the record are that Veronica Mumbi Njuguna (*Veronica*) and the appellant are brother and sister. In 1982 a dispute over inheritance of their father's estate arose between them, where Veronica claimed that the appellant held land parcel no Kiambaa/ Kanunga/486 comprising one and a half acres in trust for herself and her mother after their father passed away. Aggrieved that the appellant had evicted her from the land, Veronica filed a land complaint before a panel of elders at the District Office, Kiambaa. On 22nd March 1983, the panel determined that the appellant would retain 1 acre of the subject land and Veronica would have ½ an acre. The award in respect of the panel's decision was adopted by the Senior Resident Magistrate's court (Hon. O. Tunya-as he then was), as an order of the court in *Senior Resident Magistrate's Court Land Case No. 76 of 1982* on 5th July 1983.

Despite the trial court's decision, the appellant refused to sign the subdivision forms in terms of the court's order. But unbeknown to the appellant, Veronica sold her portion of the land, and with assistance of the Executive Officer of the court, had the relevant subdivision and transfer documentation signed. The result was that land parcel no Kiambaa/ Kanunga/486 was subdivided into two portions namely Land Parcel Nos. Kiambaa/ Kanunga/788 and Kiambaa/ Kanunga/789, the subject land. That ended the matter in *Senior Resident Magistrate's Court Land Case No. 76 of 1982*.

Many years later, some time in 2007, a separate application was filed with the District Land Registrar, Kiambu, where the respondent sought to have the boundaries in respect of the subject land ascertained under *section 21 of the Registered Land Act, cap 300 (repealed)*. The respondent stated that he was the registered owner of the subject land which he claimed to have purchased from one, James Ngugi Gacheru. He further claimed that the appellant had denied him usage of the subject land, and sought to have the boundaries of the land defined by the Land Registrar, Kiambu. The appellant denied knowing the respondent, and instead contended that there was a dispute pending in court between them; that he had sued the respondent in *High Court Civil No. 1307 of 2006*, and was not aware that his land had been subdivided, or that the subject land, which belonged to his sister Veronica, had been sold.

The District Land Registrar, Mr. Ndirangu J. Kingori delivered a ruling on 12th April 2007 which read in part;

"The original parcel of land was KIAMBAA/KANUNGA/486.

Vide an order of the Court in Land case no. 76 of 1982 the parcel was ordered to be subdivided.

Peter Kamondia was to get 1 acre and Veronca Mumbi Njuguna ½ acre. Peter Kamondia is the respondent herein. He refused to sign the documents and the same were executed by the Executive Officer of the Court.

This was the genesis of KIAMBAA/KANUNGA/788 and 789 being 1 acre and ½ acre respectively. It is this parcel KIAMBAA/KANUNGA/789 that has subsequently been bought by the applicant Paul Nganga Gachii. The mutation document was used to partition the land then is available in its original form...”

The Land Registrar determined that the appellant’s allegation that the subject land was fraudulently subdivided was not merited and in so finding, ordered the District Surveyor to utilize the extant mutation form to mark the common boundary between the two parcels.

The appellant was aggrieved by the Land Registrar’s decision and filed an appeal in the High Court on grounds that, the District Land Registrar was wrong to hear the complaint whilst a similar case was pending before the High Court; in finding that the mutation form was valid even though it was not drawn by a land registrar as required by law, and that the District Land Registrar erred in failing to find that the respondent was a stranger to the court order in *Senior Resident Magistrate’s Civil Case No. 76 of 1982 Kiambu*.

After considering the parties’ pleadings and submissions the learned judge found that the District Land Registrar was bound by the magistrates’ court’s decision to grant the orders concerning the boundaries of the subject land. The court found that the appeal was without merit and accordingly dismissed it.

Aggrieved by the High Court’s decision, the appellant filed this appeal on amended grounds that, the learned judge failed to appreciate that the genesis of the claim was a boundary dispute between Land parcel no. Kiambaa/Kanunga/788 and Kiambaa/Kanunga/789; that the dispute arose from the land dispute heard on 16th November 1982 at the District Office, Kiambaa, Kiambu over ownership of Land parcel no. Kiambaa/Kanunga/486 registered in the appellant’s name, and therefore the respondent had no locus standi to act or enforce the orders made in *Senior Resident Magistrate’s Civil Case No. 76 of 1982 Kiambu*, as he was a stranger thereto, the correct parties being Veronica and the appellant.

It was further contended that the learned judge erroneously believed that the respondent purchased the subject land from Veronica; that the learned judge failed to consider the entire record, on the misconduct and prejudice caused to the appellant by the District Land Registrar, Kiambu and the respondent, who are the defendants in *High Court Civil No. 1307 of 2006* which concerned a boundary dispute between Land parcel no. Kiamba/Kanunga/788 and the subject land. The appellant also complained that the learned judge was wrong to uphold the finding that Veronica had sold her half acre of Land parcel no. Kiambaa/Kanunga/486, which was not properly delineated in the mutation form and its measurements extend beyond half an acre.

Mr. Daniel Njuguna, who appeared on behalf of the estate of the appellant submitted that he was dissatisfied with the decision of the trial court which ordered the subdivision of the subject land; that the genesis of the dispute arose from a decision of a panel of elders, where Veronica claimed the subject land; that during the hearing before the panel of elders he claimed his father did not testify or, call his witnesses. It was submitted that the land was purchased by the appellant’s father and subsequently transferred to the appellant, and that his sister, Veronica had laid false claim to the land, and that the learned judge did not analyse the evidence, and instead relied on the evidence of a stranger.

Mr. David Gachie Ng’ang’a, submitting in person on behalf of the respondent stated that he was representing all the respondents including Cecilia Wakonyo Ng’ang’a who was also present in Court. He stated that the subject land was purchased from one, James Ngugi Gacheru, and that the Land Registrar’s decision was concerned with the boundaries of the subject land; that the original owner was Veronica, and their father was the third buyer. That further, he was born on the subject land, but no boundary was situated on the land, and there is no evidence to show that it was subdivided.

We have considered the pleadings, the ruling of the High Court, the parties’ submissions and the law. As this is a first appeal, it is our duty to analyze and evaluate the evidence and reach our own conclusions whilst bearing in mind that we did not have the benefit of seeing or hearing the witnesses. (See *Selle vs Associated Motor Boat Co. [1968] EA 123*; *Jabane vs Olenja [1986] KLR 661, 664*. This Court stated in *Jabane vs Olenja [1986] KLR 661, 664* that it will not lightly differ from the findings of fact of a trial judge and will only interfere with them if they are based on no evidence. (See *Ephantus Mwangi vs Duncan Mwangi Wambugu (1982-88) 1 KAR 278* and *Mwanasokoni vs Kenya Bus Services (1982-88) 1 KAR 870*).

Guided as we are by the foregoing, we consider that the issues for us to address are whether the Land Registrar was entitled to hear and determine a boundary dispute between the appellant and the respondent, and whether in upholding the decision of the Land Registrar, the learned judge erroneously determined an appeal in respect of a dispute to which the respondent was not a party, and whether the Land Registrar’s decision was prejudicial to *High Court Civil No. 1307 of 2006* pending before the court.

A review of the record reveals that, the respondent claimed to be the owner of the subject land which, he purchased from one James Ngugi Gacheru, and that the appellant had refused to have the boundaries of the subject land delineated. As a consequence, on 12th April 2007, he lodged a complaint pertaining to a boundary dispute over the subject land with the Land Registrar Kiambu, where he sought orders for the boundaries to be ascertained. The complaint was brought under section 21 of the *Registered Land Act (repealed)* which provides;

“(1) Except where, under section 22, it is noted in the register that the boundaries of a parcel have been fixed, the registry map and any filed plan shall be deemed to indicate the approximate boundaries and the boundaries situation only of the parcel.

(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.

(3) ...

(4) No court shall 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 this section.

(5) ...” (Emphasis ours)

The above provisions clearly specified that where the position of any boundary is uncertain, any interested party can apply to the Land Registrar to have the boundary ascertained, and following such application it was the statutory duty of the Registrar to determine and indicate the position of the uncertain or disputed boundary. *Section 21 (4)* further provides that until such determination by the Registrar, a court has no jurisdiction to hear and determine a boundary dispute concerning registered land. See *Wamutu vs Kiarie [1982] KLR 480*.

The appellant’s grievance is that both the Land Registrar and the High Court were wrong to have entertained the respondent’s claim as it emanated from the orders in *Senior Resident Magistrate’s Civil Case No. 76 of 1982 Kiambu*, which dispute was between himself and Veronica and therefore, the respondent was not a party. So, was there a boundary dispute in terms of *section 21* and was the respondent an interested party?

***Black’s Law Dictionary* defines an “interested party” as “A party who has a recognizable stake (and therefore standing) in the matter.”**

According to the record, the award that was adopted as an order in *Senior Resident Magistrate’s Civil Case No. 76 of 1982 Kiambu*, specified that Land parcel no. Kiambaa/Kanunga/486 was to be shared, where the appellant was to have 1 acre and Veronica ½ acre. Since the appellant had refused to sign the related documents, including a mutation form and transfer, the record shows that they were signed by the Executive Officer of the court. It would seem that, Veronica sold her portion, which the respondent claimed to have later purchased from one, James Ngugi Gacheru. In the complaint lodged with the Land Registrar, the respondent sought to have the boundaries in respect of Veronica’s portion demarcated.

Satisfied that the circumstances of the case pointed to a boundary dispute, where the respondent had demonstrated that he had an interest in the subject land and was therefore entitled to have the boundaries ascertained, the Land Registrar as mandated by *section 21* ordered the District Surveyor to mark the common boundary between Land parcel no. Kiamba/Kanunga/788 and the subject land.

On her part, in answer to the complaint that the learned judge ought not to have entertained the appeal from the Land Registrar’s decision, since at all times what was contested was an ownership dispute over Land Title No. Kiambaa/Kanunga/486 registered in the appellant’s name, and therefore the respondent had no *locus standii* to act or enforce the court orders in *Senior Resident Magistrate’s Civil Case No. 76 of 1982 Kiambu*, the learned judge had this to say;

“When the appellant addressed the court, he most certainly was not aware his sister had sold her portion of ½ an acre of land. He admitted that she was entitled to that ½ acre and wished to know how the said respondent came to be in possession.

The explanation given by the respondent’s advocate that upon refusal to sign the transfer forms as ordered by the court, the sister was granted leave to have the executive officer sign the form in place of the appellant. This is the reason why the respondent now had locus in the matter.”

The learned judge discerned that following the order of subdivision of Land Title No. Kiambaa/Kanunga/486 in *Senior Resident Magistrate’s Civil Case No. 76 of 1982 Kiambu*, Veronica sold her portion, that is the subject land. And, after the respondent purchased it, it seems a boundary dispute ensued between the appellant and the respondent, in which the respondent sought to have the Land Registrar ascertain.

Contrary to the appellant’s assertions that the dispute was between himself and Veronica, our view is that what was for determination before the Land Registrar was a boundary dispute between the appellant and the respondent. And, having demonstrated that he held an interest in the subject land, we are satisfied that the learned judge rightly concluded that the respondent had *locus standii*, as an interested party to lodge a complaint with the Land Registrar for the determination of the boundaries, and pursuant to *section 21*, the Land Registrar was mandated to order the District Surveyor to mark the common boundary between Land parcel no. Kiamba/Kanunga/788 and the subject land. Based on the foregoing, we consider that the Land Registrar’s decision was made in accordance with the provisions of the law, and the learned judge cannot be faulted for upholding that decision.

As concerns *High Court Civil No. 1307 of 2006*, which was pending before the court, since the appellant did not demonstrate that conservatory orders were granted by the court prohibiting any dealings with the subject land, we find that nothing barred the Land Registrar from granting the orders sought.

In sum, we find that there is no basis for interfering with the decision of the High Court. The appeal is unmerited and is dismissed with costs to the respondent.

It is so ordered.

Dated and delivered at Nairobi this 19th day of June, 2020.

W. OUKO (P)

.....

JUDGE OF APPEAL

P.O. KIAGE

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR