



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED, J.J.A)

CIVIL APPEAL NO. 196 OF 2012

BETWEEN

GRACE MMBONE KAMIDI (*Suing as the Personal*

Representative of **RICHARD LOCHO MAKAYA**).....**APPELLANT**

AND

HUDSON AMBANI.....**1ST RESPONDENT**

HERBERT MUNUBLI.....**2ND RESPONDENT**

JAMES ONDOLO.....**3RD RESPONDENT**

(An appeal against the judgment and decree of the High Court at Kakamega

(Lenaola, J.) delivered by (Chitembwe, J.) on the 2nd February, 2012

in

Kakamega HCCC No. 83 of 2004)

JUDGMENT OF J. MOHAMMED JA

Background

1. The history of this land boundary dispute is long and chequered. **Richard Locho Makaya**, (the deceased) brought this appeal against the judgment and decree of the High Court of Kenya at Kakamega (**Lenaola, J.**) as he then was, delivered on his behalf by (**Chitembwe, J.**) on 2nd February, 2012. The deceased died on 13th June, 2013 before this appeal could be heard and was substituted by his legal representative, **Grace Mmbone Kamidi** (the appellant). In the judgment the learned Judge dismissed the deceased's suit in which he had sought an eviction order against the respondents for allegedly trespassing onto the deceased's parcel of land known as **Kakamega/Lugari/1340**. The deceased also sought a permanent injunction barring the respondents from interfering with the said parcel of land.
2. From the record, parcel number **Kakamega/Lugari/1340** was registered in favour of the deceased. On 8th deceased subdivided the parcel into two plots numbers **766** and **767**. On the other hand, parcel number **Kakamega/Lugari/21** was registered in the name of **Joseph Kadima**, the father of the respondents.
3. On 26th November, 1998, the District Land Registrar a **Mr. A. O. Akello** following a complaint lodged by **Margaret Kaveza Kadima**, the mother of the respondents, filed another report in which he reaffirmed the amendment of the map as ordered by his counterpart in 1985 but observed that after comparing the amended map with the ground position the deceased had exceeded what he had been given by the amended map; and that he had in fact been cultivating the respondents' parcel of land.
4. Sometime in the year 2000, the deceased lodged a complaint to the police against the respondents accusing them of forcibly entering into

plot number 1340. The respondents were charged with forcible entry contrary to **section 90** of the Penal Code in the Resident Magistrate's Court at Butali. The Magistrate ordered the Land Registrar together with the District Surveyor to visit the disputed parcel numbers Kakamega/Lugari/20 and 21 and file a report. In the report the Land Registrar made a finding that the respondents had not forcibly entered the deceased's parcel of land. On that basis they were acquitted. We believe that it is all the above events that culminated in the deceased filing the suit in the High Court that is the matter of this appeal. The High Court (**Lenaola J** - as he then was) after hearing the case and also relying on the Land Registrar's report, filed in the Criminal Case against the mother of the respondents in the Magistrate's Court as well as the report prepared by **Mr. A. O. Akello** dismissed the case. The learned judge held that the 1985 boundary as affirmed on 26th November, 1998 should be maintained.

Submissions by Counsel

5. The deceased was aggrieved by that decision and has preferred this appeal against the entire judgment on six grounds. When the matter came up for hearing before us, **Ms. Kipkesei** appeared for the appellant and **Ms. Sheila Soita** appeared for the respondents. **Ms. Kipkesei** submitted that two documents were presented in the High Court, namely a copy of the title over Kakamega/Lugari/1340 and the official search thereof, which indicated that the deceased was the registered owner of the land. Learned counsel argued that the respondents did not raise any objection to the issue of ownership. Counsel contended that the appellant was in occupation of the subject land that the boundary dispute arose in 1985 and an amendment of the map was ordered by the Land Registrar and the appellant's land increased by 3.82 ha while the respondents' land decreased by 3.4 ha; and that in 1999 the respondents built a structure that encroached on the appellant's land. Counsel therefore faulted the learned Judge for making a finding that it was the appellant who had encroached onto the respondents' land.

6. **Ms. Sheila Soita** for the respondents opposed the appeal and submitted that the respondents did not dispute that parcel number 1340 belonged to the appellant. However, counsel denied that the 1985 report by the Land Registrar increased the appellant's portion by 3.81 ha. Counsel submitted that the learned Judge clearly utilized the reports from experts and the proceedings from the site visits by the experts who went to the ground. It was argued that the reports and the criminal case have never been appealed. In conclusion, counsel maintained that the two parcels border each other and the appellant and respondent are both utilizing their portions and there is no encroachment or trespass.

Determination

7. We have considered the evidence on record, the respective submissions by learned counsel, the authorities cited and the law. As this is a first appeal, it is this Court's duty to analyze and re-assess the evidence on record and reach its own conclusions bearing in mind a precaution that it did not have the benefit of seeing and accessing the demeanor of the witnesses. See **Selle V. Associated Motor Boat Co.** [1968] EA 123. This Court stated in **Jabane V. Olenja**, [1986] KLR 661 at pg 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 V. Duncan Mwangi Wambugu**, (1982-88) 1 KAR 278 and **Mwanasokoni V. Kenya Bus Services**, (1982-88) 1 KAR 870.

8. In our view, the only issue that turns for consideration in this appeal is whether the learned Judge misdirected himself in his finding dismissing the appellant's case. To begin with the learned Judge relied on **section 21** of the Registered Land Act (now repealed) which provided as follows:

"21(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 approximate 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) Where the Registrar exercises the power conferred by subsection (2), he shall make a note to that effect on the registry map and in the register and shall file such plan or description as may be necessary to record his decision.

(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) Except where, as aforesaid, it is noted in the register that the boundaries of a parcel have been fixed, the court or the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as it or he thinks fit. "

9. At the institution of this suit in 2004 two regimes being the Registered Land Act (RLA), now repealed, and the Land Disputes Tribunal Act (LDTA), also repealed, had provisions for resolution of boundary and trespass disputes. As a matter of fact, under Part II of the RLA the Registrar had power to determine boundary disputes under **section 21(2)** as follows:

"21(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" (emphasis added)

10. When a dispute fell within the ambit of **section 3(1)** of the LDTA, it was to be determined by the Land Dispute Tribunal in accordance with that Act. The section provided:

"3. (1) Subject to this Act, all cases of a civil nature involving a dispute as to—

- (a) the division of, or the determination of boundaries to land, including land held in common;
- (b) a claim to occupy or work land; or
- (c) trespass to land,

shall be heard and determined by a Tribunal established under section 4.” (Emphasis Supplied)

11. This Court in the case of Esther Rita Mwelu Kyendo & another V. Kazungu Ngari, Civil Appeal No. 59 of 2015, expressed itself as follows on disputes involving the determination of boundaries and trespass to land:

“The Land Disputes Tribunal Act, before it was repealed by Environment & Land Court Act, established the Land Dispute Tribunal with the power to hear cases of civil nature involving: -

- “(a) the division of, or the determination of boundaries to land, including land held in common.
- (b) a claim to occupy or work land; or
- (c) trespass to land.

The decision of the Tribunal would be filed and entered in the magistrate’s court as a judgment. Appeals from the Tribunal lay to the Provincial Appeals Committee and thereafter to the High Court only on points of law. The Land Disputes Tribunal Act amended section 159 of the Registered Land Act by expressly recognizing the jurisdiction of the Tribunal in matters enumerated under section 3(1) aforesaid.

It must follow from this that neither the Registrar nor the learned trial magistrate had jurisdiction, as was rightly determined by the learned Judge, to entertain the action. Section 159 that the trial court relied on to cloth itself with jurisdiction did not vest any such powers in that court in disputes relating to boundary and or trespass to land.

...

At the same time the powers relating to boundary determination vested in the Registrar by the Registered Land Act was to be read with the amendments to section 159 of the Act in mind. The determination of boundary disputes having expressly been divested from the courts and the Registrar and vested in the Tribunal by a later legislation could only be entertained by the Tribunal.

...

Of course the Tribunal in adjudicating upon any of the questions it was empowered to inquire into by the Act, could under section 3 (10) be assisted by the Registrar.”

12. It is not in doubt that the suit properties were registered under the Registered Land Act (repealed). From the above provisions and authority, it is clear that the power to determine a dispute concerning boundaries of registered land and trespass fell on the Land Disputes Tribunal. The learned Judge clearly appreciated these provisions when he stated that they ousted the jurisdiction of the court on the question of boundary. However, he ought too; to have found that in the particular case before him the issue was one of trespass. This, similarly, was an issue that was not within the jurisdiction of the High Court in terms of **section 159** of the RLA (repealed) which provided that;

“**159. Civil suits and proceedings relating to the title to, or the possession of, land, or to the title to a lease or charge, registered under this Act, or to any interest in the land, lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration, shall be tried by the High Court and, where the value of the subject matters in dispute does not exceed twenty five thousand pounds, by the Resident Magistrate’s Court, or, where the dispute comes within the provisions of section 3 (1) of the Land Disputes Tribunals Act in accordance with that Act.**” (emphasis added)

13. According to the plaint, the appellant alleged that the respondents had unlawfully occupied his land and erected buildings. The proper forum for determination of a trespass dispute in accordance with **section 159** of the RLA as read with **section 3(1)** of the LDTA was the Land Disputes Tribunal and not the High Court. The High Court only comes at the tail end when the decision of the Appeals Tribunal is challenged. And even then only on points of law. The LDTA amended **section 159** of the Registered Land Act by expressly recognizing the jurisdiction of the Tribunal in matters enumerated under **section 3(1)** aforesaid. See Esther Rita (supra).

14. I have looked at and analyzed all the evidence produced in the High Court. As noted hereinabove the appellant instituted criminal proceedings against the respondents accusing them of forcibly entering onto his parcel of land known as Kakamega/Lugari/1340. The learned magistrate ordered the District Land Registrar and the District Surveyor to visit the disputed land and file a report. According to the report, the respondents had not trespassed onto the appellant’s land and on this basis, the learned magistrate acquitted the respondents. No appeal was lodged against that decision. I am also of the view that the appellant, as the complainant, having lost the criminal case decided to lodge the suit in the High Court still accusing the Respondents of trespassing onto his land. The report by the District Land Registrar which has never been challenged by the appellant clearly stated that the respondent had not trespassed onto the appellant’s parcel of land.

15. Yet another report dated the 26th November, 1998 by Mr. A.O. Akello a District Land Surveyor likewise concluded that it was the

appellant who had failed to comply with the amended map and thereby encroached onto the respondents' land. Though the appellant filed an appeal against that report, we are not aware what became of the appeal.

16. The inevitable conclusion that I arrive at is that the respondents have not trespassed onto the appellant's land. With respect, the learned Judge reached the correct decision in dismissing the suit.

17. Accordingly, this appeal lacks merit and is dismissed with costs to the respondents.

Dated and delivered at Kisumu this 30th day of December, 2019

J. MOHAMMED

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR

JUDGMENT OF H. OKWENGU, JA.

I have read the draft Judgment of my sister Mohammed, JA. The facts relating to this appeal are well captured in the Judgment. I fully concur with the reasoning of my sister Judge. The Learned Judge of the High Court properly considered the issues and came to the correct decision. In the circumstances, the orders of the Court shall be as proposed by Mohammed, JA.

This Judgment has been delivered in accordance with Rule 32(3) of the Court of Appeal Rules Githinji, JA having ceased to hold office by virtue of retirement from service.

Dated and delivered at Kisumu this 30th day of December, 2019.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR