



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPEAL NO. 151 OF 2012

BETWEEN

JOSHUA NYAMACHE OMASIRE.....APPELLANT

AND

CHARLES KINANGA MAENA.....RESPONDENT

(An appeal against the Judgment and Decree of the High Court of Kenya

at Kisii (D. Musinga, J) dated the 27th day of July, 2010

in

Kisii HCCC No. 153 of 2003)

JUDGMENT OF J. MOHAMMED JA

Background

1. This appeal emanates from the judgment of the High Court at Kisii (*Musinga, J*), as he then was, where the appellant had filed a suit against the respondent seeking to be declared the rightful owner of land known as Gesima Settlement Scheme/96 (hereinafter referred to as the suit property) measuring approximately 10.9 hectares. His claim was on the basis that 3.3 hectares (hereinafter referred to as the disputed portion) of the suit property was erroneously appropriated to the respondent's land Gesima Settlement Scheme/59. He therefore sought a permanent injunction to restrain the respondent, his agents, servants and/or employees from interfering with the suit property in any way.
2. It was the appellant's case that in 1964 he was allocated the suit property by Settlement Fund Trustees (SFT). He alleged that the respondent filed a complaint with SFT in 1986 claiming ownership of the disputed portion and the SFT determined that he was the rightful owner; that in 1988, he was issued with a title deed to the suit property which erroneously indicated that the suit property was 7.6 hectares instead of 10.9 hectares; that in 1995 he lodged a complaint with the District Land Registrar, filed a mutation form and the District Surveyor carried out a survey of the suit property and established that the disputed portion was part of the suit property; that following the survey exercise done in 1995, he returned the faulty title deed and on 22nd November, 1995 he was issued with a new title deed indicating the correct measurement of the property as 10.9 hectares and the Registry Index Map (RIM) was also amended.
3. The respondent filed a defence and a counterclaim denying the appellant's allegations stating that he was the registered proprietor of all that parcel of land known as Gesima Settlement Scheme/59 (hereinafter referred to as the adjoining property) measuring 15.0 hectares including the disputed portion. For this reason, he contended that it was the appellant who had encroached on the adjoining property because the suit property measures 7.6 hectares and not 10.9 hectares. The respondent therefore prayed for the dismissal of the appellant's suit and judgment in his favour on the counterclaim.
4. The main issues for determination were whether the disputed portion was part of the appellant's land; and if so whether the respondent had encroached on it, or conversely whether it was the appellant who had gone beyond the boundary of his land into the respondent's land.
5. In determining this question the learned Judge found that the correct measurement of the suit property is 7.6 hectares and not 10.9 hectares because the alteration of the size of the suit property was done contrary to the provisions of **section 19(1) and (2)** of the Registered Land Act (now repealed) as there was no notice given to persons whose parcels of land were likely to be affected by the surveyor's exercise; that the surveyor was not accompanied by the District Land Registrar or any other official from the Lands Registry during the survey

exercise; that PW1, PW2, PW4 and DW1 were in agreement that the alteration of the RIM and issuance of the second title to the appellant was done contrary to the law; and that the second title did not correspond to the final area list.

6. Further, the learned Judge held that the disputed portion of 3.3 hectares rightly belongs to the respondent and is part of the adjoining land because upon listening to a complaint brought by the appellant, the District Land Registrar, Nyamira, arrived at the conclusion that the appellant had encroached on the respondent's land. That determination aggrieved the appellant who appealed to the Chief Land Registrar who, in turn confirmed the findings of the District Land Registrar.

7. The learned Judge found that while the appellant failed to establish his claim, the respondent proved that the appellant had trespassed upon his land since August 2003. Consequently, the learned Judge directed that the respondent be given immediate possession of the disputed portion, failure to which an eviction order would issue. The appellant was restrained by an order of permanent injunction from trespassing on his land. The learned Judge, however dismissed the respondent's claim for *mesne* profits for lack of evidence.

8. Naturally, being aggrieved by this decision, the appellant has proffered this appeal on 18 grounds as enumerated in his memorandum of appeal. The grounds can be consolidated into two main issues; that he owns the suit property, and that the case for encroachment was not proved by the respondent.

Submissions by Counsel

9. **Mr. Ombwayo** learned counsel for the appellant posited that the appellant had demonstrated that he owned the suit property and that it was the respondent who had encroached on his land; that when a boundary dispute arose in 1968, the SFT resolved it in favour of the appellant; that even after that determination, the error was never corrected as the survey map had already been prepared earlier in 1964; that as a result, the disputed area was not included in the survey map which mistake he submitted ought to have been corrected by the Planning Department of the Ministry of Lands and Settlement; that the error found its way into the Final Area List prepared by the Director of Survey which showed the suit property as 7.6 ha and the respondent's as 15 ha; that from this the RIM was prepared and titles issued; that the RIM and Area List were not absolute and could be amended. On this basis, Counsel faulted the trial court for ignoring all this evidence and choosing to adopt an alleged fraudulent amendment to the RIM done by the registration of a mutation upon a District Land Surveyor measuring the suit property again despite no evidence pointing to fraud. It was posited that the respondent had in 1968 promised the Director of Settlement to abide by the resolution of the boundary dispute; that in 2003 he appeared to have changed his mind and resuscitated the dispute thus is estopped by promissory estoppel from re-asserting his claim; that there was no evidence to show that the disputed portion had been hived off the respondent's land; and that the court had no basis to find otherwise.

10. The issue of limitation was also raised, with the argument that the appellant had been in possession of the disputed land for over 40 years with the knowledge of the respondent; that the appellant remained its lawful owner; that the cause of action by the respondent for the dispossession of land arose in 1968 as such he had only 12 years to bring his claim which he failed to do; that the respondent's claim was founded on trespass and since the cause of action arose in 1968 the respondent's claim was similarly time barred.

11. **Mr. Ochwangi** opposed the appeal and submitted that in the plaint, the prayers sought were to declare the appellant as the proprietor of the suit property measuring 10.9 hectares. He refuted the claim by the appellant that he had been in occupation of the disputed parcel of land and had acquired it by adverse possession maintaining that the plaint does not refer to adverse possession; that the trial court therefore could not grant such a prayer as adverse possession was not pleaded; that the appellant took possession in 1964 and went to court in 2003 and has not explained the time lapse.

12. It was contended that the 3.3 ha is not the entire parcel owned by the parties rather, it falls under the respondent's land; that in arriving at this conclusion the learned Judge relied on the area list which showed that the respondent was allocated 15.0 hectares and the appellant 7.6 ha; that if there was a dispute the parties were to go back to SFT which allocated the parcels to them.

13. Counsel maintained that the appellant was the cause of all problems referring to the title deed issued to the appellant on 22nd November, 1995 which indicated that the suit property measured approximately 10.9 ha; that the title deed issued to the respondent showed that his property measured 15.0 ha which corresponds with the area list; that it was the appellant who was found by the Land Registrar to have trespassed on the respondent's land.

Determination

14. This is a first appeal. The duty of a court on first appeal is well articulated in the case of **Abok James Odera T/A A.J Odera & Associates V. John Patrick Machira T/A Machira & Co. Advocates** [2013] eKLR as follows:

This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2 EA 212 wherein the Court of Appeal held inter alia that:-

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

15. From the record and submissions by the parties, the first issue for determination to relate to the question whether the respondent's claim was statute barred and the second one as who, between the appellant and the respondent is the owner of the disputed portion of land.

16. On the issue of limitation on the ground of adverse possession, the appellant submitted that he was the lawful owner of the disputed portion as he has been in possession since 1968. The respondent on the other hand contended that he was only aware of the appellant's trespass in 2003 when he was issued with the title to his land. It is worth noting that the issue of adverse possession was not canvassed before the High Court. Neither was there a claim for adverse possession in the pleadings nor evidence alluding to the appellant's ownership by adverse possession. For that reason the issue of adverse possession cannot be addressed by this Court at this stage.

17. Turning to the main issue of ownership of the disputed portion, **sections 107 and 109** of the Evidence Act places the burden of proving a fact on the party who desires the court to believe in its existence. It was therefore for the appellant to prove that there was an error in the measurements of his land and as a result of which the disputed portion constituted part of his land.

18. The learned Judge observed that the letters of allotment did not indicate the acreage of the parcels of land. I have not been able to trace the appellant's letter of allotment on record. It is however common factor that the letter of allotment relied on at the trial did not indicate the size of the appellant's parcel. But the appellant maintained that in 1988 he was issued with a title deed to the suit property which erroneously indicated that the land measured 7.6 ha; that this title deed did not correspond with the measurements on the ground therefore he returned it; that he filled a mutation form to make the necessary amendments; and that he had also seen the 1982 area list for Gesima Settlement Scheme which indicated that the size of his land was 7.6 ha which in his view was erroneous. He further stated that the documents from SFT showed that the suit property was 24.5 acres which was approximately 10.9 ha. However, he was unable to verify the size of the suit property purchased from SFT in 1964 as the letter of allotment he produced as evidence did not indicate the size of the land.

19. To the contrary, there was overwhelming evidence alluding to the fact that the suit property measured 7.6 ha. A letter dated 29th September, 2003 to the appellant from the Ministry of Lands and Settlement states that in 1982 all the plots within Gesima Settlement Scheme were surveyed as per the RIM and Development Plan Area List; that the suit property measured 7.6 ha but the respondent's land measured 15.0 ha; that the appellant had never complained of the map being erroneous; that as a result, on 19th January, 1988 the appellant presented a transfer and discharge of charge from SFT of the suit property measuring 7.6 ha to the Kisii Land Registry which was received, registered and a title deed issued to that effect. Additionally, the Final Area list shows that the suit property measures 7.6 ha. In view of the foregoing evidence it is unclear where the appellant got the notion that his land was 10.9 ha.

20. DW1, who was the then Land Registrar, stated that in resolving the boundary dispute he asked the District Surveyor to ascertain the physical boundaries between the two plots; that the surveyor came to the conclusion vide his report dated 28th August, 2003 that the disputed portion fell on the respondent's land; that the sketch plan prepared by the surveyor ascertained the measurements of the respondent's land as 15.0 h.a; that this evidence was corroborated by the area list and title deed issued to the respondent. The Registrar, therefore, came to the conclusion that the disputed portion belonged to the respondent. Being dissatisfied with this determination, the appellant appealed to the Chief Land Registrar who sent a Land Registrar Inspector from Nairobi to the area who once again confirmed Registrar's findings. These findings prompted the Registrar to respond to the appellant vide his letter dated 29th September, 2003. The Registrar confirmed that the RIM had not been altered; that the appellant's title deed did not correspond with the area list; that he did not know how the acreage changed to 10.9 ha; that there was no amendment to the RIM and that he was not aware if any mutation had been done.

21. The appellant in his evidence stated that he had filed a complaint with the District Land Registrar over the disputed portion in 1995 leading to rectification and issuance of a subsequent title on 12th November, 1995. However, he conceded that the requisite parties were not involved in the matter. In that regard, **Sections 19 and 22** of the Registered Land Act (repealed) was not followed. It provided for the power and procedure of altering a registry map as follows:

19. (1) Where the Registrar is maintaining the registry map he may, or in any case he may require the Director of Surveys to, correct the line or position of any boundary shown on the registry map with the agreement of every person shown by the register to be affected by the correction, but no such correction shall be effected except on the instructions of the Registrar in writing in the prescribed form, to be known as a mutation form, and the mutation form shall be filed.

(2) Whenever the boundary of a parcel is altered on the registry map, the parcel number shall be cancelled and the parcel shall be given a new number.

(3) Where the Registrar is maintaining the registry map he may, or in any case he may require the Director of Surveys to, prepare a new edition of the registry map or any part thereof, and there may be omitted from the new map any matter which the Registrar considers obsolete. (Emphasis Supplied)

Further, **section 22** stipulates that;

“(1) If the Registrar in his discretion considers it desirable to indicate on a filed plan, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if any interested person makes 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 the boundaries.

(2) The Registrar shall, after giving all persons appearing by the register to be affected an opportunity of being heard, cause to be defined by survey the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and thereupon the plan shall be deemed to define accurately the boundaries of the parcel.” (Emphasis supplied)

22. There can be no correction to the Registry Index Map without instruction or authorization from the Land Registrar, and any person affected by the correction must be in agreement. The evidence by the Land Registrar was that there was no amendment to the RIM, and that he was not aware if any mutation had been done. Further, there was no evidence of the cancellation of title to the parcel number of the suit property. It is apparent from the record that at all times the suit property remained as parcel number **Gesima Settlement Scheme/96**. Had the

boundaries of the suit property been altered, the RIM and Final Area List would have been amended to reflect the increase in acreage and resultant parcel would have had a new parcel number in accordance with the requirements of **sections 19(2) and 22** of the RLA aforesaid.

23. Surprisingly, the mutation form on record under clause 1(b) under the new parcel number shows that the parcel number of the suit property remained the same. This mutation was also not done under the instruction or authorization of the Land Registrar hence the procedure for the registration of the mutation was not regular. PW2 (the Land Registrar who succeeded DW1) in his testimony stated that DW1 dealt with the issue of the mutation of the suit property which fact was refuted by DW1 who maintained that he was not aware if any mutation had been done. PW2 stated that the mutation affected the respondent's parcel and resulted in an increase of the suit property by 3.10 ha. But of significance is the fact that the mutation was allegedly without the involvement of owner of the neighbouring property who would be affected by such mutation; that there was no amount of registration fees endorsed on the mutation form and no relevant receipt to prove payment was presented; that the receipts for payment of stamp duty were dated 24th October, 1995 which was earlier than the date of the mutation which was 24th November, 1995; that the mutation would not have been registered without a receipt connoting payment. Yet the mutation resulted in the issuance of the title deed on 22nd November, 2005.

From all the foregoing, it is clear that the authenticity of the mutation was questionable.

24. The respondent whose boundary would be affected was not called to participate in the boundary alterations. See **Stephen Onyango Oloo V. Nelson Makokha Kaburu & 4 others**, Civil Appeal No. 83 of 2014 where this Court stated:

“Given that any proposed changes in the boundaries inevitably affected the parties herein, the Land Registrar ought to have notified the respondents of the impending boundary alteration or adjustment, so as to provide them with an opportunity to defend or interrogate the proposed changes to the boundary positions. There is no evidence to show that the respondents were consulted as interested parties, owners or occupiers for the purposes of fixing or adjusting the boundaries of the concerned parcels. The respondents were not accorded any opportunity to be heard prior to adjustment of the boundaries affecting their parcels 62 and 63.”

25. The respondent was able to prove that he was the rightful owner of the disputed portion of land. It was proved that when the title deed to his land was issued to him in 2003, he notified the District Land Registrar who initiated due process which was conducted in accordance with the law. The Registrar accordingly followed the process under **section 22** of the RLA and the case of **Stephen Onyango Oloo** (supra).

26. I come to the conclusion that the learned Judge properly evaluated the evidence on record and arrived at the correct conclusion, that the disputed portion belonged to the respondent as such, his findings do not warrant interference by this Court. Accordingly, this appeal lacks merit and is dismissed with costs.

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

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

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

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR