



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: E. M. GITHINJI, HANNAH**

**OKWENGU & J. MOHAMMED, J.J.A.)**

**CIVIL APPEAL NO. 15 OF 2013**

**BETWEEN**

**ALFRED NYANGWESO AKUNGA.....APPELLANT**

**AND**

**REV. JOSHUA HAMISI ONDIMU.....RESPONDENT**

*(Appeal from the judgment of the High Court of Kenya*

*at Kisii (Musinga, J.) dated 16<sup>th</sup> September, 2011*

**in**

**KISII CIVIL SUIT NO. 81 OF 2007)**

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**JUDGMENT OF THE COURT**

[1] This is a second appeal arising from a suit that was filed in the High Court by **Rev. Joshua Hamisi Ondimu** (who is now the respondent). The respondent who is the registered owner of land parcel No.Kisii/Nyaribari Chache/B/B/Boburia/6498 (respondent's property), had sued **Alfred Nyangweso Akunga** (appellant) who is the owner of land parcel No.Kisii/Nyaribari Chache/B/B/Boburia/4086 (appellant's property). The suit was for a permanent injunction restraining the appellant and his servants, family members or agents from constructing any permanent buildings or structures on the access road passing through the appellant's property and the respondent's property. The appellant denied the respondent's claim through a statement of defence in which he contended that there was no access road between the two parcels of land.

[2] During the hearing of the suit, the respondent testified together with **Josephat Waswa** (Waswa) who was at the material time the District Physical Planning Officer, Rachuonyo, and **Zebedio Muruli Obaga** (Obaga) who was a former owner of the appellant's plot. Both witnesses supported the respondent's claim. The appellant also testified and called **Machora Mogare** (Mogare), who was at the time of his evidence the District Land Registrar, Kisii. The witness testified in support of the appellant's defence that there was no access road between the appellant's property and the respondent's property.

[3] In his judgment, the learned judge found that it was not disputed that some of the records in regard to the respondent's property and those in regard to the appellant's property were not in agreement concerning the actual position on the ground. However, the learned judge found a report prepared by the District Land Registrar, Kisii, pursuant to an order of the court, illuminating. The report explained that the plan by the District Planner provided for a four metre wide access road, to serve adjacent plots, one of which were the ones subdivided to produce plot No. 4085 and the respondent's property, but that the Surveyor inadvertently omitted the four metre road from the plan. The learned judge therefore reached the conclusion that there was an access road between the appellant's property and the respondent's property, and that the appellant was merely capitalizing on the error made by the Surveyor. The learned judge therefore found in favour of the respondent and directed that the access road be put in place, and issued an order permanently restraining the appellant, his servants or agents from interfering with the access road by putting up any structures on the access road.

[4] Following directions given by the court, the hearing of the appeal proceeded by way of written submissions which were duly highlighted by the parties' counsel. In his memorandum of appeal, the appellant has raised twenty grounds which he argued in five clusters. First, that

the trial judge had no jurisdiction to determine the dispute. Secondly, that the learned judge erred in failing to appreciate the powers of the Land Registrar under the Registered Land Act Cap 300 (now repealed) and failing to consider and give due weight to the evidence of the District Land Registrar who was a defence witness. Thirdly, that the learned judge erred in awarding special damages in the absence of strict proof. Fourthly, that the learned judge failed to make his judgment in accordance with the law, as no reasons were given for his decision.

[5] In the written submissions, it was argued for the appellant that the dispute between the appellant and the respondent was a boundary dispute; that under **section 20** of the former **Registered Land Act**, jurisdiction for determining such a dispute was vested on the Land Registrar; and that under **section 21(4)** of the same Act, the learned judge of the High Court had no jurisdiction to determine the boundary dispute between the appellant and the respondent.

[6] The appellant further contended that the learned judge erred and misdirected himself in failing to consider the evidence of Mogare, the District Land Registrar who testified for the appellant, and in failing to note that the Physical Planner could not provide a road of access without the consent of the registered proprietor of the parcel of land. In addition, it was submitted that the evidence of Waswa that there was an access road which was omitted by the Surveyor in 1985 was contradicted by the evidence of Mogare who was categorical that there was no access road on the land, and that the plot was well served by an existing road.

[7] The appellant contended that the respondent did not strictly prove his claim for special damages as production of receipts alone without any explanation could not amount to proof. Finally, the learned judge was faulted for failing to comply with the mandatory provisions in regard to preparation of the judgment, by failing to set out the points for determination, analyzing the evidence of the witnesses, giving the decision of the court on the points for determination, and the reasons for such decision. The Court was therefore urged to allow the appeal.

[8] In his submissions, the respondent addressed the appellant's grounds in five clusters. First, on whether or not the trial judge had jurisdiction to determine a boundary issue under section 21 of the repealed Registered Land Act; secondly, whether or not the trial judge failed to consider the evidence of the District Land Registrar; thirdly, whether or not there existed a road of access; fourthly, whether or not the special damages of Kshs.6,040/= were strictly proved; and finally, what reliefs if any, should be granted by the Court.

[9] On the issue of jurisdiction, it was submitted for the respondent that the learned judge appreciated section 21(4) of the repealed Registered land Act that ousts the jurisdiction of the Court on boundary issues, hence his reliance on the expert evidence of the Land Registrar and or the Surveyor. It was argued that the evidence of the District Land Registrar called by the appellant was of minimal probative value as he did not avail the file in regard to the parcels in dispute. It was maintained that the trial judge did not act outside the ambit of his jurisdiction.

[10] In regard to the existence of the access road, the appellant submitted that the learned judge relied on the Land Registrar's report that was prepared pursuant to the court order. The report indicated that the District Physical Planner's subdivision plan had provided for a four metre wide access road to serve parcels of land created out of plot No. 3087 (parent title for the appellant's property) and that the Land Registrar had recommended in the report that the access road be opened to pass through the appellant's property. It was noted that the appellant's witness (Mogare) admitted the flaw in the process, and that the appellant did not exhibit good faith in denying the existence of the access road, as it was clear that he knew of the existence of the access road but capitalized on the error made by the Surveyor. The Court was urged to dismiss grounds 15, 17, 18 and 19 of the appeal as they were extraneous issues raised as an afterthought.

[11] On whether the reliefs issued by the learned judge were proper, it was maintained that the court had powers to make such orders as may be necessary for the ends of justice to prevent abuse of the court process. It was reiterated that the order of injunction issued by the court was proper and that the special damages were proved through production of receipts. The Court was therefore urged to dismiss the appeal.

[12] This being a first appeal, this Court is obligated to reconsider and re-evaluate the evidence that was adduced before the trial court bearing in mind that the court did not have the benefit of seeing and assessing the demeanour of the witnesses. The first issue that this Court must address is the issue of jurisdiction. The appellant has contended that the trial court lacked jurisdiction to determine the dispute between the appellant and the respondent as section 21(4) of the repealed Registered Land Act ousts the jurisdiction of the court from dealing with such a dispute. We note that this issue was not raised in the trial court. In fact at paragraph 18 of his statement of defence, the appellant specifically admitted the jurisdiction of the court to determine the suit. Be that as it may, the issue of jurisdiction being a legal issue, it is one that can be raised at any stage. We therefore proceed to consider this issue.

[13] Section 21(4) of the repealed Registered Land Act, stated 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.”***

[14] From the above provision, it is clear that the power to determine a dispute concerning boundaries of registered land fell on the Land Registrar, and that any interested party could apply to the Registrar for determination of such boundary dispute.

[15] We have perused the plaint that was filed by the respondent in the lower court, and the statement of defence that was filed by the appellant. Nowhere do we find any reference to a boundary dispute nor did any of the parties refer such a dispute to the Land Registrar. From the pleadings and the evidence, it is apparent to us that the dispute between the appellant and the respondent concerned the existence of an access road passing through the appellant's property leading to the respondent's property, and the alleged illegal closure of the access road by the appellant. Indeed, it was not disputed that the appellant's plot and the respondent's property were not adjoining plots as there are two plots in between them.

[16] Furthermore, the relief sought by the respondent was not determination of the boundaries, but resolution of the dispute concerning the existence and closure of the alleged access road, hence the prayer for a permanent injunction restraining the appellant from interfering with the alleged access road through construction of any permanent building or other structure. In our view, the dispute between the parties was not a boundary dispute and section 21(4) was not applicable. We therefore reject the ground of appeal that the trial court had no jurisdiction to determine the dispute between the appellant and the respondent.

[17] In regard to the main issue in this appeal, which is, whether the learned judge erred in his findings concerning the existence of the alleged access road, we have re-considered and re-evaluated the evidence that was adduced before the trial court. We note from the file that on 24<sup>th</sup> July, 2007, the court directed the parties to take the District Surveyor and the Land Registrar, Kisii Central to the site to establish whether the disputed road of access exists, before further hearing could proceed. A report signed by one J. O. Owuor, District Land Registrar, Kisii/Gucha District, was produced by the respondent in evidence, indicated that the Land Registrar's conclusion was that a mistake had been made on the mutation survey of the subdivision of B/B/Bokuria/3086 out of which the appellant's property was created, as an access road of four metres proposed by the Physical Planner was inadvertently omitted by the Surveyor - in preparing the Mutation Forms.

[18] In his evidence before the trial judge, the respondent reiterated this position, and was supported by the District Physical Planning Officer, Rachuonyo, who was representing the Nyanza Physical Planning Coordinator. Surprisingly however, the appellant called Mogare a Land Registrar then stationed in Kisii, who claimed not to be aware of the earlier report, but maintained that there was no access road as alleged by the appellant.

[19] In our view, the trial judge had contradicting evidence from the lands office and it was for the court relying on its assessment of the witnesses including their demeanour to decide on whom to believe. The trial judge chose to believe the respondent's evidence that there was actually an access road provided by the Physical Planner which was omitted by the surveyor in preparation of the mutation forms during the subdivision of Plot No. 3086 and that the appellant was merely trying to take advantage of the situation. On our part, we find no reason to fault the learned judge as there was sufficient evidence upon which the learned judge having the benefit of the witnesses' demeanour could come to that conclusion. Moreover, the learned judge was entitled to disbelieve Mogare's evidence as he stated that he had only been in Kisii for 1½ years, and admitted that he was not privy to the report made by the previous Land Registrar nor had he visited the disputed land.

[20] As regards the special damages awarded of Kshs.6,500/=, these damages were specifically pleaded in the plaint. During the hearing, a bundle of receipts that had already been identified in court by the respondent were produced in evidence by consent of the parties. The appellant did not raise any issues regarding these receipts. In the circumstances, we are satisfied that the special damages were properly proved.

[21] Finally, the appellant complained that the judgment of the learned judge was not in accordance with the law as no reasons were given for his decisions. We have perused the judgment, we are satisfied that in coming to his conclusion, the learned judge addressed the respondent's claim and the appellant's defence together with the evidence that was adduced. Although the learned judge did not specifically set out the issues, he was clearly alive to the issues and made a decision that finally determined the dispute. For the above reasons, we find no substance in this appeal. It is accordingly dismissed with costs.

**DATED and delivered at Kisumu this 11<sup>th</sup> day of October, 2018.**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**