IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

CIVIL APPEAL NO. 264 OF 2009

(CORAM: NAMBUYE, OKWENGU & KIAGE, JJA)

BETWEEN

ANDREW CHERUIYOT...1ST APPELLANT

BETTY CHEPNG'ENO...2ND APPELLANT

AND

ANYOKA ROGITO...RESPONDENT

(Being an appeal from the Ruling/order of the High Court of Kenya at Kericho (Ang'awa, J) dated on 19th day of February 2009

in

H.C.C.C. No. 5 OF 2003

****

JUDGMENT OF THE COURT

The appellants herein challenge by this appeal the judgment and decree of the High Court at Kericho (Ang'awa J) by which a report by a Surveyor filed in court by consent of the parties, was adopted by the learned Judge and made the judgment of the court.

That judgment was in a suit in which the respondent by a suit filed on 22nd January 2003, and later amended on 4th September 2003, had alleged in relevant part that;

> ***"5A. In May 2001 or thereabout the defendants herein without any colour of right and without the consent of the plaintiff entered into the suit land measuring approximately 35 square meters and put the same into their own use thus depriving the plaintiff lawful use of his land and in so doing ignored the beacons defining boundaries between LR No. 631/1254 and LR No. 631/1253 which is jointly owned by the defendants".***

In the premises, the respondent prayed for a declaration that the first defendant's occupation of a portion of the suit land constituted a trespass and accordingly sought an order of eviction against the 1st

respondent herein.

The appellants filed a statement of defence, also later amended, by which they denied allegations of trespass. They also pleaded as follows at paragraph 9 of the amended defence;

> ***"The defendants refer to paragraph 10 of the amended plaint and deny the jurisdiction of this court to entertain this matter."***

On 29th May 2007, the advocates for the parties before the High Court as before this Court, namely **Migiro & Co**. for the respondent and **Odhiambo & Odhiambo** for the appellant, filed a consent letter dated 24th May 2007 and signed by them both in the following terms;

> ***"By consent of the parties herein, it is mutually agreed that the Kericho District Surveyor do determine and fix the boundaries of parcel LR. Nos. KERICHO/631/1254 and 631/1255, which parcels of lands are within the Kericho Municipality and submit his report to this court within 60 days from the date of service of this order. The parties herein to share the costs of survey if any."***

That consent order was duly recorded and adopted by the court and on 23rd July 2007 **J.K. Kibuba,** the District Surveyor, Kericho wrote to the two law firms indicating that he would make a site visit on Wednesday 25th July 2007 with a view to undertaking the survey. They were requested to avail themselves without fail. In the event the respondent did attend having previously paid the surveyor's fees, but the appellants did not attend and had also not paid the requisite survey fees.

The surveyor then prepared a report dated 31st August 2007 and forwarded it together with a survey plan and a site plan to the Court. The report had a part6, titled, "***Conclusion"*** to the effect that;

> **"(i) The fence erected on LR. No.631/1255 does not tally with the boundaries as defined by beacons Ad60, Ad61, Ad66 and Ad67 (all I.P.Cs old) as shown.**
>
> **(ii) Part of the existing structure on LR.No.631/1255 has also encroached into LR.No.631/1254.**
>
> **(iii) The owner of LR.No.631/1254 is loosing an area of approximately 0.065 Ha. as shown by the shaded area.**

(iv) The boundary beacons of LR.No.631/1254 and 631/1255 were fixed on the ground and shown to the owner of LR.No.631/1254."

The respondent thereupon filed a Notice of Motion dated 28th November 2007 in which he sought orders that the said report be adopted as a judgment of the court. The application was said to be under **Section 3A** of the **Civil Procedure Act** together with **Sections 21** and **22** of the (now repealed) **Registered Land Act**. The grounds appearing on its face were that;

> ***"(a) The survey Report of the Kericho District was read to the parties on 2nd October, 2007 with an order that any aggrieved party do file objection within thirty (30) days from the aforesaid date.***
>
> ***(b) It is more than one month since the said order was given and no objection has been filed.***
>
> ***(c) In the circumstances of the aforegoing, it is the interest of justice to have the District Surveyor's Report filed herein be adopted as a judgment of this Court."***

The appellants could hear none of that application and filed Grounds of Opposition thereto dated 28th

January 2008 in which they gave notice that they would oppose it as follows;

> ***"1. That the application is bad in law, incompetent and an abuse of the court process.***
>
> ***2. That the survey report purportedly sought to be adopted as the judgment of the court is a fraud and an abuse of the court process.***
>
> ***3. That no survey was undertaken.***
>
> ***4. That the surveyor cannot replace this court in the adjudication of this matter.***
>
> ***5. That the prayers sought in the suit herein would warrant the full trial of this matter.***
>
> ***6. That the said application is contrary to natural justice and contravenes the entire object of the trial process."***

Simultaneously with the Grounds of Opposition the appellants filed an application of their own under **Order L. Rule 1** of the **Civil Procedure Rules** in which they sought orders that the Surveyors Report be expunged from the record for reasons similar to the ones in the Grounds of Opposition. That application was however abandoned by consent of the parties, we take it because it was essentially duplicating the grounds of opposition.

When the application came up for hearing before the learned Judge on 16th February 2009, **N. O. Migiro** and **B.N. Kipkoech,** learned counsel appeared for the respective parties. The learned Judge allocated time for 9.50 a.m. She then indicated on record that what was for hearing was the application dated 22nd November 2009, and that there were grounds of opposition dated 28thJanuary 2008 and then "***parties given time".*** What then followed is a recording of **Mr. Migiro's** submissions. At the end of those submissions, however, the record shows the learned Judge's order that a ruling would be delivered on 19th February 2009. There is no record of the submissions that were made by **Mr. Kipkoech** for the appellants herein. There was no indication from him that he would not be making any submissions and the question we asked, and which counsel before us could not answer, is what became of those submissions and why it is they were not recorded by the learned Judge. Indeed, in the ensuing ruling, which is the subject of this appeal, the learned Judge just before making her findings, captured the procedural history of the matter briefly as follows;

> ***"4. A report was duly filed within the stipulated time and read to the parties.***
>
> ***5. The said plaintiff then filed this application dated 28th November, 2007 to seek to make the surveyors report a judgment of this Court.***
>
> ***6. The respondent had then later objected to this (12th November, 2008) but they abandoned their application that wished to expunge the report from the record."***

It is clear that the leaned Judge took into account the fact only that the application to expunge the surveyor's report from the record was abandoned but in the process failed to note that the appellants' opposition to the said application, being made a judgment of the court remained alive, as captured in the Grounds of Opposition, which must have been relied upon and submitted upon by their counsel. However, the record taken by the learned Judge herself, is conspicuously silent on them.

The High Court as a superior court of record is enjoined, as are we all, to ensure that proceedings are captured accurately and that in particular the evidence or submissions of the parties must be faithfully recorded. It is a matter of practical necessity and a desideratum of judicial accountability. Public confidence is enhanced or eroded in proportion to the accuracy with which litigants are assured that their case will be fully heard, fully recorded, and fully considered. It is what is on record that gets to be considered so that one is entitled to conclude that if what they said was never recorded, then it was never

considered. That is the fate that appears, quite amply, to have befallen the appellants. Such an omission on the part of the learned Judge strikes at the very heart of the judicial process because it violates the natural justice or due process requirement of ***audi alterem partem*** which enjoins that both parties to a dispute must be heard. A failure to accord a fair hearing by the court below entitles, indeed obligates, this Court on appeal to set aside the impugned judgment ***ex debit justiae***.

There is yet another troubling aspect of the manner in which the learned Judge handled the matter before her and it is captured at paragraph 8 of her brief judgment thus;

> ***"8. I am satisfied that this is a correct report. I hereby adopt the report and enter judgment making the report a judgment of this Court".***

When the parties consented on 29th May 2009 that the Kericho District Surveyor determine and fix boundaries of the suit lands and submit his report to court within 60 days, they did not go ahead to say that they were thereby relieving the court of its duty to adjudicate on the matter. The consent did not state that the report was to be determinative of the issues in controversy. Much less was the said report intended to be a judgment. Indeed its author never pretended that what he wrote was anything other than a report. The learned judge clearly erred in adopting it as a judgment of the court. It was not subjected to cross-examination. No comments or submissions on it were taken from counsel. And it definitely was not capable of dealing with the totality of the controversy that was before the learned Judge as can be gleaned from the amended pleadings by both parties, including the all-important question of jurisdiction pleaded by the appellants and which ought to have been dealt with in limine, but was not. In proceeding as she did, the learned Judge abdicated her judicial role and rendered the judgment a nullity. See **TELKOM KENYA LTD –VS- JOHN OCHANDA** ***suing on his own behalf and on behalf of 993 Former Employees of Telkom Kenya Ltd*** [2014] e KLR.

Those issues we adverted to, which are at the heart of and do colour this appeal that was urged by **Mr. Opondo** for the appellants and opposed by **Mr. Migiro** for the respondents, are sufficient to dispose of the appeal without consideration of any other matter given the orders that must flow from our said findings.

We allow the appeal. We set aside the Ruling of Ang'awa J dated 19th February 2009 and the ensuing decree of the same date. The case shall be remitted to the relevant Land and Environment Court for hearing and disposal.

Each party shall bear own costs of this appeal.

Dated and delivered at Nakuru this 14th day of April, 2016.

R. N. NAMBUYE

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR