IN THE COURT OF APPEAL

AT NYERI

CORAM: VISRAM, KOOME & ODEK, J.A.)

CIVIL APPEAL NO. 55 OF 2014

BETWEEN

LAWRENCE KAIRU NYAMBURA……...……APPELLANT

A N D

SYMON KABUGI KINYURU……..…….RESPONDENT

(Being an appeal against the ruling of the High Court of Kenya at Nyeri (Ombwayo, J.) delivered on 16th May, 2014)

in

E.L.C. Civil Appeal No. 110 of 2008)

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JUDGEMENT OF THE COURT

The genesis of the dispute that has snowballed into the present appeal was a matter that was decided before the Mweiga Land Disputes Tribunal as Tribunal case no 24 of 2001. The original owner of the ***Land Parcel No Nyeri /Watuku 739,*** Moses Kinyuru Gathogo filed a boundary dispute against his neighbour Lawrence Kairu Nyambura (appellant) the owner of ***Parcel Number Nyeri/ Watuku 738***. Moses Kinyuru Gathogo subsequently passed away and was substituted by Symon Kabugi Kinyuru (respondent).

What is discernible from this record is that the two parcels of land fall within Watuku Settlement Scheme which was originally acquired by the Government through the Settlement Fund Trustee in 1963 for allocation and settlement of landless Kenyans. The undisputed facts show that demarcation and allocation of the land was done by the Soil Conservation Unit of the Ministry of Agriculture in 1964. Every allottee of the land was shown their plot boundaries by the Settlement Officer according to the area list and map that was prepared for purposes of settling the landless people. Each allottee upon being shown their parcel of land and the boundaries signed a certificate confirming that they were shown the land.

Thereafter, a letter of allotment was issued detailing the conditions that each allottee had to fulfill within a specified period. One of the conditions was each allottee had to fence the boundaries within six months using appropriate materials as recommended by the Settlement Officer. According to the area list the appellant's mother, one Nyambura Kairu was allotted plot 738 measuring approximately 39 hectares while Moses Kinyuru Gathogo the respondent's father was allotted plot 739 measuring approximately 29

hectares. Nyambura Kairu passed away in 1978 and was succeeded by the appellant. Both parcels are abutted to each other.

It was further undisputed that both families occupied their respective parcels of land and co existed peacefully until the year 2000 when the respondent's father wanted to subdivide his land. He obtained a survey map that indicated his parcel of land was 39 hectares while that of the appellant was 29 hectares. The discovery of extra land prompted the respondent's father to file a claim before the Mweiga Land Disputes Tribunal seeking to recover 10 hectares from the appellant's mother Nyambura Kairu. After hearing both parties, this is what the Land Disputes' Tribunal ruled:

> ***"That the existing boundary between plot No. Nyeri/Watuku 739 of Moses Kinyuru Gathogo and Nyeri/ Watuku 738 of Grace Nyambura Kairu to remain as it was fenced in 1967 up to date".***

Dissatisfied with the verdict of the Land Disputes Tribunal, Moses Kinyuru Gathogo (respondent) appealed before the Provincial Appeals Committee. On 10th December, 2008, the Appeal Committee gave the following award:

> ***"1 This provincial panel having listened to both sides and having perused all the relevant documents (sic) keeps Nyeri tribunal aside and rule that Nyeri District Registrar visit the site and settle the dispute of the suit parcel No. Nyeri /Watutku/738 &739.***
>
> ***2. 60 days of Appeal awarded***
>
> ***3. No costs awarded".***

This time round it was Lawrence Kairu Nyambura who appealed before the High Court challenging the jurisdiction of the tribunal to determine this particular land dispute. The appeal was dismissed by a judgment dated 4th May, 2012. In a well-reasoned judgment, Sergon, J., affirmed that under the Land Disputes Tribunal Act, the Tribunal was vested with jurisdiction to determine boundary disputes and indeed the dispute between the appellant and respondent was about the boundary of the two parcels abutted to each other.

What followed after this judgment by Sergon, J., were series of applications; there was one by the respondent in which he sought for an order compelling the Mweiga District Land Registrar to enforce the orders of the Provincial Appeals Committee. Apparently, this was done in the High Court instead of the Magistrates Court that was vested with the power of execution of Tribunal awards by adopting them as court orders. We, nonetheless, suspect this matter was caught up in the transition as ordinarily, execution of the awards by the Land Disputes Tribunals under the repealed ***Land Disputes Act*** was done by the Magistrate's Court. By this time the land laws had changed most profoundly beginning with the promulgation of the ***Constitution of Kenya 2010***; The Land Disputes Tribunal Act was also repealed; it is the one that vested the jurisdiction upon the magistrate's court to enter judgment and the consequential decrees that emanated from the decisions of the tribunals. The ***Environment and Land Court Act*** was also enacted with a commencement date of 30th August 2011, followed by the ***Land Registration Act*** of 2012 that commenced when the Judge was seized of the matter.

Under the new laws jurisdiction on land matters was now vested upon the High Court and specifically the newly created Land and Environment Courts. The second application was by the appellant seeking a stay of the ruling dated 16th May, 2014, which is also the subject of this appeal.

This is what the leaned Judge stated in the aforesaid ruling:

> ***"The subject matter herein is the decision of the Provincial Appeals Committee made on the 10/12/2008. The committee decided that the District Land Registrar Nyeri do visit the site and***

settle the dispute of the boundaries of the two parcels of land 738 and 739. The land Registrar Nyeri visited the parcel of land and made a decision. This court finds that the decision does not conform with the order of the appeals committee as the Land Registrar has not considered the acreage of the two parcels of land. I do find that the Land Registrar has not complied with the order of the Appeals Committee as he has not determined the boundary between the two parcels of land according to acreage and therefore the report is not admitted. This court directs the Land Registrar to return to the parcel of land and determine the boundary of the two parcels of land according to acreage thus NYERI/WATUKA/739 to measure 39.0 hectares and NYERI/ WATUKA/738 to measure 29.0 hectares. This exercise to be undertaken within 30 days and a report be filled in court within the said period, failure of which the Land Registrar to be committed to jail for six months for contempt".

This is the ruling that has provoked this appeal which is predicated on some twelve grounds of appeal. However, during the hearing of the appeal, Mr. Kebuka Wachira, learned counsel for the appellant, combined all the arguments. Counsel submitted that it was irregular for the High Court to take over the execution of a matter that emanated from the Land Disputes Tribunal when it had no jurisdiction; the matter was supposed to be taken before the magistrate's court for the adoption of the order and the High Court Judge had no role save to hear the appeal from the Provincial Appeals Committee; the Land Registrar was supposed to visit the land and determine the boundaries according to the award of the Provincial Appeals Committee which he did and prepared a report dated 28th January, 2014; in that report the Land Registrar recommended that the boundaries remain as they were as he relied on the surveyor's findings and the area list of the land occupied by all the allottees by the Settlement Fund Trustee.

It was further argued that, although the learned Judge had by a ruling of 14th March, 2014, indicated that it was not within the province of the court to direct the Land Registrar on the decision to make, he subsequently contradicted himself by directing the Land Registrar in the aforesaid ruling by telling him how to place the boundaries; the appeals committee did not discuss the acreage; it is within the powers of the Land Registrar to exercise his discretion according to the law and evidence and to determine boundaries. In this case he was directed to place boundaries according to the acreage that was dictated by the Judge; the Judge was faulted for dictating the acreage of the land to allocate and for intimidating the Land Registrar by threatening him with contempt of court; thus the powers of the Registrar were fettered. The Land Registrar merely corrected the report made earlier to exactly comply with the Judge's orders; by directing the Land Registrar to allocate plot 738, 39 hectares and plot 379, 29 hectares was tantamount to usurping the powers of the Land Registrar. The consequences were that if appellant lost 10 hectares, that would affect his developments; according to counsel for the appellant, it was only the map that was erroneous, the area list and the records of settlement and the way the two parties had taken possession of their respective portions of land and settled for many years was correct. Counsel urged us to allow the appeal and adopt the report by the Land Registrar dated 28th January 2014, or order the Land Registrar to fix the boundaries according to the law.

The respondent, Simon Kabugi Kinyuru was acting in person. He filed written submissions which he relied on in their entirety. In that submission, he supported the decision of the learned Judge, which he argued was made within the mandate of the court to execute the tribunal's orders; the Provincial Appeals' Committee overturned the decision of the Land Disputes Tribunal based on the weight of the documentary evidence; moreover, the leaned Judge was '*merely stating the rights of the parties*' . The Land Registrar was refusing or neglecting to implement the provincial appeals verdict and that is why the respondent sought the intervention of the court; the Land Registrar gave a vague report dated 28th January, 2014, which was not in compliance with the Provincial Appeals' Award.

The respondent further submitted that the ruling appealed against has been overtaken by events as it is fully implemented; that the appellant is merely derailing the cause of justice, he urged us to dismiss this appeal

This is a first appeal, that being so, we have taken the trouble to review albeit in summary the material that was before the High Court which we have attempted to summarize as above. See ***SELLE V ASSOCIATED MOTOR BOAT, [1968] EA 123.***

The issues that we discern from this appeal are threefold; firstly, did the learned Judge have jurisdiction to entertain execution proceedings of a matter that emanated from the Land Disputes Tribunal, and if he did to what extent? Secondly, did the Judge veto the powers and discretions of the Land Registrar by ordering him how to draw the boundaries of the two disputed parcels of land and by directing the acreage to allocate to each plot? Lastly, what was the order or award by the Provincial Appeals' Committee and how was it to be implemented?

The Judge was obviously exercising his discretion under the transitional clauses. It is trite that before this Court can interfere with the learned Judge's exercise of discretion, it must be satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or, that he misapprehended the law or failed to take into account some relevant matter.

As pointed out earlier in this judgement, there is no doubt that an award by the Land Disputes' Tribunal or the Provincial Appeals' Committee was supposed to be executed by the magistrate's court in accordance with the provisions of the repealed Land Disputes' Tribunal Act. Obviously, it is not lost to us that after the Act was repealed, this matter was caught up in the transition after the change of the laws. What fell before the learned Judge in the circumstances of this matter called for the exercise of his discretion to ensure justice is done to the parties. In ***Mbogo & Another-vs- Shah, (1968) E.A. 93*** at page 95, Sir Charles Newbold P. held:

> "***…..a Court of Appeal should*** not ***interfere with the exercise of the discretion of a single judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice…."***

We also wish to emphasize that an appellate court may only interfere with the exercise of judicial discretion if satisfied either:

a. ***The Judge misdirected himself on law, or***

b. ***That he misapprehended the facts;***
c. ***That he took account of considerations of which he should not have taken an account; or***

d. ***That he failed to take account of consideration of which he should have taken account; or***

e. ***That his decision, albeit discretionary one was plainly wrong. (See Mrao Limited vs. First American Bank of Kenya Limited & 2 Others [2003] KLR 126.***

From our own evaluation of the matters that were before the leaned Judge, we are satisfied that he had jurisdiction to deal with the issues.

Did the Judge exceed his discretion and thus interfered with the powers of the Land Registrar to fix the boundaries of the disputed parcels of land? The Provincial Appeals' Committee's order was simple. We have reproduced it elsewhere in this judgment, it merely directed the Land Registrar to visit the two parcels of land and settle the dispute. The only dispute that there was between the two parties was over the existing boundary. According to counsel for the appellant the Judge overstepped his mandate by directing the Land Registrar how to do his work when no evidence was adduced before the Judge regarding the acreage to assign to each plot. Also, the order by the Provincial Appeals' Committee did not direct the Land Registrar how to place the boundaries. Since this matter started before the Land Registration Act came into effect we would wish to highlight some provisions under the repealed ***Registered Land Act*** which made provisions on how to determine boundary disputes:-

Section 20:

> ***"The Registrar may cause a survey to be made for any purpose connected with this Act,***

but, where the registry map is maintained by the Director of Surveys such survey shall be used to amend the Registry Map only if it is approved by the Director of Survey.

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 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 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*".*

The above provisions have been re- enacted under ***Sections 16, 19, 20*** and ***21*** of the ***Land Registration Act***. Upon careful consideration of this matter, we find merit in the contention that by directing the Land Registrar on how to draw the boundaries when no such evidence was adduced before the Judge, and the order by the Provincial Appeals' Committee did not include the acreage was indeed misdirection on the part of the Judge. Certainly, the Land Registrar had to comply with the order issued by the Judge. The Judge directed him how to draw the boundaries. What the Land Registrar did was to merely amend an earlier report where he had recommended that the boundaries were to remain as they were and moved them to reflect the acreage as ordered.

The aforementioned provisions of the law, gave the Land Registrar the power to determine the boundaries. He has powers to summon evidence from the Survey record and other sources that he may deem necessary and the courts have no role in that regard. The order by the Judge directing the Land Registrar how to draw the boundaries and the additional order that if he failed to do so he would be in contempt of Court and liable to imprisonment for six months did not leave the Land Registrar with any option but to draw the boundaries as ordered by the Judge.

We think we have said enough to demonstrate this appeal has merit, as the Judge exceeded his jurisdiction by directing the Land Registrar how to draw the boundaries and what acreage to allot to each plot. The order that the Court was enforcing required the Land Registrar to visit the suit parcels of land and determine the boundary dispute in accordance with the provisions of the law.

Consequently, we allow the appeal and set aside the ruling of the High Court delivered on the 16th May, 2014. The order that renders itself just in the circumstances of this matter is an order that another Land Registrar, other than S.N Mburu do determine the boundaries of ***Parcel Nos. Nyeri /Watuka 738 AND Nyeri/ Watuka 739***, according to the applicable laws. The report be filed before the Land and Environment Court within 90 days from the date of this judgment. The appellant shall have the cost of this appeal.

Dated and delivered at Nyeri this 3rd day of February, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

……

JUDGE OF APPEAL

J. OTIENO-ODEK

……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR