



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT NYERI**  
**(CORAM: VISRAM, KOOME & ODEK, J.J.A.)**  
**CIVIL APPEAL NO. 12 OF 2013**

**BETWEEN**

**WARIBU CHONGO .....APPELLANT**

**AND**

**BENSON MAINA GATHITHI ..... RESPONDENT**

***(An appeal from the judgment of the High Court of Kenya at Nyeri ( Sergon, J.)***

***dated 17<sup>th</sup> September, 2010***

**in**

**H.C.C.A NO. 117 of 2009**

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**JUDGMENT OF THE COURT**

1. The dispute in this appeal relates to ownership of trees on land. It is trite law that whatever is permanently attached to the soil becomes part of the soil and runs with the land; it matters not who affixed or embedded the object. This is captured in the latin maxim *quicquid plantatur solo, solo cedit*. The owner of the land becomes the owner of the soil and all objects permanently affixed or embedded thereto. In a conveyance or sale transaction, all objects affixed and embedded to the land at the time of the contract of sale must be left for the purchaser unless otherwise agreed. In law, a sale agreement is effective to pass objects permanently affixed to the soil without express mention (see *Dibble Ltd – v- Moore, (1970) 2 QB 180*).
2. By a plaint dated 8<sup>th</sup> August, 2006, the appellant filed suit in the Principal Magistrate’s Court at Muranga against the respondent claiming compensation for the value of 15 blue gum trees cut down by the respondent. The trees were planted by the appellant but the disagreement is on whose land were the trees standing.
3. The appellant and the respondent are adjoining land owners sharing a common boundary. The appellant is the registered proprietor of land parcel known as **Loc.8/Matharite/300** measuring 0.86 acres while the respondent is the registered proprietor of land parcel known as **Loc.8/Matharite/301** which borders the appellant’s land. The appellant states that he acquired title

to his property **Loc.8/Matharite/300** on 27<sup>th</sup> November, 1970, while the respondent upon purchase took possession of **Loc.8/Matharite/301** on 13<sup>th</sup> February, 2002. It is the appellant's claim that long before the respondent came into possession of **Loc.8/Matharite/301** he had planted blue gum trees along the common boundary which separated the two parcels of land. The appellant contends that when the respondent came into possession of his parcel in 2002, he found mature and medium blue gum trees growing on the common boundary. It is the appellant's contention that the said blue gum trees belong to him since he planted them and they were on his land. In the year 2006, the respondent cut down the 15 blue gum trees and converted the timber to his own use. The appellant claims compensation for the value of the timber which was valued by Zenith Valuers at Ksh. 161,000/=.

4. On his part, the respondent states he purchased land parcel known as **Loc.8/Matharite/301** in 2002 and found trees growing on the land that he purchased. He avers that in law, land includes trees that are growing thereon and as such, the blue gum trees he found growing on the land were his trees. Whereas the respondent admits cutting down the trees and using the timber, he denied liability to the appellant stating that the 15 blue gum trees were on his land and he was the owner thereof.
5. During the hearing of the case before the trial magistrate, a critical fact was established. It was not disputed that there was alteration of boundary as evidenced by the two maps produced by the appellant, and that the respondent bought his land parcel with mature trees already in existence. The appellant in evidence testified that although the boundary was altered, the trees remained on his parcel of land. The trial magistrate entered judgment for the appellant against the respondent stating that the trees growing on the common boundary belonged to the appellant. The magistrate was of the view that it was incumbent upon the respondent to inquire the status of the trees from the person who sold him land. The trial magistrate ordered the respondent to compensate the appellant in the sum of Ksh. 161,000/- being the value of the 15 blue gum trees.
6. Dissatisfied with the judgment of the trial magistrate, the respondent in this appeal moved to the High Court. The High Court (**Sergon, J.**) set aside the judgment entered against the respondent by the trial magistrate and substituted it with an order dismissing the suit. The High Court ordered that any money which may have been paid to the appellant in satisfaction of the decree of the trial magistrate should be refunded forthwith.
7. In setting aside the trial magistrate's judgment, the High Court expressed itself as follows:

***“I have carefully considered the evidence tendered. It is apparent from the judgment of the learned resident magistrate that the trial magistrate did not make a finding whether the trees were on land parcel Loc.8/Matharite/300 or land parcel Loc.8/Matharite/301. This was important in view of the fact that there was evidence showing that there existed no boundary so that it is difficult to know exactly where the trees stood. The fourth ground argued is to the effect that the learned trial magistrate erred when he accepted the evidence of the valuer who presented the valuation of the trees standing on land parcel known as Loc.8/Matharite/299. With respect, I agree with the appellant. It was incumbent upon Zenith Valuers to value trees standing between parcel No. Loc.8/Matharite/300 and Loc.8/Matharite/301. The suit is based on a claim of trees allegedly cut along the boundary between the aforesaid parcels of land. The valuation report therefore related to trees in a different location other than the location mentioned in the suit. It was an erroneous report. The trees valued were not in dispute”.***

8. Aggrieved by the High Court's decision that set aside the judgment by the trial magistrate, the appellant has now moved to this Court in a second appeal. The grounds of appeal are set out in the memorandum of appeal dated 5<sup>th</sup> June, 2013. It is stated that the learned Judge erred in law by his failure to note that there existed a recognized common boundary between land parcel **Loc.8/Matharite/300** and land parcel **Loc.8/Matharite/301**. That the learned Judge erred and failed to appreciate that all trees growing on the common boundary between the two parcels of land belonged to land parcel **Loc.8/Matharite/300**; that the learned judge wrongly interpreted the evidence and arrived at an erroneous decision.
9. As stated heretofore, this is a second appeal and this Court is enjoined to consider only points of law. **Section 72** of the **Civil Procedure Act** stipulates that:-

**“Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely: -**

**(a) the decision being contrary to law or to some usage having the force of law;**

**(b) the decision having failed to determine some material issue of law or usage having the force of law;**

**a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case**

**(c)**

**upon the merits.”**

10. At the hearing of the appeal, learned counsel, Messrs C. M. Kingori appeared for the appellant while learned counsel, H. K. Ndirangu appeared for the respondent.
11. Counsel for the appellant elaborated on the grounds of appeal. He submitted that the finding of the High Court Judge that the evaluation report referred to a different parcel of land was erroneous. Counsel stated that the evaluation report by Zenith Valuers clearly indicated on the face of it that it relates to **Land Parcel No. Loc.8/Matharite/300**. Counsel submitted that the disputed trees stand on **Land Parcel Loc.8/Matharite/300** as per the valuation report. On our part, we have examined the valuation report and the following statement is captured as part of the background facts: **“the practice in areas of general boundaries is to go by the existing boundaries in this case the mature trees – planted and nurtured by the registered proprietor of L.R. Loc.8/Matharite/300.”** Counsel for the appellant reiterated that the appellant’s claim is not on ownership of land but relates to ownership of trees. He emphasized that the respondent did not deny cutting down the 15 blue gum trees.
12. In opposing the appeal, counsel for the respondent submitted that when the respondent purchased his land **Loc.8/Matharite/301**, it had mature blue gum trees and it is these trees that he cut. That the disputed 15 blue gum trees stood on the respondent’s land and he owned them. That the appellant had not shown how the learned judge erred or misdirected himself. Counsel stated that the boundary between any two parcels of land is very thin in terms of width and no tree can grow on it. Any tree growing along the boundary must of necessity grow and stand on a specific parcel of land; a tree cannot grow and stand on a thin boundary line because boundary lines have no width. Counsel for the respondent referred this Court to the testimony by Moses Mureithi from Zenith Valuers who valued the trees and prepared the valuation report and who orally testified in cross-examination that **“the trees were along the boundary of LR No. 299 and 300”**. Counsel pointed out that the High Court Judge properly evaluated the evidence on record particularly the testimony by Moses Mureithi and arrived at the correct factual position when he expressed himself as follows:

**“The fourth ground argued is to the effect that the learned trial magistrate erred when he accepted the evidence of the valuer who presented the valuation of the trees standing on land parcel known as Loc.8/Matharite/299. With respect, I agree with the appellant. It was incumbent upon Zenith Valuers to value trees standing between parcel No. Loc.8/Matharite/300 and Loc.8/Matharite/301. The suit is based on a claim of trees allegedly cut along the boundary between the aforesaid parcels of land. The valuation report therefore related to trees in a different location other than the location mentioned in the suit. It was an erroneous report. The trees valued were not in dispute”.**

13. There are two critical issues for determination in this appeal. First, did the appellant prove on a

- balance of probability that the disputed 15 blue gum trees were standing on his portion of land? Did the respondent discharge his evidential burden of proof to show that the disputed 15 blue gum trees were standing on his portion of land bearing in mind that the respondent did not have the legal burden to prove any fact?
14. Both the trial magistrate and the High Court were satisfied that when the respondent purchased his parcel of land **Loc.8/Matharite/301**, there were blue gum trees standing thereon. Both the trial magistrate and the High Court Judge established as a fact that the trees were along the common boundary of the appellant and the respondent's parcels of land. It was not controverted that the appellant planted the trees. However, the critical question is – on whose portion of the land were the trees standing?
  15. The appellant called a valuer who prepared a valuation report. A reading of the written text of the Valuation Report shows that the valuer did not emphatically state that the 15 blue gum trees were standing on the appellant's portion of land. The report ignored the critical issue which was to determine where the boundary between the two parcels of land existed. Did the blue gum trees mark the existing boundary? The valuation report simply states that “*the practice in areas of general boundaries is to go by the existing boundaries in this case the mature trees – planted and nurtured by the registered proprietor of L.R. Loc.8/Matharite/300.*” This statement is not emphatic as to prove on whose portion of land were the trees standing. What is the existing boundary? The boundary of any parcel of land is delineated by beacons placed by a surveyor. It was incumbent upon the appellant to tender evidence from a land surveyor or the land registry to prove the exact boundary of his land and then demonstrate and prove that the disputed trees were standing on his portion of land. Evidence relating to the beacons along the adjoining parcels of land should have been given.
  16. It is our considered opinion that the expert valuer called by the appellant could only testify as to the value of the blue gum trees and he did not give cogent evidence to prove on whose portion of land the trees were standing. The valuer contradicted himself in his oral testimony when he stated that the trees he valued were the trees standing on land parcel known as **Loc.8/Matharite/299**. The issue that comes to mind is that, if the author of a written report contradicts the same report in his oral testimony, what weight should be given to the report? We are of the considered view that such a written report whose critical aspect has been contradicted by the author carries very little or no weight. Such a report cannot be said to prove any fact on a balance of probability.
  17. Upon examining the record and judgment of the High Court, we are satisfied that the appellant did not discharge his legal burden to prove that on a balance of probability, the disputed 15 blue gum trees were standing on his portion of land. The appellant tendered evidence to prove the value of the 15 blue gum trees but did not tender evidence to prove the boundary of his parcel of land. In totality, it is our considered view that the grounds contained in the memorandum of appeal have no merit and the upshot is that this appeal is hereby dismissed with costs.

***Dated and delivered at Nyeri this 5<sup>th</sup> day of February, 2014.***

***ALNASHIR VISRAM***

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***JUDGE OF APPEAL***

***MARTHA KOOME***

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***JUDGE OF APPEAL***

***J. OTIENO-ODEK***

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**