



IN THE COURT OF APPEAL

AT BUSIA

(CORAM: MARAGA, MUSINGA, MURGOR JJ. A)

CIVIL APPEAL NO. 83 OF 2014

BETWEEN

STEPHEN ONYANGO OLOO..... APPELLANT

AND

NELSON MAKOKHA KABURU.....1ST RESPONDENT

SILVESTER OPIYO..... 2ND RESPONDENT

CHARLES OWINO..... 3RD RESPONDENT

TIMOTHY ONYANGO..... 4TH RESPONDENT

GILBERT OKELLO..... 5TH RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Busia (Kibunja, J.) dated 24th September, 2014

in

E.L.C. NO. 150 of 2013

(formally HCCC No. 23 of 2006))

JUDGMENT OF THE COURT

This appeal concerns a boundary dispute where, ***the appellant, Stephen Onyango Oloo (Stephen)*** seeks orders for the setting aside of a decision of the High Court which found that he had interfered with the boundaries between the appellant's Land Parcel No. Samia/Bukangala 'B'/59, (***“parcel 59”***) and the respondents' Land Parcel No. Samia/Bukangala 'B'/ 62 (***“parcel “62”***) and Land Parcel No. Samia/Bukangala 'B'/ 63 (***“parcel 63”***).

The origins of the dispute dates back to 1965 when parcel 59 belonging to the appellant's father, Thomas Oloo Osolo, was allegedly unlawfully invaded by his neighbours, William Kaburu and Onyango Achola. Following determination of the dispute by the Funyula African Court in Land case No. 31 Of 1965, the land was returned to Thomas Oloo, and William Kaburu was evicted from the land in question. William Kaburu appealed to the Bungoma African Appeal Court in Appeal No. 68 of 1965, but the appeal was dismissed.

In 1971, land adjudication was carried out in the area, and Thomas Oloo's parcel 59 was registered as comprising 3.8 hectares. His neighbor's parcel 62 registered in the name of Onyango Ogono comprised 1.8 hectares, while William Kaburu's parcel 63 comprised 5.3 hectares.

This remained the position until 1988 when Thomas Oloo embarked on the subdivision of parcel 59 into three portions that is, Land Parcel No. Samia/Bukangala 'B'/249 ("**parcel 249**"), Land Parcel No. Samia/Bukangala 'B'/250 ("**parcel 250**") and Land Parcel No. Samia/Bukangala 'B'/251 ("**parcel 251**") all of which totaled 6.43 hectares. The subdivision process was concluded on 11th December 1991 when the mutation form signed by Thomas Oloo and the Land Registrar, Busia was registered.

William Kaburu died in 1997, and his sons, **Nelson Makokha Kaburu (Nelson)** the 1st respondent, and **Silvester Opiyo (deceased)**, being the beneficiaries entitled, became the absolute proprietors of parcel 63. Since their uncle Onyango Ogono died without heirs, his parcel 62 was registered in the names of the 3rd, 4th and 5th respondents absolutely, who were also William Kaburu's sons.

It was during the distribution of the estate of their late father and uncle that the respondents' realised that the acreage of parcels 62 and 63 on the ground did not conform to the acreage in the Land Register, and that the boundaries in the Land Register had been interfered with, to the extent that, the acreage in the Land Register and Survey Maps of parcels 62 and 63 were substantially reduced in size.

On account of this, the respondents filed suit against the appellant as the administrator of the estate of the late Thomas Oloo and Siprina Apiyo Oloo (deceased), the District Land Registrar, Busia, the District Land Surveyor, Busia, and Director of Surveys, Nairobi, and prayed for the eviction of the appellant, cancellation of the new map and rectification of the boundaries between parcel 59, and the respondents' parcels 62 and 63.

In his defence, the appellant merely denied the contentions as set out by the respondents in their plaint.

The District Land Registrar, Busia, the District Land Surveyor, Busia, and Director of Surveys, Nairobi, who were the 2nd, 3rd and 4th defendants, stated that, at the core of the case was the implementation of the decisions of the Funyula and Bungoma courts, a matter which was long overdue; that the Survey Map showed that portions of parcels 62 and 63 had encroached into parcel 59 and that this required to be rectified; that the consent of the respondents in the rectification process was unnecessary as the Funyula and Bungoma courts had already determined the issue; and that the correction on the Survey Map was a mere formality, as the status on the ground did not change.

When he testified, Nelson stated that, parcel 59 initially comprised 3.8 hectares. Following registration of the mutation form on 11th September 1991, it was subdivided into parcel 251 comprising 2.55 hectares, parcel 250 comprising 2.55 hectares and parcel 249 comprising 1.33 hectares all totaling 6.43 hectares; that the size of the three new parcels grew by an additional 2.63 hectares, hence encroaching on most of the respondents' parcel 63 and almost all of parcel 62. The encroachment was only discovered on 10th April 1997 when the respondents filed for Letters of Administration in the name of their late father, and sought to subdivide the properties amongst the beneficiaries of the estate.

According to Nelson, the original Survey Map of parcel 59 did not border parcel 63, as parcel 62 lay in between those parcels. But, the Mutation form showed that parcel 63 shared a border with parcels 249 and 250, yet parcel 59 had not at any time shared a boundary with parcel 63. Nelson testified that he later obtained copies of the Land Adjudication Register for parcel 63 dated 10th December 1969 which showed the acreage as 5.2 hectares, while the acreage of parcel 62 was stated to comprise of 1.8 hectares.

On cross examination, Nelson pointed out that the last page of the Mutation form registered on 11th December 1991 indicated that the boundaries marked in black were to be deleted, as they were not supported on the ground. He concluded by stating that it was when he discovered that the acreages of parcels 62 and 63 were significantly more in the documents in the Land Registry than on the ground that he filed the suit.

On 10th December 2013, the court visited the disputed land, where the features marking the boundaries of parcel 59 and the subdivisions of parcels 249, 250, and 251 were pointed out. The boundaries were found to be clearly visible marked with growing trees. Also pointed out were the intersections where the respondents believed that parcel 59 had encroached into parcels 62 and 63. The court also noted the houses captured on the Land surveyors report.

On his part, Stephen's case was that there had been a boundary dispute between the parties that was determined by the two land cases in 1965. His father had two wives, and the younger wife lived close to parcels 106 and 107, but the home was later relocated to the current site on parcel 250. Thomas Oloo also constructed a permanent building next to parcel 63 in 1971, to which the proprietors of parcels 63, 106 and 107 did not raise any objections. That it was in 1997 when the respondents' claimed that the appellants had encroached on their land.

Stephen asserted that parcel 59 was at all times between parcels 106 and 107 on the lower side. Parcel 59 was subdivided into parcels 249, 250 and 251 all measuring 6.43 hectares, and which belonged to his family. He went on to state that in 1988, it was realised that the title documents were not reflective of the position on the ground, and following requests made to the Survey Department, measurements were taken to effect the adjustments.

According to him, no changes were made on the ground, as what was measured was the status on the ground, and that their land was clearly marked by old trees and tree stumps going back 40 years. He further testified that in 1991, when it was realised that the changes in the register had not been effected, he notified the Survey Department which took up the matter and amended the Land Register and the Survey Maps. It was his contention that the respondents only sought to take advantage of the mistakes and errors on the Land Register, which differed from the ground position, but that the errors had since been corrected, and as a consequence, the claim by the respondents had no basis.

Stephen agreed in cross examination that the Funyula and Bungoma land cases were finalized in 1965 about 6 years before the land adjudication exercise of 1971, and that the green cards of 23rd March 1971, indicated that parcels 62 and 63 were 1.8 and 5.3 hectares respectively, while parcel 59 was indicated as 3.8 hectares, which was subsequent to land adjudication. He confirmed that no complaints were raised by his father following land adjudication. It was also conceded that before the subdivision of parcel 59, parcels 62 and 63 shared a boundary while the amendments on the sketch of the mutation form showed that parcels 62 and 63 were no longer bordering each other as parcels 249 and 250 now lay in between.

The next witness for the defence was **Jared Ouma Okoth, (Jared)**, the land surveyor. He stated that he

visited the land on 16th June 2010 and prepared a report following the orders of the court. He testified that after measuring the ground position, he compared this with the sizes indicated in the surveyor's diagram of 1988 which was attached to the mutation form registered in 1991. He thereafter sketched a summary diagram of the parcels which he annexed to his report of 1st July 2010.

His findings showed that, the shapes of parcels 62 and 63 varied from the original Survey Maps, and that the mutation form of 11th September 1997 was for parcels 249 and 251 which had been subdivided from parcel 59, and was signed by Thomas Oloo the owner of parcel 59, the surveyor and the District Land Registrar. The subdivisions were captured in the second edition Survey Map No. 6 produced in court. He said that he had checked with the first registration documents and found that they agreed with the areas he had marked, and that no boundaries were uprooted or changed during the amendment exercise.

When cross-examined he agreed that the mutation form indicated the size for parcel 59 as 3.8 hectares which acreage was cancelled in red, and replaced with 6.43 hectares. He conceded that the subdivisions carried out on parcel 59 affected the original sizes of parcels 59, 62 and 63, but stated that the Mutation form did not affect the ground sizes for parcels 62 and 63, as it confined itself to the ground position occupied by parcel 59.

Also supporting Stephen's case were witnesses, Benjamin Onyango Ezekiel and Washington Osaso Odakala who emphasized that the boundaries that existed between the parties had not been changed.

Upon hearing both parties, the learned trial judge concluded that there was sufficient evidence to show that the registration of parcels 249, 250 and 251 resulted in an injustice to the owner of parcels 62 and 63 through encroachment into their boundaries and reducing the acreage, and ordered that the subdivision undertaken by way of the mutation form registered on 11th December 1991 be cancelled so that the parcels 59, 62 and 63 revert back to the position that existed subsequent to 23rd March 1971 following the land adjudication exercise.

Being aggrieved by the decision of the High Court, the appellant has filed this appeal whose grounds in the main are that the learned judge erred in holding that the decision in the Funyula and Bungoma courts had been implemented, and formed part of the Land Adjudication process; that the subdivision of parcel 59 resulted in the encroachment of parcels 62 and 63; and that the order of rectification of the maps and registers under **section 148 (1) and (2)** of the **Registered Land Act** by the court was erroneous despite there having been no complaint by the parties in respect of the existing boundaries on the ground.

Mr. Manwari, learned counsel for the appellant, informed us that he would canvass ground 1 separately, and grounds 2 to 12 together. On the issue that the court found that the appellant ought to have raised an objection following the land adjudication exercise, counsel contended that since the two court decisions had corrected the position on the ground, the necessity to file an objection was unwarranted.

On the contention that the judgment of the learned judge was against the weight of the evidence on record, counsel submitted that the challenge through the mutation form of 11th September 1991 was not because the adjudication exercise had long passed; that when the subdivision of parcel 59 was carried out through the mutation form registered on 11th September 1991, there was no evidence of encroachment onto the respondents' parcels 62 and 63, and so to hold that the mutation form resulted in a growth in size by 2.63 hectares was incorrect; there was no such increase. What took place was within parcel 59 and it did not extend to the other parcels. Following the subdivision exercise of 1991 no objection was raised by the owners of 62 and 63. The boundaries had never changed from the date they were demarcated. It was when the respondents filed their succession cause, and demarcated the internal boundaries that the discrepancies in the acreage of the parcels 62 and 63 were realised.

Following this discovery, the respondents had filed suit claiming that their land had been encroached upon by the appellant.

Mr. Onsongo, learned counsel for the respondents submitted that the learned judge was correct in finding that the appellant had failed to raise an objection following land adjudication. **Section 26** of the **Land Adjudication Act** specifies that this requires to be carried out within 60 days. No objection was filed by Thomas Oloo, following the land adjudication exercise, and neither were there any appeals pending against the decision of the Funyula or Bungoma courts' earlier decisions. Even after the survey no one has been moved on the ground. Counsel argued that if indeed it was the case that the subdivision was with respect to the appellant's parcel 59 on the ground, then, such alterations ought not to have affected the respondents' parcels 62 and 63 as shown by the second edition Survey Map and the Land Register for the area.

We have considered the record, and the submissions canvassed for the parties and take the view that in order to reach a justice determination of this appeal we must arrive at a finding of the following issues:

1. *Whether the Land Adjudication Act was applicable to the circumstances of the case.*
2. *Whether the subdivision of parcel 59 into parcels 249, 250, and 251 affected the boundaries and acreage of parcels 62 and 63.*
3. *Whether alteration of maps and boundaries carried out on account of the subdivision of parcel 59 conformed to the stipulated requirements of the Registered Land Act.*
4. *Whether section 148 (1) and (2) of the repealed Registered Land Act was applicable to the mutation form of 11th September 1991.*

This is a first appeal, and as stated in **Kenya Ports Authority vs Kuston (Kenya) Limited (2009) 2 EA 212**;

“On a first appeal from the High Court , the Court of Appeal shall reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has never seen or 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 the record and not to introduce extraneous matters not dealt with by the parties in evidence.”

We begin by considering whether the learned judge rightly applied the provisions of the Land Adjudication Act to the circumstances of the case. In this regard the High Court had this to say,

“... The adjudication register for the area was completed in 1969 which was three years after the decision of the court cases. The copies of the adjudication register dated 10th December 1969 for Samia/Bukangala B/62 and 63 indicates their acreages as 1.8 and 5.2 hectares respectively which is the same acreages in their registers. Thomas Oloo did not file any objection proceedings as required under section 26 of the Land Adjudication Act Cap 284 of Laws of Kenya...”

The learned judge concluded;

In view of the finding in 4 above, and considering that there were no objection proceedings to the adjudication exercise results for Samia/Bukangala B/62 and 63 by the registered owner of Samia/Bukangala B/59 there was therefore no basis for altering the acreage of that parcel from

the registered size of 3.8 hectares to 6.43 hectares during the subdivision into parcels 249, 250 and 251 on 11th September 1991.

It was the appellant's argument that since the position on the ground had been finalized by the 1965 Funyula and Bungoma courts, the adjudication process was not applicable to the circumstances of the case.

As we understand it, the suit in the Funyula and Bungoma courts was concerned with a dispute between Thomas Oloo and his neighbours, William Kaburu and Onyango Achola, over the ownership of parcel 59. It was not a dispute over the parcel's acreage. Indeed, those courts found that Thomas Oloo was the actual owner of parcel 59. Subsequent to determination of the suit, land adjudication for the area was carried out, and with the registration of parcel 59, the acreage was confirmed as 3.8 hectares as at 23rd March 1971.

We can find nothing to show that in accordance with **section 26** of the **Land Adjudication Act** Thomas Oloo lodged any objection to dispute the acreage for parcel 59 captured in the Land Adjudication Register. Without any such objection, the terms of **section 27** of the **Land Adjudication Act**, were applicable, and the Adjudication Register was at that point deemed to have been duly finalized.

Accordingly, we find that the learned judge rightly concluded that since no objection was raised within the stipulated period following the land adjudication exercise, the appellant was estopped from seeking to adjust the acreage on the Land Register on the basis that the acreage on the ground differed from the acreage specified on the Land Register.

This leads into the next issue of whether the subdivision of parcel 59 into parcels 249, 250, and 251 affected the boundaries and acreage of parcels 62 and 63.

The appellant's case was that, since the subdivisions were solely with respect to parcel 59, they did not in any way interfere with parcels 62 and 63, and Thomas Oloo was entitled to carry out the subdivision in such manner as he deemed fit.

Our analysis of the evidence clearly shows that it was the subdivision of parcel 59 by Thomas Oloo that led to the boundary dispute between the appellant and the respondents. We say this because, following Land adjudication, the Land Adjudication Registers of 10th December 1969, the Land Register and Survey Map for the area indicated that the acreage of parcel 59 was 3.8 hectares. Similarly, the Land Register for parcels 62 and 63 which was opened on 23rd March 1971 indicated the acreages as 1.8 and 5.2 hectares respectively. The same acreages were also specified in the Adjudication Register.

In addition to this, the second edition Survey Map of Bukangala Section "B" No. 6 with amendments upto 1992, indicated that parcels 62 and 63 were situated adjacent to each other, and Parcel 62 and was clearly mapped as being situated in between parcel 59 and 63.

Then in 1988, Thomas Oloo commenced the process of subdividing parcel 59 which was completed in 1991 with the registration of the mutation form. It was at this point that, the changes in Survey Map No. 6 could be observed.

What is significant is that another second edition Survey Map No. 6 for the same area, this time as amended in 2003, took into account the subdivisions captured in the impugned mutation form, with the result that parcel 62 and 63 were shown to have been separated by parcels 249, 250 and 251 (supposedly the former parcel 59). Parcel 62 was subsumed into the newly created subdivided portions,

and was no longer situated between parcel 63 and what was previously parcel 59.

These changes were confirmed by the findings in Jared's Survey report of 1st July 2010 which showed that following subdivision of parcel 59, the acreages recorded for parcels 249, 250 and 251 increased, to the detriment of parcels 62 and 63.

There can be no doubt that the subdivision of parcel 59, resulted in a change in the shape and acreage of parcel 63, and a distinct alteration of the boundaries between parcel 59, 62 and 63, where parcel 62 ceased to exist altogether. It is apparent that the total acreage of the subdivided parcels grew from 3.8 hectares to a total 6.43 hectares, and gave rise to a disproportional decrease in acreage of the respondents' parcels 62 and 63.

From this analysis, we find that, the subdivision of parcel 59 affected the shape, acreage and positions of parcels 62 and 63, and in order to give effect the amendments in the mutation form, the boundaries of the second edition Survey Map for Bukangala Section "B" Map No. 6 of 1992 were significantly altered. This resulted in another second edition Survey Map this time of 2003 which showed the changes in the positions and acreages of parcels 249, 250 and 251 (the purported subdivisions of parcel 59) in relation to parcels 62 and 63.

Having found that the boundaries of the Survey Maps were altered to reflect the boundary alterations, we now address the question of whether the procedures adopted for the alteration of the boundaries in Survey Map No. 6 conformed to the stipulated requirements of the Registered Land Act.

Section 22 of the repealed **Registered Land Act** stipulated;

"(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."

In this case, Thomas Oloo set out to subdivide his parcel 59. The procedure he adopted was by way of a mutation form registered on 11th September 1991, signed by himself and the District Land Registrar. From the sketches annexed to the mutation form, it is clear that the boundaries and acreages of parcels 62 and 63 were altered to accommodate parcels 249, 250 and 251, which alterations translated into amendments of the Survey Map and the Land Register.

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.

In the circumstances, we are satisfied that, the Survey Map for Bukangala Section “B” was unilaterally and unlawfully altered without consultation with the respondents, by Thomas Oloo and the Land Registrar, Busia, resulting in the purported second edition Survey Map No. 6 for the same area, mapping out the new boundaries and adjusting the position and acreages for parcels 63, 249, 250, and 251.

In effect, since the procedure for amending maps and altering or adjusting boundaries specified by **section 22** of the Act was disregarded, we find that the second edition Survey Map No. 6 for Bukangala Section “B” which sought to alter the boundaries, positions and acreages of parcels 62 and 63, was irregularly and unlawfully contrived, and as a consequence it is null and void, and of no effect.

We might add here that, it mattered not that the existing boundaries on the ground were not affected. Provided the boundary, whether on the Survey maps or on the ground is likely to be affected, then, the position is that the provisions of **section 22** of the Act were applicable, and all concerned parties required to be consulted.

The final issue is whether the court was entitled to order the rectification of the Land Register under **section 148 (1) and (2)** of the **Registered Land Act**, following the registration of the ill-fated mutation form registered on 11th September 1991. In ordering its revocation, the learned judge found that even though there was no evidence of fraud presented by the respondents, the process through which parcel 59 increased from 3.8 hectares to 6.43 hectares was through a mistake which was irregular and unlawful.

In our view, the learned judge rightly invoked the provisions of **section 148 (1) and (2)** of the **Registered Land Act**. We would go further to add that, this was not a claim arising solely from an error in the acreage of the respondents’ land, but a claim arising from the wrongful and unlawful alteration of the boundaries and Survey Map contrary to the requirements of **sections 22** and **143** of the **Registered Land Act**. Accordingly, we find no reason to interfere with the decision so reached.

For the foregoing reasons, the appeal lacks merit and is hereby dismissed with costs to the respondent.

It is so ordered.

Dated and delivered at Kisumu this 17TH day of NOVEMBER. 2015.

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true

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