



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC APPEAL NO. 3 OF 2017

JANE NJERI ARTHUR.....APPELLANT

VERSUS

JOSEPH MWAURA NJOROGE.....RESPONDENT

JUDGEMENT

Introduction

By a Memorandum of Appeal dated the 18th September 2006, the Appellant appeals against the whole of the ruling/ judgment delivered on 17th August, 2006 by the Kajiado District Land Registrar. The genesis of this appeal is from the determination of the District Land Registrar, Kajiado's decision dated the 17th of August 2006 regarding a boundary dispute relating to parcel No. NGONG/NGONG/6385 and NGONG/NGONG/6386 where he made the following orders:

- a) The present boundary is hereby adopted as the boundary between the two parcels.
- b) The map to be amended to conform with the ground.
- c) Under section 23 of the REGISTERED LAND ACT (hereinafter referred to as "RLA") the parties to maintain in good order and repair the boundary so determined.

The Appellant being dissatisfied with the Ruling, a Survey of the land was undertaken by the District Surveyor who prepared a report dated 4th September 2006 and another report by a Private Surveyor B.M. Okumu which is undated.

The appellant being dissatisfied by the ruling filed an appeal at the High Court of Kenya in Nairobi on 18th September 2006.

The Memorandum of Appeal contained the following grounds;

- a) The District Land Registrar erred in failing to appreciate that the boundary between the two parcels had been interfered with and that the acreage of each of the parcels on the ground differed with the acreage shown in the mutation forms and the area survey maps.
- b) The District Land Registrar erred in failing to ascertain the actual acreage of each of the two plots as shown in the title/mutation forms and ensure that the size of the plots on the ground is equivalent to the size in the mutation forms/title and/or register.

- c) The District Land Registrar erred in failing to consider and appreciate the evidence adduced by the Appellant.
- d) The District Land Registrar erred in failing to appreciate that the subdivision line between the two parcels of land clearly shows an encroachment onto parcel 6386.
- e) The District Land Surveyor erred in failing to consider that the Registry Index Map (R.I.M.) reference number 20/NW covering the parcels in questions is at variance with the associated mutation forms and that most of the distance measurements shown on the mutation forms are very different from their corresponding distances on the R.I.M, hence the discrepancy between the area in the RIM and in the mutation form.
- f) The said District Surveyor did not adjudicate the dispute impartially and was influenced by extraneous matters, hence the erroneous decision.

The Appellant prays that:

- a) The said Ruling and all the consequential orders be set aside and the dispute be determined afresh and or the correct boundary reflecting the correct acreage of each parcel be determined and maintained.
- b) The area maps which reflect the correct acreage/size of each parcel be determined and maintained and the boundary on the ground be marked to confirm with the said maps.
- c) The respondent to pay the cost of appeal.

I have considered the submissions of both parties in respect of this Appeal.

Analysis and Determination

Upon consideration of the materials presented in respect of the Appeal herein, the only issue in dispute is whether the proceedings and decision of the District Land Registrar dated the 17th of August 2006 and District Surveyor's Report dated 4th September, 2006 regarding a boundary dispute relating to parcel No. NGONG/NGONG/6385 and NGONG/NGONG/6386 should be set aside and the boundary dispute determined afresh.

It is not in dispute that there was a boundary issue between land parcel Nos. NGONG/NGONG/6385 and NGONG/NGONG/6386. It is further not disputed that the District Land Registrar in exercising his mandate proceeded to determine the dispute and prepare a report. The Appeal has arisen as a result of the District Land Registrar's decision where he directed that the parties should adopt the boundaries as per the findings on the ground.

The Appellant contends that she is the widow of the deceased owner of land parcel number NGONG/ NGONG/ 6368 who was involved in a boundary dispute with the Respondent. She claims the Respondent had encroached on her land. She admitted that the late husband had initially tried to fix the boundary when it was uprooted.

The District Land Registrar, in determining the boundary dispute stated as follows: **' the surveyor present did a ground check and realized that the shape of the parcel on the map differed from that on the ground. The measurement on the side facing the road indicated the boundary to fall within the acceptable position of any boundary. A check along the river line also indicated that parcel No. 6368 takes the approximate shape and that upon taking measurements, it almost checked with the measurement on the mutation. Parcel No. 6385 had its total measurement as indicated on the mutation form along the river, an indication that he has not encroached into parcel No. 6386 as alleged.'**

It is the Appellant's contention that these averments are contradictory and should not have been relied upon for the Land Registrar to make his decision. Further, she averred that the District Land Registrar relied on extraneous issues to determine the boundary dispute. The Appellant also disputed the report by the District Surveyor, Kajiado dated the 4th September, 2006 that had ruled out an encroachment and relied on the undated report by the private Surveyor B M Okumu who stated that the Registry Index Map (RIM)

reference number 20/NW covering the parcels in questions was at variance with the associated mutation forms. From a cursory look at the proceedings and decision of the District Land Registrar, the Appellant confirmed that her deceased husband purchased the suit land and relied on the existing boundaries at that time. The Appellant confirmed that it is her late husband who placed pegs to mark the boundaries and that they rectified the boundary together with the Seller. The Respondent herein stated that he bought the suit land from one James Mbai Mburu and he was shown the boundaries, which have remained intact. He confirmed having no dispute with the Appellant's deceased husband. One of the Appellant's witness Apollo Mwangi confirmed he did not know the boundary of the two parcels of land although he used to farm the deceased land. As for another witness Mwangi Mugo, he confirmed visiting the two parcels of land in 1986 and 1996 but never saw the boundaries. He however contended during the hearing that the boundaries looked different. He also said that the deceased never told him of any encroachment on his land. One Samuel Kiruki who is a neighbor of the disputants, stated that he had seen a boundary of euphorbia plants for almost 17 years. He however confirmed he did not know the entire boundary. Further, one Moffat confirmed that he brought Mwaura to view parcel Ngong/Ngong/6385 in 1997 – 1998 and the boundaries have remained intact to date and the fence was as it is presently.

Since the boundary dispute herein was determined during the regime of the Registered Land Act, I will mainly refer to the said Act. Section 21(1) (2), & (3) of the Registered Land Act (repealed) gave power to the Land Registrar to fix boundaries to registered land and provided that ' (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.'

From the materials presented herein, it is evident that the Land Registrar adhered to the law and invited all the parties to deliberate on the boundary dispute wherein they each called their respective witnesses. Further, in exercise of his legal mandate, the Land Registrar proceeded to determine the dispute. I note the Appellant seeks to rely on the Fair Administrative Actions Act and the Constitution of Kenya 2010 which were not in force when the Land Registrar determined the boundary dispute and in the interests of justice, I will not refer to them. In the said proceedings, no witness stated that the deceased had a boundary dispute with the Respondent herein prior to his death. I note the dispute arose one year after the demise of the owner. This in essence points out to the fact that the deceased had been comfortable with his boundary as pointed out by the seller and had acquiesced on the same. The Respondent herein who owns the adjacent parcel of land confirmed that it is the seller who pointed out to him the boundary which he had retained to date. All witnesses stated there was a boundary between the two parcels of land, and DW3 Moffat Buja was emphatic that the boundaries had remained the same. Further, both John Mbugua, (PW3) and Samuel Kiruki (DW1) all stated that the boundary was made of euphorbia plants which corroborated Joseph Mwaura Njoroge's averments. It is hence evident that the majority of the witnesses of the Appellant and Respondent confirmed that the boundaries had been there. The Appellant contends that the District Land Registrar failed to appreciate her evidence. The rule of evidence is clear that the burden of proof was upon the Appellant to prove that the Land Registrar at the time of arriving at his decision failed to appreciate all the evidence before me, which to me is not the case.

The District Surveyor further did a report dated the 4th September, 2006 addressed to the District Land Registrar where he stated as follows: ' **Measurements taken on both the parcels sides, namely the side fronting the road and the side facing the river, revealed that both parcels dimensions were within acceptable lengths as indicated in the mutation forms (subdivisions of 3386). Furthermore, area analysis on parcel 6386 revealed that its area was intact, and hence no encroachment had been done.**'

From this report, the District Surveyor confirmed that there was no encroachment on the Appellant's land.

There was a second Survey undertaken by BM Okumu who prepared an undated report where he stated that: ' **the boundary line between the parcels 6385 and 6386 did not give the acreage of the two parcels of land as shown in the mutation form as 1.01 hectares and 1.41 hectares respectively. This subdivision line on the ground seems to show encroachment onto parcel 6386 if the acreages given in the mutation form are to be considered.**'

I note that the report by BM Okumu seeks to contradict the findings of the Land Registrar and the District Surveyor. Further, it is not clear whether the said report was prepared before the Land Registrar's report or after.

In the case of **Azzuri Limited v Pink Properties Limited [2017] eKLR**, Justice Angote while making a decision relating to general boundaries had this to say: ‘ **In his paper, “The Role of the Registry Index Map (RIM) in Land Management in Kenya”, Peter K. Wanyoike has stated that the Registered Index Map is a very useful document in registration and management of land in Kenya within the context of “General Boundaries” or “approximate boundaries.”**

The paper defines “General Boundaries” as follows:

“A boundary of which the precise line is undetermined in relation to the physical features which demarcate it ... However, it is clear on the ground where the parcel is situated and where the boundaries are, for they are clearly visible and unmistakable physical features, though they do not indicate the exact location of the line within the breadth which such physical features necessary process.”

In the case of **Ali Mohamed Salim vs Faisal Hassan Ali (2014) eKLR**, this court held as follows:

“The type of survey that generated the Registry Index Map is what was known as “general boundaries” which has been defined in Section 18(1) of the Land Registration Act, 2012 to mean “the approximate boundaries and the approximate situation only of the parcel.” Indeed, most of the titles under the repealed Registered Land Act were issued on the basis of the general boundaries, meaning that such parcel of land had no fixed beacons. On the other hand, land registered under the Registration of Titles Act required a cadastral survey to be prepared, which is based on a fixed boundary principle. Such a survey has an accurate linear and angular measurements to aid the registration of a title of a plot. The boundaries of land registered under the Registration of Titles Act can easily be identified by any surveyor because of the fixed nature of its beacons.”

In the case of **Samuel Wangau Vs. AG & 2 others (2009) eKLR**, it was held as follows:

“However, it is common ground that such maps (R.I.M) are not authorities on boundaries. Both the District Land Registrar and the District land surveyor said as much.....It means therefore that when and where there is a dispute as to the position and location of a boundary as in this case, unless the same is a fixed boundary, one has to go beyond the R.I.M in solving the dispute.”

Indeed, both PW1 and DW2 were agreeable that for one to determine a dispute in respect to general boundaries, the physical features existing on the ground are very critical. Such features include hedges, fences and roads. Because general boundaries are identifiable by using the existing physical features, and by interviewing the owners of the adjacent plots, the law requires disputes relating to such boundaries to be handled by the Land Registrar, and not Surveyors or even the court.’

In this Appeal, the boundary dispute the District Land Registrar was determining related to a general boundary and all the witnesses admitted there were general features to confirm an existence of a boundary between the two parcels of land. The Appellant is aggrieved by the Land Registrar’s ruling for failing to rely on the measurements as per the RIM. As per section 21 (1) of the Registered Land Act, the registry map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel. In the current scenario it is clear the boundaries on the RIM were an approximation.

Further, in the case of **Azzuri Limited v Pink Properties Limited [2018] eKLR**, the Court of Appeal while dismissing an Appeal emanating from a Judgement in the above cited case, where the ELC Judge had dealt with an issue of General Boundaries, stated as follows:’ **We find it impossible to depart from the above findings by the Judge. We have also taken note of the evidence that when the appellant purchased the suit plot, the respondent’s fence was in place, and so were all the features. The appellant did not raise an issue of encroachment with the neighbors or the land Registrar so that the boundaries could be fixed. One can deduce from appellant’s conduct that it was happy to buy the plot “as is” and turning later to involve the County Commissioner and to file suit prematurely contrary to the statute in a case where the Judge found inadequate evidence of encroachment, the orders made cannot be faulted.’**

In relying on the facts as presented, I opine that the District Land Registrar and District Surveyor who were experts properly arrived at their conclusions in respect of the general boundaries between land parcels numbers Ngong/Ngong/6385 and Ngong/Ngong/ 6386 respectively. Since this was a determination of a general boundary, the issue of exact measurement as per RIM as stated by BM

Okumu Surveyor does not arise as the same was used as a guide and was not conclusive since it relies on approximation. It is against the foregoing that I find that the proceedings and decision of the District Land Registrar dated the 17th of August 2006 regarding a boundary dispute relating to parcel No. NGONG/NGONG/6385 and NGONG/NGONG/6386 proper and decline to set the same aside.

The upshot of the foregoing is that the appeal is dismissed with costs to the Respondent.

Dated signed and delivered in open court at Kajiado this 8th day of April, 2019

CHRISTINE OCHIENG

JUDGE



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