



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELC APPEAL NO. 3 OF 2019

STEPHEN KONG'A.....APPELLANT

VERSUS

SYMON KIPRUTO ROP

(suing as the personal representative of the estate of KIPROP KIPCHILAT)RESPONDENT

(Being an appeal from the judgment and decree of the Principal Magistrate's Court at Eldama Ravine

(Hon. N. Thuku, Senior Resident Magistrate) delivered on 2nd April 2019

in Eldama Ravine ELC No. 1 of 2018)

JUDGMENT

1. This appeal traces its roots to the plaint dated 3rd January 2018 which the respondent filed in the subordinate court on 24th January 2018 and in which he averred that he was the owner in possession of the parcel of land known as Pokor/Kebe/Kures/52 registered in his deceased father's name while the appellant was the owner and occupant of the adjoining parcel of land known as Pokor/Kebe/Kures/53 registered in the name of Chepkog'a Chebet. He further stated that during adjudication of the parcels, an access road was created linking the respondent's parcel of land to the main road and that the said road was a documented utility enabling him and his family to access their home as well as ferry his farm produce and other material to and from the farm. He added that the appellant had blocked the said access road and that efforts by Koibatek Land officials to have it opened had been in vain since the appellant had always closed it whenever it was opened.

2. The respondent therefore prayed in the plaint for judgment against the appellant as follows:

a. A declaration that the road connecting Pokor/Kebe/Kures/52 to the main road is a public road and that the defendant's actions of closing the road are illegal and unlawful.

b. An order for opening of the road of access leading to parcel no. Pokor/Kebe/Kures/52.

c. An order of permanent injunction restraining the defendant either by himself, his servants and or agents from closing the said access road and or in any other manner interfering with the plaintiff's access to his land using the said road.

d. Costs of the suit.

e. Any other or further relief as the Honourable Court may deem fit to grant.

3. The appellant filed statement of defence in which he denied the respondent's allegations as to existence of the access road. He admitted being the owner and resident of the adjoining Pokor/Kebe/Kures/53 and averred that any action by Koibatek Land Officials would have been of no consequence since the officials lacked jurisdiction to deal with the matter. He further contended that the survey map which the respondent sought to rely on did not involve the participation of interested parties and disregarded the legal process of creation of survey maps and thus a nullity and that he had title vesting in him the disputed portion and it had never been a public access road. He gave notice of a preliminary objection and urged the subordinate court to dismiss the suit.

4. Upon hearing the matter, the subordinate court (Hon. J. Nthuku, Senior Resident Magistrate) found merit in the respondent's case and granted judgment in his favour as follows:

1. I hereby issue a declaration that there is a public road connecting the plaintiff's land POKOR KEBEN/KURES /52 to the main road is a public road and that the defendants acts of closing the same are unlawful and illegal.

2. I hereby order the defendant to open the said road immediately failure to which the plaintiff shall proceed and open it with supervision (sic) of the OCS EMINIG POLICE STATION

3. I hereby issue an order restraining the defendant, his servants, agents and employees from closing the said access road or in any manner interfering with the plaintiff access to his land using the said road.

4. Lastly the defendants to bear the costs of this suit.

5. Aggrieved by the judgment, the appellant filed this appeal in which he prayed that the judgment be set aside and the respondent's case in the subordinate court be dismissed with costs. The following grounds of appeal are listed on the face of the Memorandum of Appeal:

1. THAT the learned magistrate erred in law and fact and misdirected herself in failing to hold that the defendant/appellant was non suited in the suit as he is not the registered owner of the suit land.

2. THAT the learned Magistrate erred in law and in fact in failing to hold that the suit was incompetent despite finding that the defendant/appellant was not the registered owner of the suit land and had not been appointed as personal representative of the estate of the deceased owner of the suit land.

3. THAT the learned Magistrate erred in law and in fact in failing to hold that the suit suffered from misjoinder of the defendant/appellant and was thus fatally defective.

4. THAT the learned Magistrate erred in law and in fact in disregarding section 19 of the Land Registration Act that stipulates that both the owners and occupiers of a suit land must be consulted and involved in public participation before the alterations to survey maps and register of boundaries.

5. THAT the learned Magistrate erred in both law and in fact in disregarding the evidence on record that showed clearly that the defendant/appellant was not involved or consulted before the alteration of the survey map that created a public access road in the disputed parcel of land.

6. The appeal was canvassed through written submissions. The appellant collapsed the grounds of appeal into two: firstly, that the trial court ignored the evidence on record and erroneously failed to hold that the defendant/appellant was a non-suited party in the suit thus the suit was incompetent and secondly, that the trial court disregarded the provisions of **Section 19** of the **Land Registration Act** and the evidence on record which showed that the defendant (as an occupier) was not consulted before the alteration of the survey map.

7. On the issue of whether the trial court ignored the evidence on record and erroneously failed to hold that the defendant/appellant was a non-suited party in the suit thus the suit was incompetent, the appellant argued that he testified that he was not the registered owner of the suit land and that it was registered in his deceased father's name and that he had not been appointed a representative of his deceased father's estate. That the learned magistrate ignored that evidence and granted judgment that will affect the estate of a deceased person thus rendering the orders to be in vain. That had the trial court considered the appellant's testimony, it would have found that he was wrongly sued. He relied on the cases of Munywoki Musuva Ngao v Mutua Mbinda & another [2019] eKLR and Anderson Mole Munyaya & 3 others v Morris Sulubu Hare Civil Appeal No. 105 of 2016 in which the Court of Appeal quoted the Supreme Court of Nigeria in Goodwill & Trust Investment Ltd and another vs Witt & Bush Ltd - SC 266/2005 in support of the contention that proper parties must be identified before an action can succeed in a court; that the jurisdiction of the court may well be determined by the question of proper parties; and that where wrong principles have been sued the court has no jurisdiction and the resulting judgment is therefore a nullity. The appellant therefore urged this court to find that he is non-suited and the subordinate court had no jurisdiction to deal with the suit as the registered owner of the suit land was deceased and the purported defendant was not appointed as a personal representative of the estate of the deceased.

8. On the issue of whether the trial court disregarded provisions of **Section 19** of the **Land Registration Act** and whether the defendant was consulted, the appellant argued that as an occupier of the suit property, he had a right to be consulted before any re-designation of its boundaries and drawing up of new survey maps and that the learned magistrate erred when she held that if anybody was to be notified then it was his father and not him. That consequently, the 8th edition of the survey map sheet that the respondent relied on was a nullity owing to non-compliance with **Section 19** of the **Land Registration Act** and that the court should not lend its aid to a party founding his cause of action on an illegality. The case of D. Njogu & co Advocates v National Bank of Kenya [2009] eKLR is cited to buttress those submissions.

9. The respondent also opted to tailor his submissions along the two broad grounds adopted by the appellant. On the issue of whether the trial court ignored the evidence on record and erroneously failed to hold that the defendant/appellant was a non-suited party in the suit, he argued that the issue in the suit was not whether the appellant was the registered owner of Pokor/ Keben/ Kures/53 but whether the appellant blocked the road, an action can only be done by a living person. That the appellant never raised the issue of *locus standi* and the argument about being non-suited was a mere afterthought.

10. As to whether the trial court disregarded provisions of **Section 19** of the **Land Registration Act**, the respondent argued that there was no re-design of the boundaries but implementation of the 8th edition of the survey map sheet which was the official map in terms of **Section 30 (1)** of the **Survey Act** and that the appellant misapprehended facts by relying on the base map. Relying on the case of William Gacani Mbaria v Charles Kirimi Mbui [2018] eKLR, he argued that after the land registrar solving the dispute, the appellant waited for the land registrar and surveyor to leave only for him to remove the beacons and block the road again.

11. I have carefully considered the grounds of appeal and the parties' respective submissions. Only two issues arise for determination in this appeal: Whether the appellant was non-suited in the case and whether the trial court disregarded provisions of **Section 19** of the **Land Registration Act** and whether the appellant was consulted.

12. This is a first appeal. Consequently, the mandate of this court is to re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and give reasons either way. I also bear in mind that I have neither seen nor heard the witnesses and I will therefore make due allowance in that respect. I further remind myself that it is the responsibility of this court to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence. See Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR.

14. On the issue of whether the trial court ignored the evidence on record and erroneously failed to hold that the appellant was non-suited, we need look no further than the parties' main pleadings before the subordinate court: the plaint and defence. The respondent pleaded in the plaint that the appellant had blocked the access road on several occasions. He sought an order for the opening of the access road and a permanent injunction restraining the appellant from closing it. Clearly, the respondents claim targeted the appellant personally. There was no allegation made against the appellant's deceased father and there was no prayer in the plaint seeking any order in regard to the parcel of land known as Pokor/Keben/Kures/53 which was owned by the appellant's deceased father. I therefore find no merit in the appellant's argument that he was non-suited or that the judgment of the subordinate court affects his deceased father's estate.

14. Further, a reading of the appellant's statement of defence shows that at no point did he plead before the subordinate court that he was wrongly sued. Instead, he fully responded to the respondent's case and repeatedly stated that he was not only the owner but occupier of Pokor/Kebe/Kures/53. Paragraphs 4, 6 and 10 of his statement of defence confirm as much. Parties are bound by their pleadings. See **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR**. The appellant cannot at this late stage start arguing that he was wrongly sued. Such an argument is, besides being unfounded, also an afterthought as correctly argued by the respondent.

15. As to whether the trial court disregarded provisions of **Section 19** of the **Land Registration Act** and whether the appellant was consulted, I note that there is no dispute that the appellant was an occupier of the parcel of land known as Pokor/Kebe/Kures/53. **Section 19** of the **Land Registration Act** provides:

19. Fixed boundaries

(1) If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an 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 in the register 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 the plan shall be deemed to accurately define the boundaries of the parcel.

(3) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section. [Emphasis supplied]

16. The parties are in agreement that there were two maps in regard to the parcels of land known as Pokor/Kebe/Kures/52 and Pokor/Kebe/Kures/53 as well as other adjoining parcels. The two maps are what the parties referred to as base map and 8th edition of the survey map sheet. The 8th edition of the survey map sheet was produced by PW3, the Land Surveyor Kiobatek, as plaintiff's exhibit 6. He stated that it was prepared by Survey of Kenya and that it shows an access road linking Pokor/Kebe/Kures/52 to Pokor/Kebe/Kures/51 and Pokor/Kebe/Kures/53. It is actually a registry index map or cadastral map which is kept at the land registry in terms of **Sections 7 (1) (b)** and **15** of the **Land Registration Act**, having been prepared by and authenticated by the Director of Surveys pursuant to **Section 41** of the **Survey Act**.

17. PW3 further stated that a base map is produced by adjudication officers as an interim map pending issuance of a final map by the Director of Surveys. The appellant does not in fact dispute existence of the 8th edition of the survey map sheet but contends that it was developed without his involvement as required by **Section 19** of the **Land Registration Act** and that it is therefore a nullity. To begin with, the appellant did not plead any case for nullification of the registry index map or cadastral map. The learned magistrate could not be expected to make a finding that was not sought. Secondly, as between the base map and the registry index map or cadastral map, the latter has force of law under **Sections 7 (1) (b)** and **15** of the **Land Registration Act**, and **Section 41** of the **Survey Act** while the former which was produced as defence exhibit 1 clearly states on its margin that it was prepared by adjudication department "prior to survey department supervision". Indeed, DW1 who produced it admitted that it was an initial map and that it did not show any access road while the 8th edition of the survey map sheet or the registry index map showed an access road.

18. Since there existed a registry index map or cadastral map in respect of Pokor/Kebe/Kures/52 and Pokor/Kebe/Kures/53, the boundaries of the said parcels together with the access road were already fixed in terms of **Section 19 (3)** of the **Land Registration Act** and all that the District Land Registrar and the District Surveyor did was to point out to the parties the position of the access road, as is indeed the duty of the two officers. The registrar neither made any entry in the 8th edition of the survey map sheet nor any definition in the register regarding the position of the boundaries of the parcels or the access road. There was no re-designation of boundaries or drawing up of a new survey map as claimed by the appellant. **Section 19** of the **Land Registration Act** was therefore not applicable and the appellant was not entitled to any consultation under the said section. The learned magistrate's handling of the matter cannot be faulted.

19. In view of the foregoing discourse, I find no merit in this appeal. I dismiss it with costs to the respondent.

Dated, signed and delivered at Nakuru this 17th day of December 2020.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the appellant

No appearance for the respondent

Court Assistants: B. Jelimo & J. Lotkomoi



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