



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. E002 OF 2020

REUBEN KIOKO MUTYAENE.....PLAINTIFF

VERSUS

HELLEN KIUNGA MIRITI.....1ST DEFENDANT

NAHASHON KOOME.....2ND DEFENDANT

THE LAND REGISTRAR, MERU CENTRAL.....3RD DEFENDANT

THE LAND SURVEYOR, MERU.....4TH DEFENDANT

THE ATTORNEY GENERAL OF KENYA.....5TH DEFENDANT

AND

NTALALA ERIC MUTURA.....1ST INTERESTED PARTY

MT. KENYA COMMUNITY BASED ORGANIZATION (CBO)....2ND INTERESTED PARTY

RULING

1. This ruling is in respect of a Notice of Motion dated 8th October, 2020 filed by the Plaintiff as well as a Preliminary Objection raised by the 3rd, 4th and 5th defendants dated 11th November 2020. The court gave directions that the said notice of motion and the preliminary objection be heard and determined together. To this end, the parties filed submissions on the same.

The Application dated 8.10.2020

2. The application is brought under a myriad of Kenyan laws and rules where the applicant seeks the following orders;

1) Spent.

2) That pending the hearing and determination of this application and the main suit, this Honorable Court be pleased to grant Injunction Orders maintaining the status quo on the plaintiffs/applicant's parcel of land known as LR. NO. NTIMA/NTAKIRA/3121.

3) That pending the hearing and determination of this application and the main suit, orders do issue to compel the 1st and 2nd defendants to within 7 days uproot posts and barbed wire fence erected on the public access road measuring 6.5 metres leading to the suit land and restore the road to its previous/original state to the satisfaction of all parties.

4) That an order be issued to compel the Land Surveyor, Meru (the 4th respondent herein) to within 14 days prepare and file a comprehensive independent status survey report on the mutations, establishment, existence, ownership, ground bearings/coordinates and boundaries in relation to LR. NO. NTIMA/NTAKIRA/3121 (originally 2825) and 3294 (originally 618) and the adjacent public access roads.

(this order directed to the mandated government authority is deemed to be extremely essential and core in determining the import

of several survey maps and records relied on by the plaintiff/applicant, land surveyors, land valuers and the general public, ultimately will give a clear guidance to the honorable court and all parties on the true legal position/existence of the suit land and the public access road in question.)

5) *That there be such other or further orders as the court may deem fit and just to grant in the circumstances.*

6) *That cost of this application be borne by the 1st and 2nd defendants.*

3. The application is based on the 17 grounds on the face of the application as well as the content in the 56 paragraphs in the applicants supporting affidavit. In summary, the applicant avers that he purchased the suit land parcel 3121 in 1998, which land resulted from the subdivision of parcel 2825. The applicant was present during the sub division exercise and he witnessed the measurements being taken by the land surveyor who meticulously pin pointed out the beacons (wooden pegs) and all the boundaries which he has maintained to date. The access road to the suit land measuring 6.5 metres was provided for in the demarcation process and no variations or adjustments have ever been made since then.

4. That in 1999, a year after his parcel had already been sub-divided, LR. No. NTIMA/NTAKIRA/618 was sub divided into several parcels one of the resultant parcels being LR. No. NTIMA/NTAKIRA/3294 which land parcel is the cause of this dispute. No discrepancy of measurements, location of physical boundaries or dispute was noted or reported when the adjacent parcel of land was being sub divided.

5. That recently, the 1st and 2nd defendants came and re-surveyed parcel no. NTIMA/NTAKIRA/3294 and in the process, they hived off a part of plaintiff's land as well as the public access road. The 1st defendant then proceeded to dig holes on the suit land and erected a barbed wire fence traversing the suit land and a part of the road of access.

6. The applicant reiterates that since acquiring the land over 22 years ago, no one has ever claimed that he had encroached upon their land and no boundary dispute was ever raised. Thus the unsanctioned variations and boundary adjustments of the 1st defendant are not ratified by the Land Registrar and Land Surveyor and the changes stand to affect all the demarcations and mutations of numerous land parcels. Further, the applicant avers that the 1st defendant is not the registered owner of LR. No. NTIMA/NTAKIRA/3294 and has no locus standi or moral authority to undertake land re-surveying.

7. The application is opposed by the 1st defendant vide a replying affidavit dated 28/10/2020, averring that she has not trespassed into the plaintiffs land, nor encroached into a public access road as she lives on LR. No. NTIMA/NTAKIRA/3293 which is registered in her husband's name. She contends that she did put up a fence but on land parcel NTIMA/NTAKIRA/3293. This she did after consulting 2nd defendant who is a surveyor, as well as all her neighbors including one Angelo Kimathi whom she believed was the owner of parcel 3121.

8. The re-surveying exercise revealed that the interested party had fraudulently schemed to expand his land, and in that process, he encroached on plaintiff's land. The 1st defendant did suggest that there be a joint survey between the concerned parties to confirm status of the land on the ground but instead, the applicant opted to drag her to court prematurely.

The Preliminary Objection dated 11.11.2020

9. The grounds raised in the preliminary objection are that;

1) This Court lacks jurisdiction to hear the application as it offends the express provisions of section 18 and 19 of the Land Registration Act No. 3 of 2012 for reasons that;

a) The subject of the application is a boundary issue which falls within the jurisdiction of the Land Registrar.

b) Further, it is an established principle of law that where there is an alternative remedy and especially where parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order would be granted by courts and the plaintiffs herein have not established the existence of any exceptional circumstances.

2) That the orders sought can only be issued in an application for judicial review or an appeal hence the orders sought are untenable in law.

3) That the application is fatally defective, misconceived and mischievous or otherwise an abuse of the court process and therefore is unsustainable in the obtaining circumstances.

Submissions

10. The Plaintiff filed his submissions on 22.12.2020. He avers that the issues raised in the application are not limited to boundary disputes. That other numerous acts of transgression of procedure, the law and the constitution ought to be determined. That is why the applicant sought various declarations and orders which cannot be adjudicated, determined and granted by the Land Registrar. He also has a claim under pecuniary loss both under special and general damages. Further that if the court was to uphold the preliminary objection, it would be nipping plaintiff's case in the bud, thus unseating the plaintiff from the seat of justice.

11. The plaintiff also submitted that the legal route for alterations of boundaries is stipulated in the Survey Act and the Land Registration Act and it is clear that the 1st defendant failed to follow the law. That no evidence has been produced to show that the 2nd defendant is a

qualified person under the aforementioned act. The plaintiff implores the court to disregard the preliminary objection with costs to him and use its discretion to award coalesced cost of Kshs. 100,000 payable by the Attorney General to the plaintiff on behalf of the 3rd to 5th defendants.

12. The applicant further submitted that he has met the threshold for injunction orders sought as he has adduced evidence showing a prima facie case with high probability of success at hearing, that he stands to suffer irreparable injury which would not be sufficiently compensated by an award of damages and the balance of convenience is in his favor.

13. The applicant has relied on the following cases; **Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others [2019] eKLR, Musili Mwendwa v Attorney General & 3 others [2016] eKLR, Edward Akong'o Oyugi & 2 others v Attorney General [2019] eKLR, Mohamed Sheria & 2 others v Simon Kiprono Sang & 6 others [2017] eKLR, Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR.**

14. The 1st and 2nd defendants' submissions were filed on 12.1.2021. They contend that the dispute between the parties is a boundary one, hence the first port of call in matters of boundary dispute is the office of the Land Registrar. Thus the instant application and the suit are premature and incompetent for offending the mandatory provisions of section 18 of the Land Registration Act. It is trite law that where dispute resolution mechanisms are provided for under statutes, a party ought to exhaust them before moving to court and to hold otherwise would be to erode public confidence with such organs. These two defendants therefore urge the court to find that it lacks jurisdiction to entertain this suit and strike out the same.

15. The 1st and 2nd defendants have relied on the following authorities; **Diana Kethi Kilonzo & another v Independent Electoral & Boundaries Commission & 10 others [2013] eKLR, Sammy Ndung'u Waity v Independent Electoral & Boundaries Commission & 3 others [2019] eKLR, George Kamau Macharia v Dexka Limited [2019] eKLR and Wills Ocholla v Mary Ndege [2016] eKLR.**

16. The 3rd to 5th defendant filed their submissions on 22.2.2021. They aver that this court lacks jurisdiction to hear and determine the application as it offends the express provisions of Section 18 & 19 of the Land Registration Act, further the orders sought can only be issued in an application for judicial review or appeal hence they are untenable in law. Where there is an alternative remedy or where parliament has set up a statutory dispute resolution procedure, it is only in exceptional circumstances that the court would intervene before the procedure is exhausted. The plaintiff has not established that there are exceptional circumstances which require the court to intervene, nor has he established that the procedure laid down by the act is not adequate or effective. They pray that the court allows their preliminary objection and dismiss the plaintiff's suit with costs to the defendants.

17. The 3rd -5th defendants relied on the following cases; **Wills Ocholla v Mary Ndege [2016] eKLR, George Kamau Macharia v Dexka Limited [2019] eKLR, Geoffrey Muthinja Kabira & 2 others v Samuel Munga Henry & 1756 others [2015] eKLR, Charles Otieno Opiyo & 3 others v Orange Democratic Movement Party & another [2017] eKLR.**

18. I will not consider the 1st interested party's submissions as they had not filed any pleading in response to either the application or the preliminary objection. I have also declined to expunge the further affidavit filed by the applicant on 22.2.2021 as requested by the 1st and 2nd defendants. This is because the contents thereof simply explain the challenges the applicant encountered in trying to file his submissions electronically.

Analysis and determination

19. I have carefully considered the pleadings and submissions made herein. There are two issues for determination, the first is whether the 3rd - 5th Defendants' preliminary objection has merits. If not, the Court will then proceed to address the second issue as to whether the Plaintiff's application is merited.

20. The circumstances in which a preliminary objection may be raised was explained by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696**, as follows:

"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

21. The effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary. Thus a preliminary objection may only be raised on a "pure question of law". To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.

22. The issue as to whether this court has jurisdiction to determine the plaintiff's application has been raised. The locus classicus on jurisdiction is the celebrated case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1**. The Plaintiff has repeatedly stated that the 1st defendant extended the boundary into his land and it is apparent that the unsanctioned variation and boundary adjustments are not ratified by the Land Registrar and the Land Surveyor- See paragraph 33 of the plaint, paragraph 31 of the applicant's supporting affidavit and ground no. 15 in the applicant's application, where the relevant words have been set out boldly for emphasize.

23. The basis of plaintiff's claim emanate from the alleged resurveying which gave rise to the encroachment on his land and on the public access road. In his plaint, his first prayer is a declaration that he is the bonafide owner of the suit land as per the existing boundary beacons established on 15th March 1998. Prayer 2, 4 and 5 are geared towards undoing the alleged wrongs committed by the 1st and 2nd defendants, while the rest of the prayers have a direct nexus with the allegedly committed wrongs of encroachment.

24. Two issues resonate from the above analysis. The first one is that the dispute is a boundary one. Secondly, that the Land Registrar and the Land Surveyor did not ratify the alleged wrongs. It follows that this is a matter which ought to have been presented to the Land Registrar in the first instance.

25. The jurisdiction of this Court flows from Article 162(2) (b) of the Constitution which is read together with the provisions of **Section 13(2) of the ELC Act**. The latter provides as follows;

“In exercise of its jurisdiction under Article 162(2) (b) of the Constitution, the Court shall have power to hear and determine disputes—

a)relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

b) relating to compulsory acquisition of land;

c) relating to land administration and management;

d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

e) any other dispute relating to environment and land.

26. Under the Registered Land Act Cap 300 (repealed), Section 21(4) deprived this Court the power to 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 under the laws. **Section 18(2) of the Land Registration Act, 2012**, similarly prohibits this Court from entertaining 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 that section. It provides as follows:

“The Court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section”.

27. Section 18(2) of the Land Registration Act provides in mandatory terms that the dispute should be submitted to the Land Registrar.

28. Under **Section 19 of the Land Registration Act, 2012**, the duty to fix boundaries to registered land is vested in the Land Registrar. It provides that:

“19. (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”.

29. It is manifestly clear that the entity which has the statutory mandate to avail an accurate plan of defined boundaries is the Land Registrar. This is also the entity which has the requisite expertise to undertake the aforementioned task.

30. In the Court of Appeal Case of **Azzuri Limited v Pink Properties Limited [2018] eKLR**, the court stated as follows in relation to the application of Section 18 of the Land Registration Act;

“This means that under the aforesaid provisions, boundary disputes pertaining to lands falling within general boundary areas must be referred to the Land Registrar for resolution.....From this analysis of the law, it should be clear from the above that, we are in agreement with the learned Judge’s conclusion that the dispute ought to have been heard by the Land Registrar as stated in the statute. Jurisdiction is everything. It has been said many times before, that, without it a court has no powers to make one more step, irrespective of the strength and nature of evidence in the parties’ possession”.

31. In the case of **George Kamau Macharia & Dexka Limited (2019) eKLR, Kemei J** stated as follows:

“From the above provisions of the law, it is manifestly clear that the above section gives the mandate to the Land Registrar to resolve boundary disputes of land with general boundaries. Registry index map (RIM) only indicates approximate boundaries and the approximate situation on the ground. Even if this court was to hear and determine this matter it will still require the input of the Land Registrar. The framers of section 18 (2) of the Land Registration Act placed this matter before the land

registrar who has the technical advice and resources of the district surveyor to determine and ascertain the boundaries. It is trite law that where the law has given a legal obligation to a department of government, it is important for the court to let that department proceed to meet its legal obligations. In this case the office of the land registrar is mandated to deal with the general boundary dispute first before the same is escalated to the court. It is the view of this court that the dispute is prematurely before the court”.

32. While in the case of Willis Ocholla vs Mary Ndege (2016) eKLR Kibunja J rendered himself thus,

“That in terms of section 18 (2) of the Land Registration Act, proprietors of registered land with a boundary dispute are obligated to first seek redress or solution from the Land Registrar before moving or escalating the dispute to this court. That where such a party fails to do so, and comes to court without first seeking redress from the land registrar, the court being a court of law, has to remind such a party that he/she has moved the court prematurely. That the provisions of section 18 (2) of the land registration act shows clearly that the court is without jurisdiction on boundary disputes of registered land until after the land registrar’s determination on the same has been rendered”.

33. In the Court of Appeal Case of Estate Sonrisa Ltd & another v Samuel Kamau Macharia & 2 others [2020] eKLR , the court stated thus;

“It is the Land Registration Act that makes provisions relating to the determination of boundaries. Those provisions are found in sections 16 to 19. Specifically, for this dispute, the Registrar is empowered, after giving notice to all the affected parties, in this case, the 1st appelland and 1st respondent, indeed as well as any owner whose land adjoins the boundaries in question, and with the assistance of the surveyor, to ascertain and fix the disputed boundaries.

.....

Under that Act, the Registrar carries out his functions without any restrictions and may rely on any other relevant document and existing records in order to resolve any dispute between landowners. Because a title deed is only prima facie evidence of the matters shown therein, the Registrar’s investigations, of necessity must encompass all entries in the register, rely on any other relevant document and existing records, conduct proceedings in accordance with section 14(1) and cause a survey to be carried out and determine the dispute.....

It is only after determining the dispute can parties move to court to challenge it (emphasize added).

34. The aforementioned case law clearly indicate that the dispute relating to boundaries ought to be resolved by the Land Registrar in the first instance. The decision thereof can then be challenged in court pursuant to the provisions of **Sections 79 (3A), 80, 86 and 91 (9) of the Land Registration Act.**

35. It is trite law that where the law has given a legal obligation to a department of Government, it is important for the Court to let that department proceed to meet the legal obligations. In this case the office of the Land Registrar is mandated to deal with the general boundary dispute first before the same is escalated to the Court. It is the view of this Court that the dispute is prematurely before the Court.

36. In Speaker of National Assembly –Versus- Karume(1992)KLR 21 the court held:-

“Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures”.

Also see Whitehorse Investments Ltd vs. Nairobi City County (2019) eKLR (COA).

37. The Plaintiff should take the steps contemplated under **Section 18(2)** of the **Land Registration Act, 2012** in resolving the dispute.

38. In the end the Preliminary Objection is upheld. The application together with the suit herein are hereby struck out for being filed prematurely before the Court. The costs thereof are awarded to the defendants.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 19TH DAY OF MAY, 2021 IN PRESENCE OF:

C/A: Kananu

M/S Kung’u for 3rd, 4th and 5th respondents

Reuben Kioko for plaintiff

Mwirigi for 1st interested party

Gikundi for 1st and 2nd defendants

HON. LUCY. N. MBUGUA

ELC JUDGE