



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 49 OF 2015

JACK JAMES AWUOR ONONG'NO.....PLAINTIFF

VERSUS

JARED OCHIENG RABURU.....1ST DEFENDANT

PHILIP TITO OKOTH RABURU..... 2ND DEFENDANT

DISTRICT LAND REGISTRAR KISUMU.....3RD DEFENDANT

DISTRICT LAND SURVEYOR.....4TH DEFENDANT

DISTRICT LAND ADJUDICATION OFFICER KISUMU.....5TH DEFENDANT

RULING

1. The Plaintiff, **Jack James Awuor Onong'no**, commenced these proceedings through the plaint dated 13th February 2015 against **Jared Ochieng Raburu, Phillip Tito Okoth Raburu, District Land Registrar, Surveyor and Adjudication Officer Kisumu**, hereinafter referred to as the 1st to 5th Defendants. The prayers sought are summarized as follows;

- a) A declaration that parcel **Kisumu/Kochieng/2902** belongs to the Plaintiff.
- b) A declaration that 1st and 2nd Defendants obtained parcel **Kisumu/Kochieng/2885** fraudulently.
- c) Nullification of the survey process that altered the acreages of the two parcels.
- d) Permanent injunction against the 1st and 2nd Defendants over parcel **Kisumu/kochieng/2902**.
- e) Costs.

The Plaintiff also filed contemporaneously with the plaint, the notice of motion of even date seeking for temporary injunction orders against the 1st and 2nd Defendants over parcel **Kisumu/Kochieng/2902**.

2. The 3rd to 5th Defendant's filed their replying affidavit on 31 March 2015 sworn by **Vincent Oluoch** opposing the notice of motion.

3. The 1st and 2nd Defendants also opposed the notice of motion through the grounds of opposition dated

1st October 2015 and replying affidavit sworn by **Jared Ochieng Raburu**, the 1st Defendant, on 1st October 2015.

4. The 1st and 2nd Defendants then filed a notice of preliminary objection dated 19th October 2015, on the notice of motion and entire suit, setting out the following grounds:

- i) The court has no jurisdiction.
- ii) The suit violates **Section 18(2) of the Land Registration Act 2012** and that the dispute should have been registered with the Land Registrar first.
- iii) The suit and the application are misconceived, scandalous, frivolous, vexatious and an abuse of the due process of the court.

When the notice of motion came up to confirm filing of written submissions on 27th October 2015, counsel agreed to have the preliminary objection heard and determined first. This ruling is therefore on the preliminary objection raised by 1st and 2nd Defendants.

5. The counsel for 1st and 2nd Defendants filed their written submissions dated 21st March 2016 on the preliminary objection. The counsel for the Plaintiff filed theirs dated 22nd April 2016.

6. The main issues for determination are as follows:

- a) Whether this suit is about boundary dispute, and if so, whether this court has jurisdiction to entertain it in view of **Section 18(2) of the Land Registration Act**.
- b) Who pays the costs.

7. The court has carefully considered the grounds on the notice of preliminary objection, the written submissions by both counsel and come to the following findings:

- a) That whereas the Plaintiff has disputed the submission by the 1st and 2nd Defendants that the dispute subject matter of this suit is a boundary dispute, a look at the averments clearly confirms the position taken by the Defendants. There is nothing in the pleadings to suggest that any of the Defendants have disputed the Plaintiff's proprietary rights, over **Kisumu/Kochieng/2902**. As a matter of fact the 1st and 2nd Defendants statement of defence at paragraph 3 goes on to admit "**the contents of paragraph 4 of the plaint that the Plaintiff is the registered owner of land parcel Kisumu/Kochieng/2902.**" The court is therefore of the view that prayer (a) of the plaint is unnecessary. The court also notes that the Plaintiff has not laid any proprietary claim over land parcel **Kisumu/Kochieng/2885**. The Plaintiff has also not indicated whether he has any beneficial interest over the estate of the late **Abuto Kai**, whom he claims was the former owner of the said land. He has also not indicated whether he is the administrator or personal representative of that estate. He avers that the 1st and 2nd Defendants acquired the land fraudulently and unlawfully and at prayer (b) seeks to have their names revoked. The court is of the view that the Plaintiff has not disclosed on what basis he challenges the proprietorship by the 1st and 2nd Defendants of land parcel **Kisumu/Kochieng 2885**.
- b) That the averments in paragraphs 5, 8, and 9 of the plaint clearly show the dispute is about the boundary position between the two parcels of land as illustrated by the following portions of the said paragraphs.

"8. That the 1st and 2nd defendant caused the said parcel to be registered in their names and proceeded further to alter the boundaries

9. Whereas the Plaintiff's land is registered as measuring 0.9 hectares, on the ground its measurements have considerably reduced and that of the 1st and 2nd defendants considerably

increased to 0.16 hectares and the defendants have continually encroached into and frustrated the Plaintiff's quiet and lawful use and occupation of his entire piece of measuring 0.9 hectares."

The above averments points to the existence boundary dispute. It is only after the ground position of the boundary are established and confirmed that the proprietors of the two parcels would know whether the ground measurements of their parcels carries with the registered sizes and possibly take the next legal process in accordance with the law. Prayers (c) and (d) cannot therefore be granted without the boundary position being established to know whether there has been any encroachment and if so, by which party.

c) That boundary disputes are under **Section 18(2) of Land Registration Act No.3 of 2012** required to be determined by the Land Registrar in the first instance. The provision states as follows;

" 18(1) ...

(2) 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."

As correctly submitted by counsel for the 1st and 2nd Defendant's the court cannot entertain any matter where it has no jurisdiction in accordance with the other statute law. [see **Samwel Kamau Macharia & another -V- Kenya Commercial Bank Limited & 2 others** [2012] eKLR].

d) That having held as above, the court finds that the Plaintiff case commenced through the plaint dated 13th February 2015 is based on boundary dispute and ought to have been filed first with the Land registrar. The suit was filed in court prematurely and this court is barred in terms of **Section 18 (2) of the Land Registration Act** from entertaining it at this stage.

8. That in view of the foregoing the court upholds the preliminary objection raised by counsel for the 1st and 2nd Defendants. The plaint and notice of motion dated 13th February 2015 are hereby struck out with costs.

It is so ordered.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 31ST DAY OF MAY 2016

In presence of;

Plaintiff Absent

Defendant Absent

Counsel Absent

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

31/5/2016

31/5/2016

S.M. Kibunja J

Parties absent

Counsel absent

Court: Ruling delivered in open court in absence of all parties and counsel. The Deputy registrar to communicate the ruling.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

31/5/2016