



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC CASE NO. 8 OF 2021

ESTATE OF GABRIEL KIPROP CHEBET

(Suing through his personal representative, JOSEPH KIPROTICH ROP).....PLAINTIFF

VERSUS

THE DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT.....1ST DEFENDANT

HON. ATTORNEY GENERAL.....2ND DEFENDANT

RULING

(On 1st and 2nd Defendants' Preliminary Objection on Jurisdiction of Court)

1. By Notice of a Preliminary Objection dated **22/9/2021** the Defendants objected to the institution of the instant suit. The Objection was on the ground that the suit was incompetent and bad in law as the orders sought in it could not be granted by dint of **Section 18(2)** of the **Land Registration Act**. The other ground was that the Plaintiff's suit and the orders sought were a procedural and substantive nullity, an abuse of the court process, vexatious and mischievous. The Defendants prayed that the suit be struck out with costs to them.
2. The Preliminary Objection was canvassed by way of written submissions. The Defendants filed theirs on the **3/11/2021** while the Plaintiff filed his on **16/11/2021**.

The Objection

3. On the one hand, according to the Defendants, the Plaintiff's claim was a boundary dispute which was in the province of the Land Registrar. They argued through Ms. Chepkemoi, the learned State Counsel, that that being the fact the claim fell squarely within the provisions of **Section 18 (2)** of the **Land Registration Act** thus offending it. She submitted that the Plaintiff alleged that the estate of Gabriel Kiprop Chebet was entitled to **57.9** acres of all that parcel of land known as parcel **No. 172** in Suwerwa Settlement Scheme as opposed to **35.8** acres as indicated in the certificate of title to that parcel of land. She argued further that the boundaries of the parcels of land being **No 171** and **172** were clearly marked in **1964** and the difference only arose in **2019** when the sons of the registered proprietor of parcel **no. 171** claimed that as per the Registry Index Map (**RIM**), **23.1** acres belonging to them formed part of land parcel **No. 172** and that if the boundaries were not corrected, then **23.1** acres will be lost to the owners of land **No. 171**.
4. It was the Defendants' contention that the present dispute could only be resolved by the Land Registrar as provided in law and further that the suit had been brought before court prematurely. To buttress their arguments, they relied on the provisions of **Section 18 (2)** of the **Land Registration Act** and the cases of ***Fredrick Wainaina Njoroge & 2 Others vs Stephen Kariuki Ndungu & 2 Others (2021) e KLR*** and ***Reuben Kioko Mutyaene v Hellen Kiunga Miriti & 4 Others; Ntalala Eric Mutura & Another (Interested Parties) (2021) e KLR***.
5. The learned State Counsel argued further that this Court lacked jurisdiction to determine the suit. In support of the proposition, she relied on the case of ***Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd (1989) eKLR*** and urged the court to hold that it did not have the jurisdiction to determine the suit.

The Response

6. On the other hand, in opposition of the Preliminary Objection, Mr. Kiarie, learned counsel for the Plaintiff submitted that both the late Joseph Kiprotich Rop and the late Kanda Kiptoo were allocated land by the Defendant in **1964**. The parcels measured approximately **57.9** and **58.8** acres for parcel **Nos. 172** and **171** respectively. The Plaintiff denied that the dispute between the parties was a boundary one as per paragraph 7 of the Plaintiff. He further submitted that there was a mistake when titling was done by the **1st** Defendant by indicating on the

Plaintiff's title 14.5 acres instead of 57.9 acres whereas the remainder acreage of 31 acres was added to the defendant's land.

7. It was the Plaintiff's contention that the cause of action was as a result of a mistake committed during the titling process and therefore the Land Registrar would not have jurisdiction to adjudicate it. He submitted that the prayers in the Plaint could only be allowed in order to correct the mistake pleaded hence **Section 18 (2) of the Land Registration Act** would not apply. To buttress his client's contention, he relied in the case of *Fredrick Wainaina Njoroge & 2 Others vs Stephen Kariuki Ndungu & 2 Others Muranga Elc Case No. 40 of 2020.* He urged the court to dismiss the Preliminary Objection for reason of lacking in merit.

Determination

8. I carefully considered the content of the Preliminary Objection, the submissions by both counsel as well as the law cited and case law relied on. The issues arising for determination were:

(a) *Whether this suit offends Section 18 (2) of the Land Registration Act*

(b) *What orders should issue, including who to bear the costs of the Application*

9. I begin by analyzing the first issue.

(a) *Whether this case offends Section 18 (2) of the Land Registration Act*

10. The starting point is the understanding of what a preliminary objection is. In the case of *Mukhisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696*, Sir Charles Newbold defined a Preliminary objection as follows:

“A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... 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 had to be ascertained or if what is sought is the exercise of judicial discretion.”

11. In *Bashir Haji Abdullahi v Adan Mohammed Noor & 3 Others [2004] e KLR*, the same Court held that;

“We are of the considered view that if a party wishes to raise a Preliminary Objection and files in Court a Notice to that effect and is subsequently served on other parties to the suit, the Preliminary points should be sufficiently particularized and detailed to enable the other side and indeed the court to know exactly the nature of the preliminary points of law to be raised. To state that „the application is bad in law? without saying more does not assist the other parties to neither the suit nor the Court to sufficiently prepare to meet the challenge. If it is only at the hearing that the Preliminary Objection is amplified and elaborated, it gets the other side unprepared and is reminiscent of trial by ambush.”

12. Also, in *Susan Wairimu Ndiangui -vs- Pauline W. Thuo & Another [2005] eKLR*, Musinga J as he then was held as follows:-

“A preliminary objection should not be drawn in a manner that is vague and non-disclosing of the point of law or issue that is intended to be raised. It should clearly inform both the court and the other party or parties in sufficient details what to expect.”

13. It is clear that a preliminary objection arises on a point of law only. The Defendants herein stated that the suit offended **Section 18(2) of the Land Registration Act**. They also included the grounds the suit was an abuse of the court process, vexatious and mischievous. From the above definitions and the description of a preliminary objection as given in the cited cases law, I am on the view that the second limb of the preliminary objection cannot pass as one. It calls for an assessment and proof of facts. I thus dismiss it. The only limb that remains is the first one and this Court proceeds to consider it.

14. The Defendants herein pleaded that the court lacked jurisdiction on the ground that the issues raised in the suit lay within the mandate of the Land Registrar. Their reason was that the issues revolved around a boundary dispute. They derived their argument from the provisions of **Section 18 (2) of the Land Registration Act**. The Sub-section provides as follows:

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

15. There are two parts of the provision in relation to the ouster of the Court's jurisdiction. First, the Court shall not have jurisdiction on a matter of boundary dispute between parties where land is registered if no (boundary) has been determined by the relevant office. Second, the Court shall have jurisdiction over a boundary dispute between parties where one has been determined as per the Section. Thus, to determine whether the limb of the Preliminary Objection had merit, I had to look at the pleadings and prayers therein in comparison with the Provision of law relied on.

16. From the pleadings, it is not in dispute that both the Plaintiff's land parcel being No. **Suwerwa/172** and the other parcel No. **171** have title deeds which were issued to the parties upon completion of adjudication. The parcels of land in issue were thus registered. The titles were issued in terms of the boundaries shown on the **RIM** issued by the relevant office. That means that the boundaries were already fixed as per

the records by the time this suit was brought.

17. The Plaintiff's complaint against the Defendants revolved around a boundary allegedly affixed on the map (**RIM**) by the first Defendant and also rectification of the title acreage sizes. For instance, at paragraph 7 the Plaintiff avers that since 1964 there had never been a boundary dispute between the proprietors of the land parcels Suwerwa Scheme Nos. 171 and 172. In paragraph 9 he pleaded that in 1989 or thereabouts, the 1st Defendant and others people undertook a title mapping exercise by which they were to pick the existing boundaries, compute the acreage of those who had fully paid the required charges in the Suwerwa Scheme but they fixed them wrongly. Specifically, in paragraph 9 of the Plaintiff he stated "the boundary between plot No. 171 and 172 reflected in the map marked JKR5 is not established on the ground." He pleaded further that in 2001 Gabriel Chebet (now deceased) collected his title in respect of plot No. 172. He then pleaded further that the boundary on the **RIM** was not reflective of the boundary maintained between the two parcels of land all the years and the error was discovered in 2019. He pleaded further that the boundary on the ground is intact to date. He stated further that the **RIM** needed correction and a completely new boundary established. He prayed for a declaration that the mistake in title mapping exercise by the 1st Defendant regarding plot No. 172 and the boundary shown on the map was not reflective of the boundary respected by the proprietors of plot nos. 172 and 171 from 1964 to date. He also prayed that the Court declares that the boundary on the ground is the correct boundary between plot Nos. 171 and 172 in Suwerwa Settlement Scheme and the **RIM** be corrected to reflect the correct boundary between plot nos. 171 and 172 in the Settlement Scheme. He also prayed for the rectification of the Register to reflect the correct size of plot no 172. These were the main prayers save for that of the preservation of the status pending and costs and interest.

18. It is clear from the law, Sections 23 to 29 of the **Land Adjudication Act**, that once titles are issued in respect of an Adjudication Section, it means the adjudication process has been done and completed. Had the Adjudication not been completed the disputes regarding ownership, size and boundaries of the parcels of land could have been before the Adjudication Officer. The Plaintiff herein stated that the issue before this court is not a boundary dispute whereas he prays that the boundaries on the **RIM** should be altered. Moreover, when this suit came up at its inception for hearing of the interlocutory Application, the issue the Plaintiff prayed for preservation of was in regard to the boundary. At the determination of that interlocutory Application the court issued an order, on the 23/2/2021, to the effect that the boundaries existing on the ground and the status quo be maintained pending the hearing and determination of this suit.

19. Again, the plaintiff submitted that his pleading was on a mistake committed during the registry index mapping and titling process. All the above points show that the issue no longer lies in the hands of the Land Registrar only. Section 18(2) of the **Land Registration Act** empowers the land registrar to adjudicate matters relating to boundary disputes, unless the boundaries have been determined in accordance with the Section and that determination is that the boundaries have been ascertained and been fixed. This is not the case in this matter. It appears to me that the boundaries regarding to the two parcels had already been fixed in accordance with Sections 18 of the **Act** hence not an issue before the Registrar anymore.

(b) What orders should issue, including who to bear the costs of the Application

20. In conclusion, this Court finds that boundaries were fixed as per the **RIM** which gave rise to the issuance of the titles. For that reason, the suit does not contravene the provisions of Section (18) (2) of the **Land Registration Act**. Consequently, the Preliminary Objection is not merited and is hereby dismissed with costs to the Plaintiff.

21. However, for the reason of bringing all issues herein in controversy before the Court, and since the orders sought are likely to affect the size, if any, and title to land parcel No. 171, this Court directs in terms of Order 1 Rules 10 (2) and (4) of the **Civil Procedure Rules, 2010** as amended in 2020, that the proprietor or administrators of the Estate of the late Kanda Kiptoo, then proprietor of the said land parcel No. 171, be added as Defendants to this suit. If there is no administrator appointed yet, the Plaintiff to take out a citation immediately within the next fourteen (14) days or thirty (30) days of this order respectively. If there is or are administrator/s, the Plaintiff is directed to amend the Plaintiff accordingly within the next fourteen (14) days of this order and extract summons to enter appearance and serve them for purposes of bringing them on board in this matter.

22. Additionally, this Court directs that for the reason of avoiding delay in the progress of this matter, in the event of failure to fulfill of the condition of addition of the Administrator or taking out citation as given above, the Plaintiff shall deposit a sum of **Kshs. 100,000/=** in Court as security for costs of the suit.

23. This matter shall be mentioned virtually on 03/03/2022 for purposes of confirming whether or not the Plaintiff shall have taken the steps the Court has directed above.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 17TH DAY OF JANUARY, 2022.

DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE.