

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO. 250 OF 2021

MAUNGU RANCHING (D.A) COMPANY LIMITED.....PLAINTIFF

VERSUS

ABDI STARR HAJI.....1ST DEFENDANT

MOHAMED HAJI.....2ND DEFENDANT

RULING

The Defendant Abdi Starr Haji herein raised a preliminary objection that 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, the subject of the application is a boundary issue which falls within the jurisdiction of the Land Registrar. 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 Plaintiff herein have not established the existence of any exceptional circumstances. 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. 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.

The Plaintiff stated that this case is not at all about a boundary issue. That the Defendants have unlawfully, illegally and forcefully trespassed onto the Plaintiff's parcel of land and commenced mining activities thereon. That the Defendants do not even state the land on which they are carrying on their illegal and unlawful activities. That the Plaintiff's land borders that of the Mgeno Ranch, Sagala Ranch, Kasighau Ranch, Choke Ranch, Mwasui Ranch and the Wananchi Settlement Scheme and Defendants are not neighbours of the Plaintiff but trespassers on its land. Annexed hereto and marked "MK1" is a copy of a Survey Report with a map annexed thereto. That there is absolutely no evidence provided by the Defendants that there is a boundary between his land and that of the Plaintiff so as to give rise to the alleged boundary dispute nor how the alleged boundary dispute arises. That he who alleges must prove and the Defendants' allegation has remained just that, a mere allegation. That the Defendants' Preliminary Objection is absolutely without merit, is an abuse of the Court Process and ought to be dismissed with costs. That the case here, as it first requires evidence to prove that it is a boundary dispute, which evidence the Defendant has failed to provide.

This court has considered the preliminary objection and the submissions therein. The issue for determination herein is whether this court has jurisdiction to entertain this matter. A Preliminary Objection, as stated in the case of Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd (1969) E.A 696,

"..... 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"

In the same case, Sir Charles Newbold said:

"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".

J.B. Ojwang, J (as he then was) in the case of Oraro vs Mbajja (2005) e KLR had the following to state regarding a 'Preliminary Objection'.

"I think the principle is abundantly clear. A "preliminary objection", correctly understood is now well identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that, "where a court needs to investigate facts, a matter cannot be raised as a preliminary point."

The issue as to whether or not the court has jurisdiction is therefore properly raised as a Preliminary Objection and the court will consider the same.

This court has considered the preliminary objection and the submissions therein. The Defendant states that 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, the subject of the application is a boundary issue which falls within the jurisdiction of the Land Registrar. I have perused the pleadings and find that there is no evidence provided by the Defendants that there is a boundary between his land and that of the Plaintiff so as to give rise to the alleged boundary dispute. The Plaintiff stated that this case is not at all about a boundary issue. That the Defendants have

unlawfully, illegally and forcefully trespassed onto the Plaintiff's parcel of land and commenced mining activities thereon. The Plaintiff has produced a survey report. I find that the preliminary objection has no merit and it is dismissed with costs to the Plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 24TH DAY OF FEBRUARY 2022.

N.A. MATHEKA

JUDGE