



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. E415 OF 2021

SASOMUMA HOLDINGS COMPANY LIMITED.....PLAINTIFF/APPLICANT

-VERSUS-

KENYA NATIONAL HIGHWAYS AUTHORITY.....DEFENDANT/RESPONDENT

RULING:

INTRODUCTION

1. Vide Application dated the 1st day of December 2021, the Plaintiff herein has sought for the following Reliefs;

I.(Spent).²

II. Pending the hearing and determination of this Application the honourable court be pleased to issue a temporary conservatory order restraining the Respondent by themselves or their agents, servants, employees or any other person claiming under them from trespassing onto, entering, demolishing structure therein or in other manner interfering with the Applicant's quite possession and or dealing in any way with the suit premises comprised in title number, LR. No. Kiambaa/Rwaka/1824.

III. Pending the hearing and determination of this suit the honourable court be pleased to issue a temporary conservatory order restraining the Respondent by themselves or their agents, servants, employees or any other person claiming under them from trespassing onto, entering, demolishing structure therein or in other manner interfering with the Applicant's quite possession and or dealing in any way with the suit premises comprised in title number, LR. No. Kiambaa/Rwaka/1824.

IV. Cost of the application be provided for.

2. The Subject Application is premised on various grounds contained at the foot thereof and same is further supported by an affidavit sworn by one Sani Mbui Wanjigi, sworn on the 1st December 2021.

3. Though the Application herein was duly served upon the Defendant/Respondent, no appearance and/or response, if any, has been filed and/or lodged in opposition to the Application.

DEPOSITION BY THE PARTIES

DEPOSITION BY THE PLAINTIFF/APPLICANT

4. Vide the Supporting Affidavit sworn on the 1st December 2021, the deponent, on behalf of the Plaintiff/Applicant has stated as hereunder;

5. The Plaintiff/Applicant herein is the registered and lawful owner over and in respect of the property otherwise known as LR. No. Kiambaa/Ruaka/1824. It is further averred that on the 26th March 2019, the Defendant/Respondent herein served the Applicant's caretaker with a Notice of intended demolition, whereby the Defendant/Respondent, gave to the Plaintiff/Applicant 30 days within which to demolish and or remove the illegal permanent building, which is said to have encroached onto a portion of the Road Reserve on Ruaka/Kamandura Road..

6. Further, the deponent has averred that despite the Notice issued by the Defendant/Respondent, it is evident that his premises are not situated on the Road reserve, as alleged by the Defendant/Respondent.

7. The Deponent has further averred that following the issuance and service of the said Notice, same proceeded to and instructed her advocates to file Civil Proceedings challenging the Notice and to obtain an order of injunction to stop the intended demolition.

8. It is averred that pursuant to the instructions by and on behalf of the plaintiff/Applicant, Civil proceedings vide ELC No. 287 of 2019, were duly filed against the Defendant/Respondent herein.

9. Be that as it may, the deponent has further averred that upon the filing of the suit, same was placed before the court, whereupon the court found and held that the subject dispute concerns the ascertainment of the boundaries between the suit property and the Road Reserve.

10. Owing the foregoing, it is averred that the court proceeded to and made a ruling whereby the Plaintiff's/ Applicants suit, namely, ELC 287 of 2019, was ordered struck out on account of want of jurisdiction.

11. Nevertheless, the deponent has further averred that following the striking out of the previous suit, the Defendant/Respondent issued a further notice whereby same are know keen to commence the intended demolition of the Structures belonging to the Plaintiff/Applicant, under the pretext that same are situated on the road reserve.

12. In this respect, the deponent has therefore averred that the court ought to intervene and stop the threatened demolition, which will prejudice and/or affect the rights and/or interest of the Plaintiff/Applicant.

13. Finally, the deponent has averred that even though the dispute herein falls within the mandate of the Land Registrar, various attempts by the Plaintiff/Applicant to have the Land Registrar attend to and/ or deal with the dispute, has not been successful and/or fruitful.

14. Suffice it to say, that the Plaintiff confirms that the Land Registrar and the District surveyor, visited the suit property, carried out necessary survey on the property and what is now outstanding is the Report pertaining to the Boundary position between the suit plot and the Road Reserve.

DEFENDANTS/RESPONDENTS RESPONSE

15. It was pointed out hereinbefore that though the Defendant/Respondent was duly served with summons to enter appearance and the subject Application, same neither entered Appearance nor filed Statement of Defense.

16. Based on the foregoing, the Plaintiff's/Applicant's Application and in particular, the factual position thereto, have not been challenged, Rebutted and/ or controverted, whatsoever.

SUBMISSIONS:

17. The Application herein came for hearing on the 8th February February, 2022, whereupon the court ordered that the same be disposed of by way Oral Submissions. Consequently,, the Plaintiff/Applicant proceeded to argue the Subject Application.

18. In the course of oral submissions, the plaintiff counsel submitted that though the suit concerns the Determination of the Boundary, however, the court has Jurisdiction to deal with and/or attend to the subject application.

19. It was the Plaintiff's further submissions that despite lodging a Boundary dispute before the Land Registrar, the Land Registrar has failed to perform and/or discharge her statutory Duty. Consequently, because of the failure by the Land Registrar to perform her Statutory Duties, same has decided to approach this Court via the Subject Suit and Application.

20. Further, the Plaintiff's/Applicant's advocates also submitted that the Court has the necessary Jurisdiction to hear, entertain and/or adjudicate upon the Subject Matter. In this regard, the Plaintiff's Advocate has quoted and relied on the provisions of **Section 13 (7) of the Environment and Land Court Act, 2011.**

21. Finally, the Plaintiff/Applicant has also submitted that though the previous suit was struck out on account of Lack or Want of jurisdiction, the court should now assume jurisdiction and deal with the subject suit, given that the authorized officer, namely, the Land Registrar has failed to act and/or comply with the law.

22. At any rate, the Plaintiff/Applicant has further submitted that unless the Honourable Court assumes Jurisdiction in respect of the Subject Matter, the Plaintiff/ Applicant would suffer Irreparable Loss and/ or prejudice.

23. In the circumstances, the Plaintiff/Applicant has therefore implored the court to entertain the Application and in particular, to grant the Application dated the 1st December 2021.

ISSUES FOR DETERMINATION

24. Having perused the subject application, the supporting affidavit, the annexures thereto and having similarly listen to the submissions by the counsel to the Plaintiff/Applicant, the following issues are now germane for determination;

1. *Whether the Court has Jurisdiction to entertain not only the subject Application, but also the entire suit.*
2. *Whether the subject suit and Application constitutes and/or amounts to an abuse of the Due process of the court.*
3. *Whether the Plaintiff/Applicant is entitled to the orders of temporary injunction, either as sought or at all.*

ANNALYSIS AND DETERMINATION

ISSUE NUMBER 1

Whether the court has Jurisdiction to entertain, not only the subject Application but also the entire suit.

25. It is common ground that the Dispute between the Plaintiff/Applicant touches on and/or concerns the extent and/or boundaries of the suit property, versus the Road reserve on Ruaka/Kamandura Road, which is under supervision of the Defendant/respondent.

26. On the other hand, the Plaintiff/Applicant herein has also conceded that after the Previous Suit was Struck out, on account of want of Jurisdiction, same proceeded to and lodged a Boundary dispute complaint with the Land registrar, to facilitate visitation and thereafter ultimate determination of the exact boundary position involving the suit property.

27. Based on the lodgment on the boundary dispute complaint, the plaintiff/Applicant herein has stated that the Land Registrar and the County Surveyor, respectively, proceeded to the site of the dispute and thereafter same carried out measurements.

28. Be that as it may, the plaintiff/Applicant has gone ahead to state that despite the visitation to the site and survey works being carried out, the Land Registrar, has however failed to prepare the Report and/or share copies thereof.

29. Owing to the foregoing, the bottom line is that the exact boundary position between the suit property and the Road reserve, has not been ascertained, determined and/or demarcated to date, either required under the Law, or at all.

30. Simply put, the dispute herein touches on and/or concerns a Boundary dispute and therefore same belongs to and falls with the purview of the Land Registrar, who is statutorily enjoined to undertake the determination exercise, subject to issuance and service of the relevant boundaries dispute summons.

31. In this case, it is conceded that the Land registrar, has indeed issued and served the requisite boundary notices, visited the site and what is outstanding is the preparation and submissions of the report to the parties.

32. However, the pertinent issue to note is that the Boundary under dispute has never been determined nor has the boundary line been marked out and/or demarcated. Consequently, the question to be addressed is whether in the absence of the determination of Boundary, this court has and/ or is seized of the requisite Jurisdiction to entertain the subject suit.

33. Before answering the foregoing question, it is imperative to take note of the Provisions of **Section 18(2) of the Land Registration Act, 2012**, which provides as hereunder;

18. Boundaries (1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.

(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.

34. From the foregoing provisions, it becomes apparent that this court is denied and/or deprived of jurisdiction, on matters touching on determination of boundaries before the intervention and determination of the subject boundary by the designated officer.

35. In the premises, this court has been denied jurisdiction and therefore the determination of the Dispute lies elsewhere, and not before the court or at all. Consequently, I beg to state that where the statute contains and/or provides a specific recourse and/or mechanism for the determination of a particular dispute, such avenue must be exhausted, complied with and/or adhered to, irrespective of Parties feelings and/or fear.

36. In support of the foregoing observation, it is important to take note of the holding in the decision in the case of **Bethwell Allan Omondi Okal v Telkom (K) Ltd (Founder) & 9 others [2017] eKLR**, where the court stated as hereunder;

The Appellant might want to argue that he has a constitutional right of access to justice, and we agree that he does, but the High Court and this Court have pronounced themselves many times to the effect that a party must first exhaust the other processes availed by other statutory dispute resolution organs, which are by law established, before moving to the High court by way of constitutional petitions.

37. Based on the foregoing Decision, it is incumbent upon the Plaintiff/Applicant to engage the Land registrar, with a view to exhausting the Boundary Dispute Resolution Mechanism provided under the law before approaching this court.

38. At any rate, where a Statute denies a Court Jurisdiction, the court cannot purport to assume jurisdiction, either by way of craft of innovation, interpretation and or endeavors, meant to discern the position of the law, which is crystal clear.

39. In support of the foregoing observation, I can do no better than to quote the Decision in the case of **Esther Gachambi Mwangi v Samuel Mwangi Mbiri [2013] eKLR**, where the court stated as hereunder;

As was stated in the Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd 1989 KLR 1, jurisdiction is everything. Without it, a court has no power to take one more step. In the Matter of Advisory Opinions of the Supreme Court under Article 163(3) of the Constitution, Constitutional Application No. 2 of 2011; the Supreme Court noted that The Lillian 'S' case [1989] KLR 1 establishes that "jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity..."

A court of law or any Tribunal must down tools in respect of the matter before it the moment it is without jurisdiction. Applying this principle, jurisdiction was everything to the Mathioya Divisional Land Appeals Tribunal; if the Tribunal had no jurisdiction as a result of the Limitation of Actions Act, then it had to down its tools. Likewise, if the Mathioya Divisional Land Appeals Tribunal had no jurisdiction, its proceedings and award was a nullity and any appellate proceedings thereon is also a nullity.

40. In the premises, it is apparent and/or evident that the subject suit has been filed prematurely and before a forum of last resort and not one of first instance.

ISSUE NUMBER 2

Whether the Subject suit and Application constitutes and/or amounts to an abuse of the Due process of the court.

41. From the pleadings and documents filed by the Plaintiff/Applicant, it is evident that the Plaintiff/Applicant had previously filed proceedings vide, Milimani ELC No. 287 of 2019. For clarity, copies of the Pleadings and Documents filed therein have been duly supplied and attached to the Supporting Affidavit.

42. It has also been acknowledged that upon the filing of the said suit, as well as an application for Temporary Injunction, both the Suit and the Application, were ordered struck out on account of Want and/ or Lack of jurisdiction.

43. Nevertheless, despite being aware of the fact that the Previous suit was struck out on account of lack of jurisdiction, the Plaintiff has now come back to court and is trying her luck, perhaps assuming that fate that befell the previous suit will, not accrue to this one.

44. In my humble view, the previous suit having been struck out, on account of want of jurisdiction, there is no way the subject matter can be treated differently. Simply put, the fate of the subject suit is sealed.

45. In any event, the same plaintiff/Applicant has also indicated that same has engaged the Land registrar, for purposes of ascertaining and/or determining the boundary position of the suit property. For clarity, it is acknowledged that the process before the Land registrar has not been concluded and/or completed.

46. Notwithstanding the foregoing, the Plaintiff/applicant has filed the subject suit, whose import or tenor is to achieve the same, or near same orders as the ones being pursued before the Land Registrar.

47. In my humble view, the filing of the Subject suit during the pendency of the proceedings/process before the Land registrar, is tantamount to and thus constitutes an abuse of the Due Process of the Court.

48. In support of the foregoing observation, it suffices to take cognizance of the decision in the case of **MUCHANGA INVESTMENTS LTD v SAFARIS UNLIMITED (AFRICA) LTD & 2 others [2009] eKLR**, where the Court of Appeal discussed Concept of abuse of judicial process in the following case;

In the Nigerian Case of KARIBU-WHYTIE J Sc in SARAK v KOTOYE (1992) 9 NWLR 9pt 264) 156 at 188-189 (e) the concept of abuse of judicial process was defined:-

"The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice ..."

The same Court went on to give the understated circumstances, as examples or illustrations of the abuse of the judicial process:-

(a) "Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.

(b) Instituting different actions between the same parties simultaneously in different courts even though on different grounds.

(c) Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent's notice.

(d) (sic meaning not clear)

(e) Where there is no loti of law supporting a Court process or where it is premised on frivolity or recklessness."

49. Based on the foregoing observation, I come to the conclusion that the institution of the subject proceedings was wholly unnecessary and otherwise, constituted an abuse of the Due Process of the Law.

ISSEU NUMBER 3

Whether the Plaintiff/Applicant is entitled to the orders of Temporary injunction, either as sought or at all.

50. The Plaintiff/Applicant has filed the subject suit and same is seeking for orders for temporary, as well as Permanent injunction.

51. To be able to attract an Order of temporary injunction, the Plaintiff/Applicant must establish and lay before the court Evidence pertaining to the existence of a Prima facie case.

52. Nevertheless, it is important to note that a prima facie case, must be one, that establishes some semblance of triable issues, for which a court of law is obliged to carry out and/or investigate the infringement complained about, with a view to determining the rights of the Parties.

53. To fortify the foregoing position, it is important to invoke and rely on the decision in the case **Mrao Ltd vs First American Bank of Kenya Ltd & 2 others [2003] eKLR;**

“So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

54. Essentially, where the court is not possessed and/or seized of jurisdiction, no Prima facie case can arise and/or ensue whatsoever.

55. In the premises, I must similarly come to the conclusion that the Plaintiff/Applicant herein is not be entitled to an order of temporary injunction, in the absence of proof of the existence of a Prima facie case.

FINAL DISPOSITION:

56. In short, I have found and held that this court is not seized and/or possessed of the requisite Jurisdiction, to entertain and/or adjudicate upon the subject suit. On the basis of lack of Jurisdiction, the Court is obligated to down its tools.

57. In the premises, both the Notice of motion Application dated the 1st December 2021, as well as the suit, premised on the Plaint dated the 1st December 2021, are not only pre-mature, misconceived, but are also Legally untenable.

58. Consequently, the subject Application, as well as the Suit, be and are hereby struck out with no orders as to costs.

59. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF FEBRUARY 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

June Nafula Court Assistant

Ms Ng'anga for the Plaintiff/ Applicant.

N/A for the Defendant/ Respondent.