



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**  
**ENVIRONMENT AND LAND COURT**  
**CIVIL CASE NO. 105 OF 2012**

**UTE HETHA GOODWIN**

**VIOLET MAY FINLAY.....PLAINTIFFS**

**=VERSUS=**

**BEN KITHI.....DEFENDANT**

**RULING**

1. The Plaintiffs commenced this suit by way of a Plaint dated 4<sup>th</sup> July 2012 claiming that the Defendant has encroached and moved into their plot by 46 meters and also moved a public road into the Plaintiffs' plot numbers Kilifi/Jimba/583 and 584.
2. Contemporaneously with the Plaint, the Plaintiffs filed a Notice of Motion in which they are seeking for the following reliefs:
  - a. **That a temporary injunction order do issue restraining the Defendant, his servants, agents, family members and any other person deriving interest form him form encroaching, trespassing and entering onto the Plaintiff's Plot nos. Kilifi/Jimba/583 and 584 and from erecting structures thereon until the application is heard and determined.**
  - b. **THAT the costs for this application be in the cause.**
3. The Application is premised on the Affidavit of the 1<sup>st</sup> Plaintiff and on the ground that the Plaintiffs are the registered owners of the suit premises; that the Defendant has moved into their plots by 46 meters and that the Defendant is threatening to take actual possession of the suit premises.
4. According to the 1<sup>st</sup> Plaintiffs' Affidavit, the Plaintiffs' plots boundaries and that of the Defendant are clear and were put in place by the Survey Department of Kilifi Lands Office.
5. The 1<sup>st</sup> Plaintiff has deponed that he cannot develop the plots as the Defendant has altered the boundaries of the plots and has in fact lowered the value of the plots. The 1<sup>st</sup> Plaintiff wants this court to restrain the Defendant from encroaching on the two suit properties.

6. The Defendant filed his Replying Affidavit on 24<sup>th</sup> September 2012 and deponed that he is the registered owner of Kilifi /Jimba / 618 and 619 and that his plots are beacons, fenced and well pointed out on the ground.
7. The Defendant further deponed that his plots are opposite the Plaintiffs' plots and are separated by an eight meter access road; that the Plaintiff filed a similar suit in Malindi SRMCC NO. 100 OF 1994 which was dismissed for want of prosecution, that the Plaintiff filed another similar suit in SRMCC NO. 43 of 2010 which she withdrew.
8. The Defendant finally deponed that he has no legal mandate to alter plot boundaries once fixed and that this court lacks the jurisdiction at the 1<sup>st</sup> instance because what is before the court is a boundary dispute.
9. The Plaintiffs' Advocate filed his submissions on 3<sup>rd</sup> April, 2013 while the Defendant's Advocate filed his submissions on 3<sup>rd</sup> May, 2013 which I have considered.
10. The Plaintiffs are seeking for injunctive orders which can only be granted after establishing that they have a prima facie case with chances of success and that they will suffer irreparable injury unless the order is granted. However, if the court is in doubt about the two principles, it will decide the Application on a balance of convenience.
11. It is not in dispute that the Plaintiffs are the owners of plot numbers Kilifi/Jimba/583 and 584. It is also not in dispute that the Defendant is the proprietor of Kilifi/Jimba/618 and 619.
12. The only dispute between the parties is whether the Defendant's parcels of land have encroached into the Plaintiffs parcels of land by 46 meters or at all. This, in my view is a boundary dispute as contemplated under Sections 21 of the Registered Land Act, cap. 300, now repealed, under which the four parcels of land are registered.
13. Section 21 of the Registered Land Act, cap. 300, now repealed, provides as follows:

**“Where any uncertainty or dispute arises as to the position of any boundary, the Registrar, on application of any interested party shall, on such evidence as the Registrar considers relevant determine and indicate the position of the uncertain and disputed boundary.”**

14. As I have stated above, there is uncertainty as to the position of the boundaries of the Plaintiffs' and the Defendants' plots. The Plaintiffs believe that the Defendant has encroached onto their land by a whopping 46 meters and moved the public road while the Defendant has averred that he has demarcated his land according to the boundaries.
15. In the circumstances, the Registrar must determine the position of the Plaintiffs' boundaries viz a viz the Defendant's to ascertain and correct the line or position of the disputed boundaries in accordance with the relevant registry map and the survey plans.
16. Section 21 (4) of the Registered Land Act prohibits the court from entertaining any action or proceedings relating to a dispute of boundaries of registered land unless the boundaries have been ascertained pursuant to the provisions of section 21 (2).
17. The court is only required to receive evidence from the Registrar on the issue of the disputed boundaries. This is what the Plaintiffs ought to have done before moving the court to determine whether the Defendant has indeed encroached on their parcels of land. The court does not have the expertise to determine the issue of the boundaries, whether at an interlocutory stage or at the trial thus the provisions of Section 21 (2) and (4) of the Registered Land Act, cap. 300.
18. In the absence of the Registrars report pursuant to section 21 (2) and (3) of the Registered Land Act, cap 300, I find and hold that the Plaintiffs have not established a prima facie case with chances of success. Indeed, until such a report is prepared and filed in this court, this court does not have jurisdiction to entertain this suit or the Application before it.

19. In the circumstances, and for the reasons given above, I dismiss the Plaintiffs' Application dated 4<sup>th</sup> July, 2012 with costs.

Dated and delivered at Malindi this 20<sup>th</sup> day of June, 2013.

**O. A. Angote**

**Judge**