



REPUBLIC OF KENYA



Gathuthi Tea Factory Company Limited v Wambugu (Environment & Land Case 21 of 2020) [2022] KEELC 139 (KLR) (16 June 2022) (Ruling)

Neutral citation: [2022] KEELC 139 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 21 OF 2020**

**JO OLOLA, J
JUNE 16, 2022**

BETWEEN

GATHUTHI TEA FACTORY COMPANY LIMITED PLAINTIFF

AND

DUNCAN NDEGWA WAMBUGU DEFENDANT

RULING

1. By a Complaint dated 11th June, 2020 as amended herein on 9th November 2021, Gathuthi Tea Factory Limited (the Plaintiff) prays for Judgment against Duncan Ndegwa Wambugu (the Defendant) for:
 - (i) An order of permanent injunction restraining the Defendant from trespassing into and/or in any manner interfering with land parcel Thegenge/Gathuthi/753 and/or any portion thereof;
 - (ii) A declaratory order that the Plaintiff is the exclusive owner of the title number Thegenge/Gathuthi/753;
 - (iii) An order of eviction requiring the Defendant to give vacant possession of land parcel number Thegenge/Gathuthi/753;
 - (iv) Mesne profits accruing from the year when the Defendant entered the suit land until Judgment is delivered; and
 - (v) Costs and interests in the suit.
2. Those prayers arise from the Plaintiff's contention that the Defendant, his servants and/or agents have without any justification encroached onto the said parcel of land registered in the name of the Plaintiff and have erected thereon an incomplete semi-permanent house, rental houses and further planted Coffee trees thereon.



3. But in his Statement of Defence dated 14th September, 2020 as amended on 30th November, 2021, the Defendant denies the Plaintiff's contention and avers that he is legally occupying the portion being claimed which he states is part and parcel of land parcel No. Thegenge/Gathuthi /638.
4. The Defendant further asserts that he has legally and extensively developed the claimed portion of land over a long period and has had quiet and uninterrupted possession thereof for more than 30 years. He accuses the Plaintiff of being the one who entered his parcel of land No. Thegenge/Gathuthi/638 and of having erected beacons thereon without the involvement and/or consent of the Defendant.
5. Subsequently and by a Notice of Preliminary Objection dated and filed herein on 6th December 2021, the Defendant objects to the suit and urges that it should be struck out on the grounds:
 1. That this Court lacks jurisdiction to hear and determine this suit as it offends the express provisions of Section 18 and 19 of the Land Registration Act No. 3 of 2012 for the reason that the subject of the suit is a boundary issue which falls within the jurisdiction of the Land Registrar.
 2. That an action founded on tort, may not be brought after the end of 3 years from the date on which the cause of action first accrued as per the provisions of Section 4(2) of the Limitation of Actions Act and that Trespass being a tort, the Plaintiff ought to have filed its claim within 3 years from the time it learnt of the same.
6. By directions issued herein on 3rd February 2022, the parties agreed to dispose of the Preliminary Objection by way of written submissions. I have accordingly perused and considered the rival submissions and authorities placed before me by the Parties.
7. As was stated in *Mukisa Biscuits Manufacturing Company Limited -vs- West End Distributors Limited* (1969) EA 696:

“ ... A Preliminary Objection consists of a pure 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.”

8. The first limb of the Defendant's Preliminary Objection is that the subject matter of the dispute is a boundary dispute and that the same offends Section 18 and 19 of the Land Registration Act. In that respect, Section 18(2) of the said Act provides thus:

“ 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.”

9. On the other hand Section 19 of the Land Registration Act, 2012 provides as follows:

9.



- (1) If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.
- (2) The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.
- (3) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register and the parcel shall be deemed to have had its boundaries fixed under this section.”

10. In the matter before me, the Plaintiff accuses the Defendant of encroaching upon its parcel of land Thegenge/Gathuthi/753 and proceeding to erect a number of semi-permanent houses, semi-permanent canteen and some rental houses. It also accuses the Defendant of planting Coffee trees on the said parcel of land in total disregard of the ownership rights of the Plaintiff.
11. While the Plaintiff does not state in its pleadings when the alleged encroachment happened, it was clear from the Defendant’s pleadings that the parcel of land claimed by the Plaintiff is adjacent to land parcel No. Thegenge/Gathuthi/638 which belongs to the Defendant. At Paragraph 5(a) of the Amended Defence, the Defendant pleads that he resides on his parcel of land which he inherited from his father and that he has extensively developed the portion of land being claimed by the Plaintiff for a period of 30 years.
12. At Paragraph 7 of the Amended Statement of Defence, the Defendant pleads as follows:
 7. The Defendant avers that the Plaintiff is the one without any colour of right who entered on land Thegenge/Gathuthi/638 and illegally erected beacons. The same was done without involvement and/or consent of the Defendant or any other family member of the late Wambugu Gichuki the registered owner which amounts to trespass.
13. In answer to that contention by the Defendant, the Plaintiff responds at Paragraph 3 of the Reply to the Amended Defence as follows:
 - “ 3. The Plaintiff reiterates the contents of Paragraph 3A of the Amended Plaintiff and also denies in toto the particularized averments in Paragraph 5(9), 6(9) and 7, 8 (sic) of the Statement of Amended Defence and as such the Defendant is put to strict proof thereof.
14. The said Paragraph 3A of the Amended Plaintiff merely repeats the Plaintiff’s contention that it is the registered proprietor of the parcel number Thegenge/Gathuthi/753. It does not state how the Plaintiff came to learn that the Defendant had encroached and established his home on their land.
15. While the Plaintiffs have attached a Survey Report from Messrs Homeland Surveys in their List of Documents filed herein to justify their claim to the land, it was evident to me that the dispute herein



concerns the position of the boundary between land parcels Thegenge/Gathuthi/638 and Thegenge/Gathuthi/753.

16. From the provisions of Section 19 of the *Land Registration Act* cited hereinabove, it is manifestly clear that the entity which has the statutory mandate to avail an accurate plan of defined boundaries is the Land Registrar. While the Plaintiff submits that its claim herein has not made any reference to boundary disputes, they have put nothing before this Court to demonstrate that the dimensions and boundaries of the two adjacent parcels of land had been established in the manner contemplated under Sections 18 and 19 of the *Land Registration Act*.
17. In the circumstances herein, it was apparent that even if this Court was to hear and determine the matter, it would still require the input of the Land Registrar whom the Law has clothed with the mandate to resolve boundary disputes.
18. Where the law places a legal obligation on an entity of Government to perform certain functions, it is important that the Courts allow such entities to proceed and perform their obligations without hindrance. While this Court is certainly clothed with jurisdiction under Section 13(2)(a) to hear disputes concerning boundaries, a wholistic reading of the said Section together with Sections 18(2) and 19 of the *Land Registration Act* would reveal that the matter must first be dealt with before the Land Registrar before it is escalated to this Court.
19. As the Court of Appeal stated in the *Estate of Sonrisa Limited & Another -vs- Samuel Kaman Macharia & 2 Others* (2020) JELR 102359 (CA):

“It is the Land Registration Act that makes provisions relating to the determination of boundaries. Those provisions are found in Sections 16 to 19. Specifically for this dispute, the Registrar is empowered, after giving notice to all the affected parties, in this case, the 1st Appellant and 1st Respondent, indeed as well as any owner whose land adjoins the boundaries in question, and with the assistance of the surveyor, to ascertain and fix the disputed boundaries.

Under that Act, the Registrar carries out his functions without any restrictions and may rely on any other relevant documents and existing records in order to resolve any dispute between landowners. Because a title deed is only prima facie evidence of the matters shown therein, the Registrar’s investigations, of necessity, must encompass all entries in the register, rely on any other relevant document and existing records, conduct proceedings in accordance with Section 14(1) and cause a survey to be carried out and determine the dispute ...

It is only after determining the dispute that parties can move to Court to challenge it.”

20. Indeed as was stated in *Speaker of the National Assembly -vs- Karume* (1992) KLR 21:

“Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”
21. It follows that I am in agreement with the Defendant that the suit as filed by the Plaintiff is premature and misconceived. Having so determined, I did not think I needed to consider the other limb of the Preliminary Objection.
22. The Plaintiff’s suit is accordingly hereby struck out with costs to the Defendant.



RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 16TH DAY OF JUNE, 2022.

In the presence of:

No appearance for the Plaintiff

No appearance for the Defendant

Court assistant – Ndung’u

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J. O. Olola

JUDGE

