



**REPUBLIC OF KENYA**

**High Court at Machakos**

**Civil Case 89 of 2009**

**CHARLES KARANJA MASHUA.....PLAINTIFF**

**VERSUS**

**1. JONAH MZEE ORUMOI**

**2. ROSE TITO METUO**

**3. JOSEPH PARSANE ORUMOI**

**4. JULIUS SURUMUE ORUMOI**

**5. THE ATTORNEY GENERAL.....DEFENDANTS**

**RULING**

The application under consideration is the one dated 16<sup>th</sup> September, 2010 and filed in court the following day. In the application, the defendants seek that the instant suit against them by the plaintiff be struck out. They also pray that in the event that their plea is successful, they should be awarded costs.

The grounds in support of the application are that this court lacks jurisdiction to hear and determine the suit since it was premised on alleged boundary dispute when the plaintiff's parcel of land, Loitokitok/Olkaria/254 and that of the defendant Loitokitok/Olkaria/256 and which in any event share no common boundary. The plaintiff had previously filed similar proceedings against Mubiro Limited, with whom the defendants save the 5<sup>th</sup> defendant share a common boundary, and the suit was struck out by this court on 23<sup>rd</sup> April, 2009. Further, the plaintiff had previously filed a boundary dispute with the District Land Registrar, Kajiado, who heard the dispute on 25<sup>th</sup> September, 1997 and confirmed the boundaries. This being the case, the plaintiff's claim was an abuse of the process of court.

In support of the application, the 3<sup>rd</sup> defendant swore an affidavit. Where pertinent he deponed that defendants save the 5<sup>th</sup>, were the legal representative of the estate of the late **Peter Orumoi**, deceased. During the lifetime of the deceased and even during and after demarcation in 1968, the plaintiff never raised any boundary dispute with the deceased. But in 1997 following the death of the deceased, lodged a boundary dispute with the District Land Registrar, Kajiado with regard to his parcel of land then known as Loitokitok Olkaria/65 and the deceased's Loitokitok/Olkaria/66. The District Land Registrar arbitrated on the dispute and ruled that;- **“... the common boundary for parcel Olkaria/65 and 66 remains the boundary known by the witnesses, the Wazee and the family of Peter Orumoi Melue. This boundary should therefore be properly cleared and reinforced to avoid any future dispute by the two families ...”** Effectively what the District Land Registrar did was to confirm the boundary that existed between the 2 parcels of land. Subsequent thereto the plaintiff subdivided his land into

Loitokitok/Olkaria/254 and 255. He sold 255 to Mubiro Ltd and retained for himself 254. Prior to his death, deceased too had subdivided his land into Loitokitok/Olkaria/256 and 257. Whereas he sold 257 to Wakonyo Ranching Farm, he retained 256 for himself. On the ground the deceased parcels of land (256) does not share a boundary with the plaintiff's 254. Instead the deceased's land shares a common boundary with Mubiro Limited parcel's of land 255. The two had no boundary dispute. On 22<sup>nd</sup> September, 2008, the plaintiff filed suit against Mubiro Ltd being **HCC No. 145 of 2008 – Charles Karanja Muchua v Mubiro Ltd** in which he made allegations identical to those being made in this suit. That suit was struck out by this court on 23<sup>rd</sup> April, 2009. In the said case Mubiro expressly pleaded that it had no boundary dispute whatsoever with the estate of the deceased. Since it is the only land owned by Mubiro Ltd which shares a common boundary with the land owned by the deceased, there can be no basis for the plaintiff to allege, as he had done, that he shares a common boundary with the deceased's land. This suit was therefore calculated to vex the deceased's legal representatives and cause confusion in attempt by the plaintiff to unjustly acquire part of the deceased's land. In any event this being a boundary dispute this court had no jurisdiction to hear and determine the same.

In his response, the plaintiff in replying affidavit confirmed the history of the respective parcels of land as set out above. However, he maintains that from untempered records from Kajido Land Registry, Loitokitok/Olkaria/256 share a boundary with Loitokitok/Olkaria/254. That he never raised the boundary dispute with the deceased in his lifetime because fraudulent acts which led to the falsification of documents were committed by the defendants after the death of the deceased, which only came to his knowledge on 26<sup>th</sup> September 2000. Though he filed the suit against Mubiro Ltd, his claim was completely different from the instant suit. Further he believes that this claim does not fall within the purview of section 21 of the Registered land Act, hence this court has jurisdiction to hear and determine this suit.

The 5<sup>th</sup> defendant did not file a response to the application.

When the application came before me for *interpartes* hearing on 7<sup>th</sup> May, 2012, the 5<sup>th</sup> defendant was absent. However, **Mr. Amuga** and **Mr. Solonka**, learned counsel for the 1<sup>st</sup> to 4<sup>th</sup> defendants and plaintiff respectively appeared. They agreed to canvass the application by way of written submissions. It was however not until 13<sup>th</sup> July, 2012 that the respective written submissions were on board. I have carefully read and considered the same as well as the authorities cited.

I start from the premise that striking out a pleading is a drastic action and it has been held time and again that such process can be invoked or undertaken only in plain and obvious cases and that such jurisdiction must be exercised with extreme caution. See **Nitin Properties Ltd v Jagjit Singh Kalsi & another CA No. 132 of 1989**. On the same issue, **Madan JA** reiterated in the case of **DT Dobie & Company Ltd v Muchine [1982] KLR 1** that a plaint can be struck out only if the claim is incontestably or hopelessly bad. The power or discretion to strike out must be used very sparingly and cautiously. A court of justice should aim at sustaining a suit rather than terminating it by a summary dismissal. Finally, I am alive to the injunction by the Court of Appeal in the case of **Crispo Inyangira & 3 others v Rebecca Jeptum Lagat & another C. A. No. 45 of 1977** to the effect that:-

***“... It is our firm opinion that a case involving dispute about land extreme caution should be exercised before making an order on an interlocutory application to enter summary judgment or strike out a pleading for some technical defect or to enter judgment upon admission. Land is a sensitive subject in Kenya. The greatest care must be taken in disposing of litigation relating to it for the effect of the court's judgment may last for generations...”***

However, in this case, the defendants have sought to strike out the suit on account of being a boundary dispute, the suit being *res judicata* on account of HCCC No. 145 of 2008 and the decision of the District Land Registrar, Kajiado, regarding a boundary dispute filed before him by the plaintiff.

By dint of section 21(4) of the then Registered Land Act which has since been repealed, this court had no jurisdiction to entertain any action or dispute relating a boundary dispute. The section provided as

follows:-

**“21 (1) ...**

**(2) ...**

**(3) ...**

**(4) No court shall entertain any action or**

**other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in this section.**

**(5) ....**

The position of the defendants is that the dispute herein relates to a boundary. This being the case the suit ought to be struck out because the dispute being a boundary one ought to have been heard by the Registrar of Lands.

The plaintiff counters that argument by inviting the court to look at the mutation forms which to them appears to be altered resulting in the increase of the acreage of the parcel of land held by the deceased. That he has also pleaded fraud thereby taking the case outside the purview of section 21 (4) of the Registered Land Act which has since been repealed.

It is common ground that the deceased's original land parcel Loitokitok/Olkaria/66 shared common boundary with the plaintiff's land parcel Loitokitok/Olkaria/65. During the lifetime of the deceased, the plaintiff never raised any claim regarding the deceased encroachment on his land. However, in or about 1997, long after the deceased had passed on the plaintiff lodged a boundary dispute against the deceased's estate with the District Land Registrar, Kajiado. The District Land Registrar listened to the dispute and reached the verdict that the boundary between the 2 parcels of land had not been tampered with. He ordered that the boundary remains as it was. That decision is dated 25<sup>th</sup> September, 1997. The plaintiff did not appeal that finding. It is instructive that the plaintiff subdivided his parcel of land into 254 and 255 on 27<sup>th</sup> February, 1981 if the search certificate annexed to his replying affidavit is anything to go by. On the other hand the deceased effected his subdivision on 25<sup>th</sup> March, 1981 again if the certificate of official search is anything to go by. The District Land Registrar's decision was after said subdivision. Surely he could not have missed to not note the alleged encroachment that the plaintiff is complaining about now.

The gravamen of the plaintiff's complaints are found in paragraph 4-10 all inclusive of the plaint. They all point to none other than the alleged movement of boundary. Issues of fraud are only brought in as the reason behind the shifting of the boundary. In paragraph 10 of the plaint, the plaintiff has specifically pleaded that;-

**“... on diverse dates between 4<sup>th</sup> December, 1990 had 5<sup>th</sup> November, 1999, the 1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants in collusion with the District Land Registrar Kajiado, fraudulently and illegally amended and changed the boundary between parcels Number Loitokitok/Olkaria/254 and Loitokitok/Olkaria/256 and altered the official records in respect of the said parcels of land at Kajiado land Registrar and thereby encroached into 600 acres belonging to the plaintiff...”**

By this pleading can there be any doubt that the plaintiff is really complaining about changes in the boundary. It is instructive that period stated by the plaintiff when the alleged boundary was changed covers even the period when the District Land Registrar listened to the boundary dispute between the plaintiff and the deceased. Why did he not raise the issue then?

Even the prayers sought in the plaint belie the plaintiff's claim that the suit is not about boundary. On the

whole and in my view, the plaintiff is merely seeking to revive the old boundary dispute already determined by the District land Registrar. The only difference now is that the plaintiff is using the new numbers which came up following the subsequent subdivision of the original parcels of land, to allege that the boundary between his land and that of the deceased has changed. As correctly submitted by counsel for the defendants, the allegation and use of the words fraudulent, illegal, amended and or changed the boundary, does not change the fact that the dispute is to do with boundary.

I have combed through the pleadings in HCCC No. 145 of 2008. In paragraph 6 of the plaint the plaintiff makes this startling revelation:- “... ***the plaintiff and his then neighbour, the late Peter Orumoi Ole Meluo (deceased) were and still are adjoining neighbours and share a common boundary, despite the fact that both of them having since subdivided their respective parcels of land and conveyed a portion thereof to certain third parties...***” Nowhere in the plaint does he ever claim to be a neighbour of the defendants much as they were not parties to the suit. This pleading adds credence to the defendant’s assertion that they do not share a common boundary. So that even though this was a boundary dispute, it has no basis at all. In its defence, Mubiro Limited in paragraph 14 thereof of its defence has pleaded that it had no dispute whatsoever with the estate of the deceased as his land was within the boundaries demarcated pursuant to the mutation and Rim of 1990. This pleading goes further to confirm the defendants’ position as regards the boundary. Thereafter, the plaintiff makes similar allegations against the defendant in that case as he has made in the instant case. Nonetheless it is instructive that in the Mubiro’s case, the plaintiff asserted that it was Mubiro Ltd and not the defendants who had allegedly, fraudulently, illegally and unlawfully procured or amended and changed the boundary between land parcel numbers 254 and 255, thereby reducing the size of his 254. He has made similar allegations against the defendant. I think that the plaintiff is unfairly enlisting the assistance of this court on his fishing expedition that has embarked on. That is not the role of courts. Courts listen to disputes that are condensed. It cannot use its valuable judicial time to assist a party who does not know who the real defendants ought to be and the cause of action. The plaintiff herein is hoping from one defendant to another in the hope that along the way he will strike the proper defendant and cause of action. That is what is called an abuse of the process of court.

This suit relates to HCCC No. 145 of 2008 in all material particulars save for the defendants. Based on the pleadings I the earlier case, **Lenaola, J**, felt that the dispute pointed to one issue, an existing boundary dispute. The pleadings in the said case, as I have already held, are similar with the instant case. Accordingly, what are confronted with is a boundary dispute of the parties.

Section 21 of the then Registered Land Act provide *inter alia*;-

“21(1) ...

***21(2) where any uncertainty or dispute arises as to the position of any boundary, the Registrar, on the application of any interested party, shall, on such evidence as the Registrar considers relevant, determine and indicate the position of the uncertain or disputed boundary.***

***21(3) where the registrar exercises the power conferred by subsection (2), he shall make a note to that effect on the registry map and in the register and shall file such plan or description as may be necessary to record his decision.***

21(4) ...

21(5) ...

From the foregoing, it is clear that disputes regarding boundaries rested solely with the Registrar and this court then had no business entertaining such dispute. See also **Wamutu vs Kiarie [1982] KLR 480**.

I am in total agreement with conclusions reached by **Lenaola, J** in the case aforesaid. They are applicable too in this case. The inescapable conclusion is that this court had no jurisdiction to entertain the suit when it was filed. Accordingly the suit is strike out with costs to the defendants.

**RULING DATED, SIGNED and DELIVERED at MACHAKOS this 15TH day OCTOBER, 2012.**

**ASIKE -MAKHANDIA  
JUDGE**