



Estate Sonrisa Limited v Land Registrar Kwale & 3 others (Environment & Land Case E001 of 2021) [2022] KEELC 14535 (KLR) (13 June 2022) (Ruling)

Neutral citation: [2022] KEELC 14535 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE E001 OF 2021**

**AE DENA, J
JUNE 13, 2022**

BETWEEN

ESTATE SONRISA LIMITED APPLICANT

AND

LAND REGISTRAR KWALE 1ST RESPONDENT

REGIONAL SURVEYOR COAST REGION 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

SAMUEL KAMAU MACHARIA 4TH RESPONDENT

RULING

Preliminary Objection

1. 1 The 4th Defendant Samuel Kamau Macharia filed a preliminary objection dated 28th February 2022 on grounds that;
 - a. That this court lacks jurisdiction to entertain this suit as this matter has substantially been in issue in ELC 30 of 2014 and appealed in CA 14 of 2016 consolidated with 32 of 2016 where the report herein was requested from and same offends section 7 of the [civil procedure act](#)
 - b. That the pleadings instituting this suit offends the rules of procedure on form and substance.
 - c. That the application and the entire suit is fatally defective in substance and in form incompetent, lacks in merit.
 - d. That the application and suit is otherwise frivolous and an abuse of the court process.



History

2. A brief history of the suit herein is important in order to put into perspective the issues giving rise to the preliminary objection. The suit parcels are Kwale/Galu Kinondo 50 and Kwale/Galu Kinondo 48 which have been subject of intense litigation between the Plaintiff and the 4th defendant respondent. The borne of contention has been the boundary between the two parcels with the defendant claiming that the Plaintiff has encroached into his parcel. In the year 2014 the defendant filed Mombasa ELC No 30 of 2014 claiming ownership of Kwale/Galu Kinondo 50 with the claim that the plaintiff had encroached on the same by 1Ha. His claim is based on the title deed for the Plaintiff which indicates on the face of it, the plaintiffs land measures 0.9Ha instead of 1.9Ha.
3. The Plaintiff opposed the boundary issue being dealt with by the court and sought to have the same resolved by the Land Registrar as provided for by statute. The Plaintiff's objection was heard by the court whereby Justice Mukunya directed the Land Registrar on how to deal with the boundary dispute which directions were contrary to the provisions of the law. Aggrieved by the directions given by Justice Mukunya the plaintiff moved to the court of appeal under Appeal No 14 of 2016. In its judgement the Court of Appeal ordered the Land Registrar to determine the boundary dispute between the parties.
4. Based on the judgment of the court of appeal the Land Registrar requested the parties to avail themselves for resolution of the boundary dispute. That parties availed the necessary documents to facilitate the exercise which was conducted on 18th May 2021. It is the plaintiff's case that during the survey exercise in order to establish the boundaries, it was discovered that the map being used was not authentic and that the same had been provided by the 4th defendant/respondents agents a fact that had not been made known to the Plaintiff prior to the exercise. The said exercise was therefore termed as faulted and its findings disputed by the plaintiff. The plaintiff contends that a report dated 2nd July 2021 by the Land Registrar Kwale the 1st defendant, acknowledges that the Plaintiff's property is 1.9 Ha and not 0.9Ha that there is no encroachment and at the same time indicating that the plaintiff has encroached on the defendant's parcel. The plaintiff is therefore apprehensive of changes being made on the register with regards to the acreage and encroachment, which changes will be adverse to the plaintiff's property.
5. This court issued injunction orders based on the facts as outlined in the notice of motion dated 25th September 2021. However, on 23rd January 2022, the plaintiff's property was accessed and demolition of the perimeter wall surrounding the same undertaken by the 4th defendant respondent. The notice of motion dated 7th February 2022 is for contempt of the said orders and where the plaintiff seeks the 1st to 4th defendants to be compelled to pay a sum of Kshs 15,000,000/- or 6 months civil jail in disobedience of the injunctive orders that had been issued by this court. It is noteworthy that the preliminary objection has been filed in response to the plaintiffs notice of motion and suit herein filed pursuant to section 86 of the [Land Registration Act](#) 2021. The plaintiff states a case for the opinion of the court and prays for; -
 - a. A declaration that the plaintiff's property being Kwale/Galu Kinondo/48 measures 1.9 HA.
 - b. An order directing the County Land Registrar Kwale to rectify the error on the face of the title to reflect that the plaintiff property being Kwale/Galu Kinondo/48 measures 1.9 HA.
 - c. A permanent injunction restraining the 4th defendant/respondent by himself his servants, employees, contractors, agents, assigns, representatives or otherwise howsoever from entering upon, interfering with and or have any dealing of adverse nature with the parcel of land known as Kwale/Galu Kinondo/48.



- d. A declaration that the survey conducted on 18th May 2021, the use of the unauthenticated survey plan and the subsequent recommendations made by the County Land Registrar, Kwale in the report dated 2nd July 2021 are null and void.
 - e. A declaration that the survey conducted on 18th May 2021, the use of the unauthenticated survey plan and the subsequent recommendations made by the County Land Registrar, Kwale in the report dated 2nd July 2021 are null and void.
 - f. Costs.
6. The 1st 2nd and 3rd defendants through Mrs. Waswa State Counsel support the preliminary objection.

Submissions of the Parties

7. By an order of the court the parties filed written submissions to dispense the preliminary objection. Parties were also given an opportunity to highlight on the same on 29th March 2022 where Mr Ndegwa and Ms. Oluoch Wambi highlighted on behalf of the 4th defendant and plaintiff respectively.

4th defendants Submissions

Jurisdiction

8. The 4th Defendant submissions are dated 22nd March 2022. It is submitted this court should down its tools for want of jurisdiction as was the holding in of Nyarangi J in *Owners of Motor Vessel Lilian S Versus Caltex Oil[K] Limited* 1989 eKLR. Counsel contended the report sought to be revoked by the plaintiff was generated pursuant to the Court of Appeal judgement dated 24th April 2020 which judgement upheld the findings of Justice Mukunya in a decree dated 15th January 2015. It is submitted that in event this court entertains a challenge to the said report, it will amount to sitting as an appellate court equivalent of the Supreme court. Further that the report cannot be revoked without disturbing the court of appeal finding. That the only forum available to challenge the report is the court of appeal where it originated. During oral submissions Mr. Ndegwa pointed that the [Land Registration Act](#) does not define the ‘court’ because Parliament was alive to the established hierarchy of courts. That the court seized of an issue would handle the same without its jurisdiction being fettered and this is the court of appeal which originated the report. That if Parliament intended otherwise it would state so. Only a report generated suo motto by the Land Registrar would suffice for a case to be stated. That the plaintiff in choosing to state a case was circumventing the issue of jurisdiction.

Res judicata

9. According to Counsel this matter is res judicata by dint of section 7 of the [Civil Procedure Act](#) having been dealt with conclusively by the court of appeal. That if the court of appeal had intended otherwise it would have ordered a mistrial. That the application dated 25th September 2021 has sought for prerogative orders but under the wrong provisions instead of by either order 53 of the [Civil Procedures Rule](#), Article 47 of the Constitution or sections 7 and 9 of the [Fair Administrative Action Act](#).

Plaintiffs Submissions

10. The plaintiff filed its submissions on 28th March 2022. It is submitted that the court of appeal in Appeal No 14 and 32 of 2016 acknowledged that the boundaries between the disputed suit parcels being Kwale/Galu Kinondo 50 and 48 fall under the general boundaries survey system and therefore within the jurisdiction of the 1st defendant/respondent. The 1st defendant was then ordered to determine the



- boundary dispute. That the court of appeal faulted the decision by Justice Mukunya in Mombasa ELC 30 of 2014 and held that parties had the right to state a case for the opinion of the court in the event that they are aggrieved with a decision made by the 1st respondent over a boundary dispute.
11. It is stated that the land registrar Kwale proceeded to conduct a survey on the disputed parcels in order to determine the encroachment. That two reports by the County Land Registrar Kwale dated 21st June 2021 and 2nd July 2021 acknowledge that the plaintiff's property is 1.9Ha in accordance with all the available records except for the title which had an error indicating that the same was 0.9Ha. That despite the said verified findings the 1st defendant respondent proceeded to conclude that the plaintiff had encroached on the 4th defendant's property and ought to surrender 1ha to them. The plaintiff being aggrieved by the said decision has filed the suit herein as per the provisions of sections 79[3A],80,86 and 91[9] of the Land Registration Act. That the court of appeal did recognise that the decision by the Land Registrar cannot be final and declared that the order no 5 made in Mombasa ELC No 30 of 2014 was premature and had not considered the provisions of section 86.
 12. Counsel for the plaintiff further submits that the 4th defendant had tried to have orders of demolition granted based on the orders of the court in Mombasa ELC No 30 of 2014 but the said application was denied by Lady Justice Matheka who stated that the court was functus officio and any issue of interpretation of orders issued in Mombasa ELC No 30 of 2014 could only be dealt with at the court of appeal. Justice Matheka further relied on the court of appeal judgement and ruling made on 24th February 2020 and 11th March 2021. The applicant asked the court to dismiss the preliminary objection as the same lacks merit.
 13. On whether the matter before court has been substantially in issue in ELC no 30 of 2014 and more specifically the issue on the acreage this court was referred to the court of appeal sentiments over the dispute herein where the court stated that for the issue of acreage to be determined then the title deed already issued could not be used. The court directed the parties to have a survey exercise carried out to determine the boundaries and correct acreage and faulted Justice Mukunya for defining to the land registrar what should guide him in conducting his work. Counsel referred this court to the case of David Katiba Ruthi Versus Simon Njuguna & Others Civil Appeal Number 68 Of 1993 where the court stated that once an appellate court makes its decision over an issue there is nothing further that can be done or is expected to be done and it does not matter whether the decision can be termed as a ruling. That in essence the court of appeal had directed the Land Registrar in the instant suit to prepare a report and the plaintiff is now challenging the contents of the report in compliance with sections 79[3A],80,86 and 91[9] of the Land Registration Act. The court was urged to dismiss the preliminary objection with costs.

Analysis and Determination

14. I have carefully considered the pleadings, evidence, the submissions by the respective parties, the judgment of the court appeal herein and the authorities cited. The only issue for determination is whether this court is the right forum for the plaintiff to have filed the instant suit where they have stated a case for the opinion of the court.
15. I have noted the ground raised by the 4th defendant that this matter is res judicata. In my view this is highly contested and will necessitate that this court goes into the merits of this suit. This ground is not properly raised based on the test in *Mukisa Biscuit Manufacturing Co Ltd V West End Distributors Ltd* 1969 EA 696.
16. The jurisdiction of this court has been put into question on the basis that this court is not the proper forum for resolution of any controversy arising from the report of the Land Registrar which was



prepared pursuant to the order of the Court of Appeal. The plaintiff has submitted that this court is the right forum to state a case for the opinion of the court having been aggrieved by the decision of the Land Registrar. Further that the court of appeal indeed recognised that the process under sections 79(3A), 80, 86 and 91(9) of the Land Registration Act may be challenged in court by way of a case stated for the opinion of the court. It was also urged that the plaintiff could not ignore the very hierarchy of courts by bypassing the Environment and Land Court which is conferred with appellate jurisdiction for a party aggrieved by a decision of the Land Registrar. Indeed, section 86 of the Land Registration Act does not state the actual court where the party aggrieved by the decision of the land registrar should go. The court of appeal also did not state which court and left the issue open. In considering this matter this court then resorted to the definition of 'Court' as given in the Land Registration Act and it is defined thus; -

Court" means the Environment and Land Court established by the Environment and Land Court Act, 2011 No. 19 of 2011, and other courts having jurisdiction on matters relating to land.

17. Clearly the court is the Environment and Land Court and the other courts are the magistrates court in as far as their pecuniary jurisdiction permit. Therefore, the proper court for purposes of section 86 is the Environment and Land Court. This court has looked at the pleadings in the instant suit. The plaintiff at paragraph 32 raises the various concerns with the acts undertaken during the boundary identification exercise undertaken herein. Prayer 'e' of the suit seeks, 'declaration that the survey conducted on 18th May 2021, the use of the unauthenticated survey plan and the subsequent recommendations made by the County Land Registrar, Kwale in the report dated 2nd July 2021 are null and void.' In my view the plaintiff has a right to be heard on merits on this point to the extent that they are aggrieved by the decision of the land registrar and are also questioning the process itself. In this courts view the plaintiff has chosen the correct court to litigate, the only problem I have is the filing of a fresh suit when there is an existing suit where a decree emanated from and this is Mombasa ELC No 30 of 2014. In my view the end result of the case stated for the opinion of the court is ultimately to enable execution of the decree in Mombasa ELC No 30 of 2014 which awaits the outcome of the precise setting of the boundaries by the Land registrar as ordered by the court of appeal. Consequently, the provisions of Section 34 (1) of the Civil Procedure Act should kick in. In my view the plaintiff should have moved the court before the Mombasa ELC No 30 of 2014 and not to file a fresh suit before another court when there is still an existing suit whose decree has not yet been fully realised.
18. The upshot of the foregoing is that the entire suit be and is hereby struck out with costs to the 4th defendant.

DELIVERED AND DATED AT KWALE THIS 13TH DAY OF JUNE, 2022

A.E. DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Ms. Oluoch Wambi for the Plaintiffs

Mrs Waswa for the 1st 2nd and 3rd defendants

Ms. Achieng holding brief for Mr. Ndewga for the 4th Defendant

Mr. Denis Mwakina- Court Assistant.

