



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CIVIL CASE 33 OF 2005**

**MALAK ONUONG'A MACHOKA.....PLAINTIFF**

**VERSUS**

**ASHWIN GUDKA.....DEFENDANT**

**RULING**

The plaintiff filed a suit against the defendant and alleged that the defendant had trespassed onto his property known as Kisii Town/Block II/210, hereinafter referred to as “**the suit property**”. On the suit premises there is erected rental houses and other out buildings. The plaintiff claimed that sometimes in March, 2005 the defendant unlawfully entered on the suit property and destroyed the fences and other out door buildings and started his construction. The plaintiff sought an order of injunction to restrain the defendant, his servants and/or agents from trespassing onto the suit property. The plaintiff also sought general damages for trespass as well as unspecified special damages.

The defendant filed a statement of defence and denied the plaintiff’s claim. In paragraph 12 of the defence the defendant stated as follows;-

**“12. The defendant shall raise a preliminary issue that this suit is prematurely filed in this court and this court has no jurisdiction to hear and determine the same as suit and the defendant’s land are adjoining each other and S.21 of the Registered Land Act, Cap 300 has yet to be complied with and that therefore this suit be struck out”.**

When this suit came up for hearing on 19<sup>th</sup> May, 2009 the plaintiff’s advocate made an application for adjournment on the grounds that:

- (i) The District Land Registrar and Surveyor were due to visit the suit but that had not been done.
- (ii) The Plaintiff had a sick patient and had not attended court.

Mr. Soire for the defendant opposed the application and stated that:

- (a) The hearing date had been taken by consent on 10<sup>th</sup> November, 2008.
- (b) The plaintiff’s advocate had failed to respond to his suggestion that the dispute be referred to the District Land Registrar for determination.

The court disallowed the application for adjournment and directed that the hearing proceeds at 10.00a.m. Come that time and neither Miss Obaga for the plaintiff nor the plaintiff were in court. Mr. Soire argued the preliminary objection in terms of paragraph 12 of the defence as quoted hereinabove.

I agree with the defendant that this is a boundary dispute between the parties herein. Section 21 of the Registered Land Act is explicit that in such a matter, this court lacks jurisdiction unless the dispute has first been determined by the area District Land Registrar. That has not been done in this case. Consequently, I find and hold that this court has no jurisdiction to hear and determine this suit. The suit is struck out with costs to the defendant.

**DATED, SIGNED and DELIVERED at KISII this 12<sup>th</sup> day of June, 2009**

**D.MUSINGA.**

**JUDGE.**

**12/6/2009**

Before:D.Musinga. J

Mobisa-CC

No appearance for the Applicant

No appearance for the Respondent

**COURT:** Judgment delivered in open court on 12<sup>th</sup> June, 2009.

**D.MUSINGA**

**JUDGE**