



King'Ara v Spring Hill Park Limited & 2 others (Environment & Land Case 225 of 2017) [2022] KEELC 12668 (KLR) (20 September 2022) (Ruling)

Neutral citation: [2022] KEELC 12668 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 225 OF 2017**

**MD MWANGI, J
SEPTEMBER 20, 2022**

(IN RESPECT OF THE NOTICE OF MOTION APPLICATION DATED 29TH MARCH, 2022 BROUGHT UNDER THE PROVISIONS OF SECTIONS 1A, 1B, 3, 3A AND 63 (E) OF THE CIVIL PROCEDURE ACT. SECTIONS 18 (2) AND 20 OF THE LAND REGISTRATION ACT AND ORDER 40 RULE 10 OF THE CIVIL PROCEDURE RULES, THE CONSTITUTION OF KENYA AND ALL OTHER ENABLING PROVISIONS OF THE LAW, SEEKING INTER ALIA THAT THE LAND REGISTRAR DETERMINES THE BOUNDARIES BETWEEN THE PLAINTIFF'S AND THE 1ST DEFENDANT'S PARCELS OF LAND AND SUBMIT A REPORT TO COURT IN TERMS OF THE PROVISIONS OF SECTION 18(2) OF THE LAND REGISTRATION ACT)

BETWEEN

PETER GICHUKI KING'ARA PLAINTIFF

AND

SPRING HILL PARK LIMITED 1ST DEFENDANT

COUNTY GOVERNMENT OF NAIROBI CITY 2ND DEFENDANT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 3RD DEFENDANT

RULING

Introduction

1. This ruling is in respect of a notice of motion dated March 29, 2022 filed by the 1st defendant/applicant as well as a preliminary objection raised by the plaintiff respondent dated April 13, 2022. The court gave directions that the said notice of motion and the preliminary objection be heard and determined together. To this end, the parties filed submissions on the same.



The Application dated 8.10.2020

2. The application seeks the following orders;
 - a. Spent
 - b. That this honourable court do direct the plaintiff and the 1st defendant to grant access of the suit properties namely LR No 209/14990/21 registered in the name of the plaintiff and LR No 209/14990/23 registered in the name of the 1st defendant/applicant to the land registrar and the office of the survey of kenya for the purposes of determination of their boundaries.
 - c. That an order do issue directing the land registrar in conjunction with the office of the survey of kenya to visit the suit properties namely LR No 209/14990/21 registered in the name of the plaintiff and LR No 209/14990/23 registered in the name of the 1st defendant/applicant for the purposes of determining their boundaries within the framework of section 18 (2) of the [Land Registration Act](#) within thirty (30) days of this order.
 - d. That the officer-in-charge (OCS) Kileleshwa police station do provide security and ensure compliance with the orders of this honourable court.
 - e. That the land registrar and survey office do prepare a joint report in relation to the boundary dispute herein and file the same in court within 30 days of the site visit.
 - f. That the honourable court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case.
 - g. That the costs of this application be met by the plaintiff/respondent.
3. The application is based on the grounds on the face of it as well as the supporting affidavit of Daniel Agili Ojijo, the managing director of the 1st defendant/applicant company. In summary, the deponent avers that the plaintiff and the 1st defendant are the registered owners of parcels of land known as LR No 209/14990/21 and LR No 209/14990/23 respectively which properties are adjacent to each other.
4. The deponent deposes that while the 1st defendant was developing its parcel of land, it discovered that the plaintiff's boundary wall had encroached into its property. He alleges that parties discussed and agreed that the encroaching boundary wall was to be brought down and moved appropriately. However, the parties later fell out before implementing the agreement hence the current suit.
5. Upon being served with the application, the plaintiff filed a replying affidavit accompanied by a preliminary objection dated April 13, 2022 in opposition to the application.

Replying Affidavit

6. The plaintiff deposes in his replying affidavit that he purchased his parcel of land alongside three other purchasers from Teleposta Pension Scheme registered trustees. He avers that the purchasers later realized an anomaly being the mix-up of the land reference numbers of their plots. However, since parties had already occupied and developed their respective parcels of land, they signed deeds of rectification to rectify the anomalies.
7. The plaintiff purchased his property before the anomaly in the acreage had been addressed. The cadastral map of the area had however already been prepared and therefore the boundaries between the two plots had been determined. he asserts that the jurisdiction of the land registrar under section 18(2) of the [Land Registration Act](#) is limited to un-surveyed parcels where the boundaries have not been fixed or established under the Act.



8. The plaintiff states that he has been in occupation of the suit property for more than 30 years and has developed it as his matrimonial home.
9. Further, the plaintiff's position is that the prayers sought in the application are similar to those sought in the counterclaim thus granting the prayers sought herein amounts to allowing a counterclaim before hearing the parties. He denies ever participating in the alleged proceedings or making an agreement to re-survey the properties as alleged by the 1st defendant. He posits that the application by the 1st defendant is therefore misconceived.

Preliminary Objection

10. The grounds raised in the preliminary objection are that;
 - a. The orders sought are beyond the scope of the land registrar's jurisdiction under section 18 and 19 of the *Land Registration Act*, 2012. This is so since the cadastral map for the area has already been prepared thus determining the boundaries between the two plots.
 - b. That the application lacks merit under the provisions it was filed under since the dispute is on who owns the land. The application completely by –passes the roles of the land registrar.
 - c. That the application is fatally defective, misconceived and mischievous or otherwise an abuse of the court process and therefore is unsustainable in the obtaining circumstances.

Court's directions

11. The court gave directions that the application and the preliminary objection be canvassed together and by way of written submissions. Both parties have complied.

Issues for Determination

12. The court is of the opinion that the issues for determination as follows;
 - a. Whether the dispute between the 1st defendant and the plaintiff is a boundary dispute within the meaning of section 18 of the *Land Registration Act*.
 - b. Whether the boundary between the plaintiff and the 1st defendant is a fixed boundary.

Analysis and Determination

A. Whether the dispute between the 1st Defendant and the Plaintiff is a boundary dispute within the meaning of Section 18 of the *Land Registration Act*

13. Section 18(2) of the *Land Registration Act*, 2012, prohibits the court from entertaining any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided for in that section. It provides as follows:

“The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.”

14. The prayers by the plaintiff in his plaint include a prayer for a declaration that the plaintiff is in adverse possession of LR No 209/14990/22 to the extent that he has occupied the same over the last 15 years any space held within his masonry perimeter wall, having occupied the space for a period of nearly 15 years '*Nec Vim Nec Clam and Nec Precario*'. This prayer infers that the plaintiff is aware that he



has occupied a portion of the 1st defendant's property over the last 15 years. The dispute between the plaintiff and the 1st defendant then is clearly not about the boundary between their properties.

B. Whether the boundary between the Plaintiff and the 1st Defendant is a fixed boundary

15. The plaintiff in his replying affidavit annexed a copy of the original title and a cadastral map for the area where the property is situated. The 1st defendant on the other hand disputes the existing boundaries hence seeks to invoke the provisions of section 18(2) and 19 of the [Land Registration Act](#), 2012 for the land registrar to assist in the determination of the boundaries.

16. In the Court of Appeal case of *Azzuri Limited v Pink Properties Limited* [2018] eKLR, the court stated as follows in relation to the application of section 18 of the [Land Registration Act](#);

“This means that under the aforesaid provisions, boundary disputes pertaining to lands falling within general boundary areas must be referred to the land registrar for resolution.....From this analysis of the law, it should be clear from the above that, we are in agreement with the learned Judge's conclusion that the dispute ought to have been heard by the land registrar as stated in the statute. Jurisdiction is everything. It has been said many times before, that, without it a court has no powers to make one more step, irrespective of the strength and nature of evidence in the parties' possession.”

17. In the [Azzuri Limited Vs Pink Properties Limited](#) (2018) eKLR, Angote J had stated that;

“In his paper, ‘The role of the registry index map (RIM) in land management in Kenya’, Peter K Wanyoike has stated that the registered index map is a very useful document in registration and management of land in Kenya within the context of ‘general boundaries’ or ‘approximate boundaries’.”

18. The paper defines “general boundaries” as follows:

“A boundary of which the precise line is undetermined in relation to the physical features which demarcate it ... However, it is clear on the ground where the parcel is situated and where the boundaries are, for they are clearly visible and unmistakable physical features, though they do not indicate the exact location of the line within the breadth which such physical features necessary process.”

19. In the case of [Ali Mohamed Salim v Faisal Hassan Ali](#) (2014) eKLR, the court held as follows:

“The type of survey that generated the Registry Index Map is what was known as “general boundaries” which has been defined in section 18(1) of the [Land Registration Act](#), 2012 to mean ‘the approximate boundaries and the approximate situation only of the parcel’. Indeed, most of the titles under the repealed registered [Land Act](#) were issued on the basis of the general boundaries, meaning that such parcel of land had no fixed beacons.

On the other hand, land registered under the registration of titles act required a cadastral survey to be prepared, which is based on a fixed boundary principle. Such a survey has an accurate linear and angular measurements to aid the registration of a title of a plot. The boundaries of land registered under the Registration of Titles Act can easily be identified by any surveyor because of the fixed nature of its beacons.”

20. From the affidavit evidence adduced by the parties in this matter, it is clear that the boundary dispute between their two plots is a fixed boundary. The titles were issued under the regime of Registration of



Titles Act (now repealed). The boundaries issued under that regime are fixed in nature. That explains why there is a cadastral map of the area. ‘The boundaries of land registered under the Registration of Titles Act can easily be identified by any surveyor because of the fixed nature of its beacons.’ The land registrar therefore has no power under section 18(2) and 19 of the *Land Registration Act* to deal with such disputes. The land registrar’s jurisdiction is only limited to general boundaries as stated by the Court of Appeal in *Azzuri Limited v Pink Properties Limited* (supra).

21. The Jurisdiction of this court flows from article 162(2) (b) of the *Constitution* as read with the provisions of section 13(2) of the *Environment Land Court Act*. The latter provides as follows;

“In exercise of its jurisdiction under article 162(2) (b) of the *Constitution*, the court shall have power to hear and determine disputes—

- a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
- b. relating to compulsory acquisition of land;
- c. relating to land administration and management;
- c. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
- c. any other dispute relating to environment and land.”

22. This court’s finding therefore is that it has the jurisdiction to hear and determine this matter. The import is that the plaintiff’s preliminary objection is upheld while 1st defendant’s application is hereby dismissed with costs for lack of merit.

It is so ordered

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER 2022.

M.D MWANGI

JUDGE

In the virtual presence of: -

Ms. Kimere for the Plaintiff.

Mr. Gachugi for the 1st Defendant/Applicant.

No appearance for the 2nd & 3rd Defendants.

M.D. MWANGI

JUDGE

