



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MALINDI**

**ELC CASE NO. 189 OF 2017**

**GEORGE MKUZI.....PLAINTIFF**

**VERSUS**

**1. MODERN COAST BUILDERS & CONTRACTORS LIMITED**

**2. HAROON SHAHID BUTT.....DEFENDANTS**

**RULING**

1. This Ruling relates to the Defendants' Notice of Preliminary Objection dated 20<sup>th</sup> June 2019 and filed herein on 9<sup>th</sup> July 2019.
2. By his Plaint dated 8<sup>th</sup> September 2017 as amended on 9<sup>th</sup> March 2018, George Mkuzi (the Plaintiff) prays for Judgment against the two Defendants jointly and severally for:

***a) Vacant possession of the suit properties being all those registered parcels of land situated at Mgumo Patsa/Mazeras in Rabai Location within Kilifi County and known as Title No. MgumoPatsa/Mazeras/1328 and Title No. MgumoPatsa/Mazeras/1329 and the demolition of any buildings erected by the Defendants on the said suit properties and the eviction therefrom of the Defendants, (their) servants and or agents or any person claiming through them;***

***b) (A) permanent injunction restraining the Defendants either by themselves, their agents or servants or any other persons claiming through the Defendants from trespassing or encroaching upon the said suit properties, excavating the same and from constructing any buildings thereon, from selling, transferring, alienating or dealing with the suit properties in any manner whatsoever;***

***c) Payment of general damages for the lose of user of the suit properties, trespass, excavation carried out on the properties, destruction of the crops and graves to be assessed by the Court;***

***d) Interest thereon at Court rates; and***

***e) Any other relief that this Honourable Court may deem just to grant.***

3. Those prayers arise from the Plaintiff's contention that at all times material, he was the registered proprietor of the two parcels of land the same being sub-divisions of Title No. Mgumo Patsa/Mazeras/632. The Plaintiff accuses the Defendants who claim to be beneficially entitled to an adjacent parcel of land number MgumoPatsa/Mazeras/152 of trespassing and or encroaching upon the suit properties on or about 31<sup>st</sup> August 2017, excising off a portion thereof measuring about ¼ acres, clearing and excavating the same and destroying crops thereon on the purport that they are the true owners thereof.

4. By their joint Statement of Defence dated 20<sup>th</sup> June 2019 and filed on 9<sup>th</sup> July 2019 Modern Coast Builders & Contractors Ltd (the 1<sup>st</sup> Defendant) and Haroon Shahid Butt (the 2<sup>nd</sup> Defendant) however deny the Plaintiff's claim. They assert that the 1<sup>st</sup> Defendant does not own any land in the area as alleged and aver that he is a stranger to the allegations having been improperly enjoined in the proceedings.

5. On its part, the 2<sup>nd</sup> Defendant asserts that it owns Land Parcels Nos MugumoPatsa/Mazeras/151, 152 and 160 all measuring approximately 7 acres and that the same have nothing to do with the Plaintiff's land. The 2<sup>nd</sup> Defendant further asserts that the subject land was sold to him in the year 2015 and that the same do not trespass and or encroach on the Plaintiff's alleged land and the boundaries thereto are well-delineated and ascertained.

6. By their Notice of Preliminary Objection dated and filed on the same date as the Statement of Defence, the Defendants urge the Court to strike out and dismiss the Plaintiff's suit on the ground that

**1. The Honourable Court lacks the requisite jurisdiction to hear and determine the suit herein by virtue of the express provisions of Section 18(2) of the Land Registration Act, 2012; and**

**2. The suit as filed comprise(s) of a boundary dispute and the Plaintiff has failed to comply with Section 18 of the Land Registration Act, 2012.**

7. I have perused and considered the Preliminary Objection vis-à-vis the pleadings filed herein. I have similarly perused and considered the rival submissions and authorities filed both in support of and in opposition to the Preliminary Objection by the Learned Advocates for the parties.

8. It is trite law that the jurisdiction of any Court provides the foundation for its exercise of judicial authority. As a general principle, where a Court has no jurisdiction, it has no basis for judicial proceedings much less a judicial decision or order (*see Mumo Matemu –vs- Trustees of Society of Human Rights Alliance and 5 Others (2013) eKLR*). That being the case, and as was aptly observed by the Honourable Justice Nyarangi (as he then was) in the *Owners of the Motor Vessel 'Lillian S' –vs- Caltex Oil (Kenya) Ltd*, a question of jurisdiction ought to be raised, as has been properly done herein, at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it.

9. The Defendants' submissions that this Court lacks jurisdiction to entertain the Plaintiff's claim is premised on the provisions of Section 18(2) of the Land Registration Act No. 3 of 2012. The said Section provides thus: -

***"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."***

10. On account of the foregoing, the Defendants submit that at paragraph 4 and 7 of the Amended Complaint, the Plaintiff has tacitly admitted and acknowledged the fact that the Defendants are his immediate neighbours as they own the adjoining MugumoPatsa/Mazeras/ 152. The Defendants have further urged the Court to look at paragraphs 11 and 12 of the Statement of Defence in which they submit that they have demonstrated that they have not encroached upon the Plaintiff's land. On that account, the Defendants assert that the dispute herein is that of the boundary to their respective parcels of land.

11. A perusal of the pleadings herein reveals however that the 1<sup>st</sup> Defendant, a limited liability company denies owning any land in the area in dispute and actually accuses the Plaintiff of improperly enjoining it to the suit property. On the other hand, the 2<sup>nd</sup> Defendant pleads at Paragraph 5 of the Statement of Defence that its parcel of land does not encroach upon the Plaintiff's land and that its boundaries are well delineated and ascertained as contained in the land Registry Map Sheet No. 4 prepared by the Ministry of Lands.

12. At Paragraph 6 of the Statement of Defence, the 2<sup>nd</sup> Defendant further asserts that the boundaries of the respective parcels of land are clearly marked with beacons and that the same has never been the subject of any boundary dispute. Indeed, none of the Defendants herein makes any claim to the parcel of land claimed by the Plaintiff. That being the case, it was unclear to me how the claim herein can be said to be a boundary dispute.

13. At paragraphs 7, 8 and 9 of the Amended Complaint, the Plaintiff accuses the two Defendants of wrongfully hiving off a portion of his land measuring 14 acres and proceeding to destroy his crops and family graves and thereafter excavating building materials therefrom on the purport that they are the true owners thereof. That cannot in my view be equated to a claim of a boundary dispute.

14. As was stated in *Mukisa Biscuits Manufacturing Company Ltd -vs- West End Distributors Ltd (1969) EA 696*, a preliminary objection must be based on 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. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

15. A perusal of the rival pleadings before me reveals that the facts constituting the dispute are not admitted. The factual details will require evidence to be adduced and proved at the trial.

16. In the foregoing, I am not persuaded on the material presently before me that this is a matter that falls within the province of Section 18(2) Land Registration Act of 2012. On that account the Preliminary Objection must fail.

17. The Objection is accordingly dismissed with costs to the Plaintiff/Respondent.

**Dated, signed and delivered at Malindi this 22<sup>nd</sup> day of January, 2021.**

**J.O. OLOLA**

**JUDGE**