



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELCA CASE NO. 7 OF 2020**

**MOSES MUKANDA OLALIE.....APPLICANT**

**VERSUS**

**FRANCIS MAKOKHA ODONGO**

**BENSON MAKOTO WAKHUNGU**

**GODFREY ASICHE CHACHA**

**AMUKOYA OBOTE.....RESPONDENTS**

**JUDGEMENT**

The appellant being aggrieved and dissatisfied with the ruling of T.A. Odera the honourable Senior Principal Magistrate in Mumias Senior Principal Magistrate's Court Land Case No. 59 of 2018 delivered on 14<sup>th</sup> February, 2020 prefers this appeal and puts forth the following grounds of appeal;

1. That the honourable Magistrate erred both in law and fact in holding that the plaintiff did not respond to the submissions and objection when the appellant had filed his submissions dated 19<sup>th</sup> December, 2019 on 20<sup>th</sup> December, 2019 and a court filing receipt duly issued.
2. That the honourable Magistrate erred both in law and fact in failing to consider the appellant's submissions which were properly on record.
3. That the honourable Magistrate erred both in law and fact in holding that the appellant's claim was a boundary dispute under section 18 (2) of the Land Registration Act 2012 when the appellant's prayers in the plaint were for eviction and injunction.
4. That the honourable Magistrate erred both in law and fact in holding that the appellant's claim was a boundary dispute when the defendants were not the absolute registered proprietors of Land Parcel No. S/Wanga/Ekero/299 which borders the appellant's Land Parcel No. S/Wanga/Ekero/298.
5. That the honourable Magistrate erred both in law and fact in failing to consider that the order issued on 10<sup>th</sup> July, 2018 leading to the Land Registrar's and Surveyor's visitation was by consent and thereby binding and the case was thereby concluded upon such orders being issued and executed and there was no suit capable of being struck out.
6. That the ruling of the trial Magistrate have led to a miscarriage of justice.

The appellant prays for orders that:-

1. That this appeal be allowed.
2. That the ruling of the trial magistrate made on 14<sup>th</sup> February, 2020 be set aside and/or varied and the appellant's claim in the lower court be heard and determined on merit.
3. That the appellate court do issue any such orders as it deems fit in the circumstance.

4. That the respondents be condemned to pay the costs of this appeal.

The appellant submitted that the parties herein agreed by consent order issued on 10<sup>th</sup> July, 2018 to have this case settled by having survey done to confirm boundaries of land parcel No. South Wanga/Ekero/299 and 298 as used were intact and inertly to help settle dispute in whole. That the said orders were never vacated. That at time of filing notice of preliminary objection, no ground was raised challenging the said consent order as unlawful by virtue of court lacking jurisdiction to adopt the said order. It is clear that the said consent order was effected and report filed in court to confirm to court clear position on the ground in effect of court giving final directions. It is clear from record that appellant was satisfied with surveyor's report file on record, and it is the defendants who disputed the same. They submit that the notice of preliminary objection filed by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants was an academic exercise and made/sought in discretion of court and ought to have been denied. In the case of Kenya Breweries Ltd. & Another vs. Keroche Breweries Ltd. (2020) eKLR, the cited case of Mukisa Biscuits Manufacturing Co. Ltd. vs. West End Distributors 1969 EA 696 where emphasized that a preliminary objection consists of pure point of law pleaded or arising by implication out in pleadings, which if argued disposes of the suit. That the 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed the notice of preliminary objection on basis of consent order made on 10<sup>th</sup> July, 2018 and not based on the appellant's pleading. The trial magistrate erred in striking out the plaintiff's suit when no basis to do so as per pleadings filed by the plaintiff.

That the overriding objective of Civil Procedure Act is to ensure justice is done to parties by effectual and timely disposal of cases. The 2<sup>nd</sup> and 3<sup>rd</sup> defendant's notice of preliminary objection was filed in bad faith due to their protest on survey report filed in court. The claim against 2<sup>nd</sup> and 3<sup>rd</sup> defendant still remains trespass, and by virtue of the ruling by trial court dated 14<sup>th</sup> February 2020, the plaintiff is aggrieved as he has been stopped from pursuing justice and order for eviction and injunction against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants unjustly as prayed in his plaint.

This court has considered the appeal and the submissions therein. The respondents were served but failed to file any response. The appellant submitted that the honourable Magistrate erred both in law and fact in holding that the appellant's claim was a boundary dispute under section 18 (2) of the Land Registration Act 2012 when the appellant's prayers in the plaint were for eviction and injunction. That the appellant's claim was a boundary dispute when the defendants were not the absolute registered proprietors of Land Parcel No. S/Wanga/Ekero/299 which borders the appellant's Land Parcel No. S/Wanga/Ekero/298. I have perused the lower court records and find that this suit was struck out on the said preliminary objection that it is a boundary dispute. A Preliminary Objection, as stated in the case of Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd (1969) E.A 696,

*“..... consists of a 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”*

In the same case, Sir Charles Newbold said:

*“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion”.*

J.B. Ojwang, J (as he then was) in the case of Oraro vs. Mbajja (2005) eKLR had the following to state regarding a 'Preliminary Objection'.

*“I think the principle is abundantly clear. A “preliminary objection”, correctly understood is now well identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement ..... that, “where a court needs to investigate facts, a matter cannot be raised as a preliminary point.”.*

The issue as to whether or not this is a boundary dispute is therefore properly raised as a Preliminary Objection. The appellant submitted that the parties herein agreed by consent order issued on 10<sup>th</sup> July, 2018 to have this case settled by having survey done to confirm boundaries of land parcel No. South Wanga/Ekero/299 and 298 as used were intact and inertly to help settle dispute in whole. That the said orders were never vacated. I have perused the lower court records and find that this was indeed a boundary dispute and the parties had even appeared before the Chief Ekero location on the 18<sup>th</sup> April 2013. Section 18(2), the Land Registration Act, 2012 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”.*

Under Section 19 of Land Registration Act, 2012 the duty to fix boundaries to registered land is vested in the Land Registrar. It provides as follows:

*“19. (1) If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.*

*2) The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the*

register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.

(3) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section.”

I find that these provisions prohibit the courts 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 in that section. In the case of *Ratila Ghela Shah & 2 Others vs Menkar Ltd (2018) eKLR* the court stated that;

“It means that any issue relating to a dispute as to boundaries are within the Land Registrar’s mandate.”

In the case of *Willis Ocholla..Vs..Mary Ndege (2016) eKLR*, the Court held that:-

“In terms of Section 18(2) of the Land Registration Act, proprietors of registered land with a boundary dispute are obligated to first seek redress or solution from the Land Registrar before moving or escalating the dispute to this court. That where such a party fails to do so and comes to court without first seeking redress from the Land Registry, the court being a court of law has to remind such a party that he/she has moved the court prematurely. That the provisions of Section 18(2) of the Land Registration Act shows clearly that the court is without jurisdiction on boundary dispute of registered land until after the Land Registrar’s determination of the same has been rendered.”

In this matter, the court finds that since the parties herein had invited the *District Surveyor* over confirmation of the boundaries once one party was dissatisfied with the *Surveyors Report*, they ought to have escalated the matter to the **Land Registrar**. In the case of *Geoffrey Muthinja Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others (2015)eKLR*, the court stated that:-

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be for of last resort and not the first port of call the moment a storm brews... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the court.... This accords the Article 159 of the Constitution which commands courts to encourage alternative means of dispute resolution.”

I see no reason to interfere with the decision of the Trial Magistrate. This court appreciates that an appellate court will not ordinarily interfere with the findings of fact of the trial court unless they were based on no evidence at all, or on misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. The court finds that the decision by the Trial Magistrate was judiciously arrived at. I find this appeal is not merited and I dismiss it with no orders as to costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 23<sup>RD</sup> FEBRUARY 2021.**

**N.A. MATHEKA**

**JUDGE**