



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC CASE NO. E 0015 OF 2020**

**SAIGULU MELITA**

**LEMOMO NTIOLO**

**(Suing as the legal administrators of the estate of**

**NKEYEYIA OLE NTIOLO).....PLAINTIFF**

**VERSUS**

**BENSON MBOYA TAIKO.....1<sup>ST</sup> DEFENDANT**

**LEKENAH TAIKO KIROYIA.....2<sup>ND</sup> DEFENDANT**

**LEMOMO OLE TAIKO.....3<sup>RD</sup> DEFENDANT**

**(Sued as the Administrators of the estate of**

**NKORPUDUO NYIKA –deceased)**

**WINDLAB PTY LIMITED.....4<sup>TH</sup> DEFENDANT**

**LAND REGISTRAR, KAJIADO COUNTY.....5<sup>TH</sup> DEFENDANT**

**RULING**

What is before Court for determination is the 1<sup>st</sup> to 3<sup>rd</sup> Defendants' Notice of Preliminary Objection dated the 3<sup>rd</sup> October, 2020 where they contend that the suit is fatally defective and incompetent.

The 4<sup>th</sup> Defendant supported the Preliminary Objection.

The Plaintiffs' opposed the Preliminary Objection by filing a replying affidavit sworn by SAIGELU MELITA where he deposes that the said Objection does not raise any point in law. He explains that a valid preliminary objection if successful should dispose of the suit, which is not a possibility herein since the issues of fraud, illegality and trespass will be left undetermined. He confirms that the origin of the suit was on determination of the boundaries by the Land Registrar, but it has since evolved into a claim for trespass, fraud, illegality and revocation of Title. Further, the pleadings could not have been filed while excluding the Land Registrar. He insists the Registrar had already determined the boundaries and issued new titles while cadastral map had been sketched. Further, the Land Registrar having authorized a resurvey which determined the position of the boundaries and issued titles, his role is functus officio and the Court can now proceed to determine the issues of fraud, illegality and unprocedurality which has been raised. He contends that the Court can determine a dispute emanating from a boundary related issue where the said Boundaries had been determined. Further, the court can order for rectification of register. He avers that the Land Registrar cannot be allowed to issue fraudulent titles then be allowed to revoke the same as this would amount to impunity. He reiterates that it would be pointless to refer the matter back to the Land Registrar who assumedly had determined the position of their neighbours' land. Further, that the matter of fraud has been reported to the Director of Criminal Investigations.

The Notice of Preliminary Objection was canvassed by way of written submissions.

**Analysis and Determination**

Upon consideration of the instant Notice of Preliminary Objection including the replying affidavit and rivaling submissions, the only issue for determination is whether this suit should be dismissed for being incompetent.

The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in their submissions contend that the main issue in this suit is a boundary dispute which should have first been determined by the Land Registrar in accordance with section 18 of the Land Registration Act. They relied on various decisions including **Shadrack Korir V Felix Kipkemboi Simei & 2 Others (2020) eKLR**; **George Kamau Macharia Vs Dexka Limited ( 2017) eKLR** and **Michael Maluti & 5 Others Vs Julius Mbau Nzyuko & 2 Others ( 2019) eKLR** to buttress their averments.

The Plaintiffs in their submissions insist they have raised issues of trespass, illegality and fraud in the Plaintiff which ought to be determined. Further, the boundary had already been determined. To buttress their arguments, they relied on the decisions of: **Mukhisa Biscuit Manufacturers Ltd. vs. West End Distributors Ltd. [1969] E.A. 696** and **Shadrack Korir V Felix Kipkemboi Simei & 2 Others (2020) eKLR**.

On perusal of the Plaintiff, I note there are averments of fraud and illegality particularized therein. Further, the prayers sought in the Plaintiff include declaration of ownership of land; injunction; revocation of the resurvey and mutation increasing the acreage of Kajiado/ Elangata Wuas/ 17; order directing re survey and revocation of title.

I note the Plaintiffs have pleaded that the 1<sup>st</sup> to 3<sup>rd</sup> Defendants' parcel of land had been resurveyed and increased in acreage culminating in the dispute herein. Further, the 1<sup>st</sup> to 3<sup>rd</sup> Defendants have not denied that their parcel of land was resurveyed as previously it was known as Kajiado/ Elangata Wuas/ 17 and now Kajiado/ Elangata Wuas/ 3083 after resurvey.

In the case of **Mukhisa Biscuit Manufacturers Ltd. vs. West End Distributors Ltd. [1969] E.A. 696** – the Court of Appeal held that:-

***“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 has to be ascertained or if what is sought is the exercise of judicial discretion.***

***The improper raising of points by way of Preliminary Objection does nothing but unnecessarily the costs and on occasion, confirm the issues. This improper practice must stop,” as per Sir Charles New Bold.’***

According to Section 13 (2) of the Environment & Land Court Act this court has jurisdiction to determine issues emanating from title to land which includes trespass to land.

The Plaintiffs in their Plaintiff contended that they were not informed nor invited for the resurvey which had the effect of encroachment on their land.

Section 19(2) of the Land Registration Act provides that:’ **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.’**

I note as per the provisions of the said section 19 (2) of the Land Registration Act, the Land Registrar who is mandated to deal with issues of boundaries is required to notify all the affected parties. Since the Plaintiffs claim no such notices were issued when the 1<sup>st</sup> to 3<sup>rd</sup> Defendants parcel of land was being resurveyed, which fact the said Defendants have not denied, I opine that they are entitled to move to this court for redress.

It is further my considered view that even if the Plaintiffs' suit herein revolves around a boundary dispute, I note the issues raised within the suit are pertinent and cannot be determined at this juncture. Further, the issues being raised in the preliminary objection require evidentiary proof before the same can be determined.

It is against the foregoing that I find the Preliminary Objection dated 3<sup>rd</sup> October, 2020 unmerited and proceed to disallow it.

Costs will be in the cause.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT KAJIADO THIS 23<sup>RD</sup> MARCH, 2021**

**CHRISTINE OCHIENG**

**JUDGE**