



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC CASE NO. 178 OF 2016

JOSHUA ODONGO ORON.....PLAINTIFF

VERSUS

KENYA NATIONAL HIGHWAYS AUTHORITY.....1ST DEFENDANT

THE ATTORNEY GENERAL.....2ND DEFENDANT

RULING

Joshua Odoyo Oron (hereinafter referred to as the Plaintiff) has come to court against Kenya National Highways Authority and the Attorney General claiming to be the registered owner of the freehold titles number Kisumu/Korando/2284 and Kisumu/Korando/2286 measuring approximately 0.2 hectares and 035 hectares respectively. Adjudication on the respective parcels of land was finalized on 18/8/1980.

The dispute between the plaintiff and the defendants is basically revolving on encroachment by the defendants on the plaintiff's land due to the expansion of a government road. The plaintiff seeks orders of injunction restraining the defendants from acquiring encroaching into all that parcel of land known as KISUMU/KORANDO/2284 and the valuation of the area acquired or encroached into by the defendants.

If the boundary between the Road reserve and the suit parcels of land is re-established, then the court will be able to ascertain whether the 1st Defendant has encroached into the parcel of land known as Kisumu/Korando/2284.

The 1st Defendant contested that the section in dispute borders Kisumu /KorandoK/2286 and the road reserve and that the plaintiff has encroached on the road reserve by 20 meters.

The 1st Defendant has filed a notice of Preliminary Objection that the survey report undertaken by the regional surveyor is not and cannot constitute the dispute resolution mechanism contemplated to be undertaken by the Land Registrar under provision of section 19 (1) (2) and 3 of the Land Registration Act 2012 Chapter 300 Laws of Kenya as read with Section 18 (1) and (3) thereof and Article 159 (2) of the Constitution of Kenya and that this being a boundary dispute, the court lacks jurisdiction.

In his submissions, the 1st Defendant argues that the reliefs the plaintiff seeks depend on determination of boundary. The 1st Defendant further submits that the parties herein are obligated to first seek redress or resolution from the Land Registrar before moving or escalating the dispute to this court or any court of law.

According to the 1st defendant, the suit is premature before a boundary dispute determination contemplated by law.

The plaintiff on his part submits that in the instant case, there are several disputed facts including the width of the road at the locus in quo to some of the plaintiff's parcel of land and whether the actions of the 1st defendant amount to compulsory acquisition of the plaintiff's parcel of land and whether the plaintiff is entitled to compensation.

The locus classicus on the issue of jurisdiction in this country is the case of **OWNERS OF MOTOR VESSEL "LILLIAN S" .V. CALTEX OIL KENYA LTD 1989 KLR 1** where the late **NYARANGI J A** stated as follows:-

"I think it is reasonably plain that a question of jurisdiction ought to be raised 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. Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

Jurisdiction of a Court or Tribunal is donated by the constitution or other written law. It is the foundation upon which a Court of law determining any dispute before it must base its decision because any orders made without jurisdiction are a nullity. That is why the issue of jurisdiction must be raised at the earliest stage in the trial process but there is nothing to stop the Court, suo moto, from raising and determining it at any stage of the proceedings.

In **OWNERS & MASTERS OF THE MOTOR VESSEL "JOEY" .V. OWNERS & MASTERS OF THE MOTOR TUG "BARBARA AND "STEVE b" 2008 1 E.A 367**, the Court of Appeal expressed itself as follows on that issue:-

"The question of jurisdiction is a threshold issue and must be determined by a Judge at the threshold stage using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised 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."

The Court then went on to add that: -

"It is for that reason that a question of jurisdiction once raised by a party or by a Court on its own motion must be decided forthwith on the evidence before the Court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the Court." Emphasis added.

I have considered the Preliminary Objection and rival submissions and do find that this suit is not a boundary dispute between the owner of suit parcels of land named herein and the 1st defendant on the basis of the road reserve as there is no evidence that the boundary has not been fixed and determined. Moreover, the parcels of land are registered and the area mapped and therefore the surveyors report can guide the court on the issue of encroachment. There is no boundary dispute herein as the boundary appears to have been fixed after adjudication. The issues raised by the plaintiff for compensation for the alleged compulsory acquisition or encroachment by the defendants will be determined on the basis of the existing maps that show the boundary between the disputed parcel of land and the road reserve. The same fall within the jurisdiction of this court.

This court with the assistance of the land surveyor is able to determine whether the either party has encroached on the other's parcel of land.

The provisions of Section 18 of the Land Registration Act had the intention of reserving boundary disputes for the Land Registrar who can visit the site and determine the dispute however do not deter the

court from determining whether a party has encroached on another's property.

Section 18 of the Land Registration Act Provides:-

“18. (1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.

(2) 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.

(3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary:

Provided that where all the boundaries are defined under section 19 (3), the determination of the position of any uncertain boundary shall be done as stipulated in the Survey Act, Cap. 299.”

Section 19 provides:

“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.”

The defendants have not demonstrated to this court that the boundaries of the suit parcels of land have not been determined in accordance with the provisions of section 18 of the land Registration Act Cap 300 laws of Kenya. There is no evidence that the boundary between the suit parcel of land and the road reserve is not fixed. Conversely, there is no evidence that the cadastral map and any filed plan which indicate the approximate boundaries and the approximate situation only of the parcel do not exist.

For the defendant to succeed in the preliminary objection he will be required to prove that the boundary has not been fixed and that there is a boundary dispute. Ultimately I do find that the dispute is basically revolving on the tort of trespass. I do find that the preliminary objection has no basis and is dismissed with costs.

DATED AT KISUMU THIS 11th DAY OF MARCH, 2021

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE