



**REPUBLIC OF KENYA**

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

**ELC SUIT NO. 545 OF 2017**

**GATUNDU HOUSING COOPERATIVE**

**SOCIETY LIMITED.....PLAINTIFF**

**VERSUS**

**NDATHIA KAWERU.....1<sup>ST</sup> DEFENDANT**

**PAUL KAGONDO.....2<sup>ND</sup> DEFENDANT**

**JOSEPH MUTHAMA.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

By a **Plaint** dated 2<sup>ND</sup> May 2017, and filed on 22<sup>nd</sup> May 2017, the **Plaintiff** has sought for **Judgement** against the **Defendants** jointly and severally for the following orders:-

**1. That the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants be evicted from the Plaintiffs suit premises NGENDA/GITHUNGUCHU/ 644/48 and all the illegal structures erected thereon be demolished rendering vacant possession of the same and also provide its access towards Ituro road.**

**2. Costs of the suit**

**3. Any other relief the court deems fit.**

In its statement of claim, the **Plaintiff** stated that it is the proprietor of the premises known as **NGENDA/GITHUNGUCHU/644/48**, and its claim is for **eviction of the Defendants** and **removal of their illegal structures encroaching on the suit premises**. That on 22<sup>nd</sup> February 2017, the **Plaintiff** demanded that the **Defendants** do vacate its encroached portion by removing the structures and rendering free access to Ituro Road, but they have failed and neglected to do so. That if the **Defendants** are not evicted, the **Plaintiff** will continue to suffer immeasurable losses and damage. The **Plaintiff** contended that though it has issued several demand and notices for the **Defendants** to vacate the suit premises, they have failed to do so.

The suit is contested and the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> **Defendants** filed a **Defence** dated 29<sup>th</sup> July 2017 and filed on 2<sup>nd</sup> August 2017 and denied all the allegations contained in the **Plaint**. They admitted that the **Plaintiff** is the owner of the suit property to wit **Ngenda/Githunguchu/644/48, and they own plots adjacent to it being plots No.120, 119 and 140**. That since 1970's, the **Plaintiff** has been in occupation of its plot while each **Defendant** has been in occupation of his plot as allocated by the then **Kiambu County Council**. That the **Clerk to the Council upon study of the area map dismissed Plaintiff's claim in the year 2012, when it made a complaint that they had encroached on its plot. Further that upon its investigation, the defunct Thika County Council, where the plots were situated found the Plaintiff's claim to be baseless**

Upon close of pleadings, the matter proceeded by way of *viva voce* evidence on the 27<sup>th</sup> January 2020, wherein the **Plaintiff** called one witness and the **Defendants** also called one witness.

**PLAINTIFF'S CASE**

**PW1 – Patrick Munyua Chege**, testified that he was the **Plaintiff's Chairman** and adopted his witness statement and his list of documents as exhibit 1. That as per the allocation documents from **County Government of Kiambu**, the size of the land is not given. That the land was allocated in 1960, and the **Plaintiff** built on one part of the plot, but it did not give a development plan. That in **August 2017**, the **Plaintiff** was given a letter of allotment and by then, the **Defendants** had developed the land which they built structures **20 years** ago.

He further testified that a survey was done and the process of obtaining lease began, but the Plaintiff has not gotten the lease and it annexed letters dated 2014 after the letter of allotment were issued to it. That the land was allocated in 1960 and that when the Defendants developed the land, the **County Council of Kiambu** was aware and both parties pay rates. That their issue is a boundary dispute. Further that as per the letter of allotment, the plot is **40 by 80 ft**. That Defendants' plot is adjacent to the main road and he was not present when the plots were pointed out to the Defendants.

On re-examination, he testified that he wanted the Defendants to move out of the Plaintiff's land which they have encroached on since 2011. That they noted that their beacons were in the Defendants' land. It was his evidence that the District Surveyor informed the Plaintiff that the Defendants had encroached on their land by 2.4 meters by 9 ft.

### **DEFENDANTS' CASE**

**DWI – PAUL KAGONDO**, who is 2<sup>nd</sup> Defendant adopted his witness statement dated **29<sup>th</sup> July 2017**. He further urged the Court to adopt his co-Defendants statements. That they filed a common list of documents dated **29<sup>th</sup> July 2017**, and he produced it as Exhibit 1 to 10.

That he was allocated the plot by the **County Government of Kiambu** and he has been there for over 20 years as he was allocated the plot when it was vacant. He denied encroaching on the Plaintiff's plot or that the Plaintiff has ever approached him. That their plots are situated where they were shown by the County Council of Kiambu.

After close of viva voce evidence, the Court directed the parties to file written submissions and in line with the said directions, the Plaintiff through the *Law Firm of J.W Ngetho & Co. Advocates*, filed their written submissions on **17<sup>TH</sup> November 2020**. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants through the *Law Firm of Waithira Mwangi & Co. Advocates* filed their submissions on **9<sup>th</sup> December 2020**, which the Court has carefully read and considered and renders itself as follows;

It is not in doubt that the Plaintiff is the registered owner of **L.R Ngenda/Gichunguchu/644/48**, while the Defendants are the registered owners of **L.R 644/120,119 and 140**, which are fully developed. The Plaintiff has sought for eviction of the Defendants from **L.R 644/48**, on the basis that they have encroached on its property and further that their structures have encroached on the Road that have blocked their access to **Ituro Road**. In his evidence, PW1 acknowledged that the issue is a boundary issue. Further the Court ordered that the County Surveyor of Kiambu do visit the disputed land and carry out a survey. The above happening, have necessitated the Court to question whether it has jurisdiction to deal with the matter as per the report by the Surveyor, the Surveyor in his Conclusion, indicated that the area in contention relates to unsurveyed market plan and that the boundaries on the plan had not been surveyed.

**Blacks Law Dictionary Free Online Legal Dictionary 2<sup>nd</sup> Ed** defines survey as:-

*The process by which a parcel of land is measured and its contents ascertained.*

Further the **Wikipedia**, defines **Surveying** or **land surveying** as the technique, profession, art, and science of determining the terrestrial or three-dimensional positions of points and the distances and angles between them.

**Section 18** of the **Land Registration Act** provides:-

*“(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.*

*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”.*

Therefore, it is not in doubt that where boundaries have not been fixed, this Court does not have jurisdiction to deal with the matter. The Sub County Surveyor in his report was categorical that the land was unsurveyed and therefore boundaries had not been fixed and went ahead to correctly opine that the Court could not determine the dispute unless the boundaries were fixed. It therefore follows that the same being a boundary issues, this Court is not clothed with the requisite jurisdiction and only the **Land Registrar** can determine the said boundaries as the provisions are couched in mandatory terms and as was held in the case of **Ratilal Ghela Shah & 2 Others...Vs...Menkar Ltd (2018) eKLR**.

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

The Court will also concur with the findings in the case of **Willis Ocholla...Vs...Mary Ndege (2016) eKLR**, where 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.”*

The Upshot of the foregoing is that this Court has **no** requisite jurisdiction to deal with this matter. Without Jurisdiction, the Court has no

option but to down its tools. See the case of Owners of Motor Vessel 'Lilian S'...Vs...Caltex Oil (Kenya) LTD (1989) 1 KLR, where the Court held that:-

***“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 downs its tools in respect of the matter before it at the moment it holds the opinion that it is without Jurisdiction.”***

Consequently, the ***Court strikes out the Plaintiff's entire suit and all the consequential pleadings for lack of jurisdiction. Costs usually follow the events. The Plaintiff having filed the suit in a Court without requisite Jurisdiction will bear costs of the suit.***

*It is so ordered.*

**DATED, SIGNED AND DELIVERED AT THIKA THIS 29TH DAY OF APRIL 2021.**

**L. GACHERU**

**JUDGE**

**29/4/2021**

**Court Assistant – Phyllis**

**ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**With Consent of and virtual appearance via video conference – Microsoft Teams Platform**

**M/s Ndirangu holding brief for M/s Ngetho for the Plaintiff**

**No appearance for the 1<sup>st</sup> Defendant**

**No appearance for the 2<sup>nd</sup> Defendant**

**No appearance for the 3<sup>rd</sup> Defendant**

**L. GACHERU**

**JUDGE**

**29/4/2021**