



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC CASE NO. 69 OF 2020**

**MUTUNKEI OLE KEREYA KAYIE.....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**

**AND**

**WINDLAB DEVELOPMENTS KENYA LIMITED.....INTERESTED PARTY**

**RULING**

What is before Court for determination is the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' Notice of Preliminary Objection dated the 26<sup>th</sup> November, 2020 in which they claim that this suit is fatally defective and incompetent.

The 4<sup>th</sup> Defendant and the Interested Party both supported the said Preliminary Objection.

The Plaintiff opposed the Preliminary Objection by filing a replying affidavit sworn by MUTUNKEI OLE KEREYA KAYIE where he deposes that the said Preliminary Objection does not raise any point in law and must fail on that ground. He explains that a preliminary objection ought to pre-determine a suit. Further, a valid preliminary objection should dispose of the suit, which is not a possibility herein since the issues of fraud, illegality and trespass will have to be left undetermined. He explains that although the origin of the suit was on determination of the boundaries by the Land Registrar, but the suit 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 contends that the Registrar had already determined the boundaries and issued new titles while cadastral map had been sketched. Further, that the Land Registrar's role in now functus officio as he authorized a resurvey and issued titles. He reiterates that this Court can entertain a dispute emanating from a boundary related issue where the said Boundary has been determined, a map prepared and Titles issued. Further, the Court has jurisdiction to order for rectification of the register where it is satisfied that the registration was obtained by fraud which is the contention herein. 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. Further, that it would be pointless to refer the matter back to the Land Registrar who assumedly had determined the position of his neighbours' land and only informed him of the outcome when he had already issued a new title based on fraud and misdeeds. He states that the matter of fraud has been reported to the Director of Criminal Investigations and it is pending investigations.

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

**Analysis and Determination**

Upon consideration of the Notice of Preliminary Objection dated the 26<sup>th</sup> November, 2020 including the replying affidavit and respective submissions, the only issue for determination is whether this suit should be dismissed for being fatally defective and incompetent.

The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in their submissions insist the fulcrum of the suit revolves around a boundary dispute which should have first been determined by the Land Registrar in accordance with section 18 and 19 of the Land Registration Act. They contend that this court does not have jurisdiction to deal with this matter as it is. They relied on various decisions including **Shadrack Korir V Felix Kipkemboi Simeji & 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 Plaintiff in his submissions contend that this court has jurisdiction to deal with this matter as the issues raised in the Complaint include fraud, encroachment and revocation of title. He makes reference to section 18(2) of the Land Registration Act and insists the boundary had already been determined. To buttress his arguments, he relied on the decision of **Mukhisa Biscuit Manufacturers Ltd. vs. West End Distributors Ltd. [1969] E.A. 696**.

From perusal of the Complaint, I note at paragraphs 10 and 15, there are averments of fraud and illegality particularized therein. Further, the Plaintiff has sought prayers for declaration that he is the owner of land parcel number Kajiado/ Elangata Wuas/ 3083 per the mutation of April, 1972; permanent injunction restraining 1<sup>st</sup> to 4<sup>th</sup> Defendants from trespassing on land parcel number Kajiado/ Elangata Wuas/ 595; revocation of the resurvey and mutation increasing the acreage of Kajiado/ Elangata Wuas/ 17; and an order directing re survey and revocation of title for Kajiado/ Elangata Wuas/ 595 issued on 15<sup>th</sup> October, 2020.

The Plaintiff 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, which fact they have not denied. I further note that the 1<sup>st</sup> to 3<sup>rd</sup> Defendants are yet to file their Defence to deny the Plaintiff's averments.

In the case of **Mukhisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Company Limited (1969) EA 696**; the Court 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 increase costs and, on occasion, confuse the issues. This improper practice should stop.'**

Further in the case of **Independent Electoral and Boundaries Commission V Jane Cheperenger & 2 Others Civil Application No. 36 of 2014**, the Supreme Court reiterated the principles set out in the aforementioned case and held as follows: **'A preliminary objection consists of a point of law which has to be pleaded or which arises by clear implication out of the 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.'**

While in the case of **Avtar Singh Bhamra & Another Vs Oriental Commercial Bank, Kisumu HCCC No.53 of 2004**, the Court held that: **"A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained."**

In the instant case, the 1<sup>st</sup> to 3<sup>rd</sup> Defendants had not filed any Defence to controvert the Plaintiff's averments. To my mind the 1<sup>st</sup> to 3<sup>rd</sup> Defendant's Preliminary Objection require to be anchored on their pleadings. The Defendants have not demonstrated nor presented any materials to show how this suit offends the provisions of section 18 (2) of the Land Registration Act, as it relates to a boundary dispute hence this court has no jurisdiction to entertain it. The Plaintiff in his Complaint contends that he was not informed nor invited for the resurvey of the disputed lands which had the effect of encroachment on his 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 Plaintiff claims 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 he is 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, there are pertinent issues raised within the Complaint which cannot be determined at this juncture. Further, the issues being raised in the preliminary objection require evidentiary proof before the same can be determined.

Based on the facts as presented while associating myself with the decisions cited above, it is my considered view that since no Defence was filed and there are no facts pleaded by the Defendants as pure points of law to enable the court ascertain if the same is correct or not, at this juncture I find the Preliminary Objection premature. On the issue whether this Court has jurisdiction to deal with the instant case. I wish to refer to section 13 of the Environment and Land Court Act which confers jurisdiction to this Court and provides that: **'(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.'**

**Section 13 (2) (c) & (d) further stipulates that ' in exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, the Court shall have power to hear and determine disputes - (c) relating to land administration and management;**

**(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land'**

I note the Plaintiff has alleged fraud, trespass and illegality in his Pleint and in relying on the legal provisions cited above, I find that this court indeed has jurisdiction to handle the instant suit. In the circumstance, I beg to disagree with the Defendants that this Court is devoid of jurisdiction to determine this case. I opine that the Defendants are simply seeking to rely on technicalities to defeat the Plaintiff's claim before the matter is heard and determined. Further, Pursuant to article 159 (2) (d) of the Constitution, I find that the Defendants' action of filing a Preliminary Objection before even filing a Defence is indeed a defeated avenue.

In the circumstance, I find the Notice of Preliminary objection dated the 26<sup>th</sup> November, 2020 unmerited and will disallow it.

Costs will be in the cause

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

**CHRISTINE OCHIENG**

**JUDGE**