



Virji Vishram Patel and Co Ltd v Aristocrats Concrete Ltd (Environment & Land Case E082 of 2022) [2023] KEELC 17384 (KLR) (8 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17384 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E082 OF 2022**

A NYUKURI, J

MAY 8, 2023

BETWEEN

VIRJI VISHRAM PATEL AND CO LTD PLAINTIFF

AND

ARISTOCRATS CONCRETE LTD DEFENDANT

RULING

Introduction

1. Before court is the notice of motion dated December 2, 2022 filed by the defendant seeking for orders that the plaint filed herein and dated November 14, 2022 be struck out.
2. The application is premised on the affidavit of Pravin Patel, the defendant's director sworn on December 5, 2022. It is the applicant's case that the plaintiff was not the registered owner of LR No 22068 IR No 83313 (suit property) as at the date of filing suit and that the plaintiff pleaded that the defendant had encroached on the suit property and that by virtue of section 18 (2) of the [Land Registration Act](#), this court has no jurisdiction to entertain this suit as the same is a boundary dispute. He stated that the suit property was registered in the name of Superstone (2006) Limited as per the search conducted by the defendant.
3. He also averred that the plaintiff's claim is based on use of the land and that the plaintiff is not the registered proprietor thereof.
4. The application is opposed. The defendant filed replying affidavit sworn on January 17, 2023 by Manish Patel, the plaintiff's director. It was the respondent's position that the basis upon which the application is anchored is a misconception as the plaintiff's claim is in regard to what happened when they were the registered proprietors of the suit property and that the plaintiff's claim for Kshs 153,600,000/- was for the value of materials extracted without the plaintiff's permission when the land belonged to the plaintiff.



5. On the question of the matter being a boundary dispute, he stated that the boundaries of the suit property are fixed boundaries as demonstrated in the deed plan and the surveyor's report.
6. Manji Mepani, a Director of Superstone (2006) Limited also swore a replying affidavit dated January 17, 2023. He stated that his company Superstone (2006) Limited purchased the suit property from the plaintiff and the transfer thereof was registered on June 13, 2022. That at the time of purchase, it was noted that the owners of LR No 22069 had excavated huge amounts of rock from LR No 22068. He further stated that as his company was buying the land on "as is" basis, it was agreed that the plaintiff would pursue the defendant for the materials unlawfully excavated from the suit property.
7. Joseph Minja Mutugi also swore a replying affidavit dated January 17, 2023, in response to the application. He stated that he was a land surveyor working at Datum Surveys and Land Consultants Ltd. That he was instructed to confirm whether the owner of LR No 22069 had encroached onto LR No 22068. That he prepared a report and he confirmed that the boundaries of the properties herein are fixed boundaries. That the property in issue has a cadastral survey in accordance with the repealed Registration of Titles Act cap 281 and that this property's boundaries are not determined by Registered Index Map (RIM) which only give relative positions of boundaries that would require to be fixed by the Registrar.
8. The application was disposed by way of written submissions. On record are the defendant's/applicant's submissions dated March 17, 2023 as well as the plaintiff's/respondent's submissions dated March 27, 2023, which the court has taken into account.

Analysis and Determination

9. I have carefully considered the application, three replying affidavits as well as submissions. In my considered view, the issue that arise for determination is whether the suit should be struck out on ground that the plaintiff is not the registered proprietor of LR No 22068 and that the dispute herein is a boundary dispute hence this court has no jurisdiction to determine the suit.
10. On whether the suit should be struck out because the plaintiff is not the registered proprietor of the suit property, I have considered the plaint and the plaintiff's witness statement and it is clear that the crux of the plaintiff's claim is that between June 17, 2009 and June 13, 2022, the plaintiff was the registered proprietor of LR No 22068 which they thereafter transferred to Superstone (2006) Limited. Further that the defendant who owns the neighbouring parcel being LR No 22069 encroached on the land then registered in the plaintiff's name within that time and extracted materials therefrom, without the plaintiff's consent and therefore the plaintiff sought for compensation for the loss suffered due to the defendant's alleged encroachment.
11. Essentially, the material time as stated by the plaintiff is between June 17, 2009 and June 13, 2022. The defendant presented a search of the suit property issued on November 24, 2022 to argue that when the suit was filed on November 15, 2022, the suit property was not registered in the plaintiff's name.
12. Clearly, the defendant is referring to a different time and not the material time upon which the plaintiff's claim rests. The same search produced by the defendant confirms the plaintiff's position that they were the registered proprietors of the suit property between June 17, 2009 and June 13, 2022 when they transferred the suit property to Superstone (2006) Limited, as shown in entry numbers 2 and 6 of the search.
13. Therefore the defendant's contention that the suit should be struck out because the plaintiff was not the registered proprietor of the suit property as at the time of filing suit has no merit as that fact, which



is not denied by the plaintiff has no bearing on the issues arising in this dispute, because the period referred to by the defendant is not material to this dispute.

14. In any event, the right to be heard on merit is a constitutionally protected right which must be jealously guarded. The core business of this court is to hear parties on merit and to grant them opportunity to be heard and to have their day in court, however weak their cases may appear to be. Striking out a suit based on factual contestations, which can be properly addressed in a trial is against the spirit and import of article 50 of the Constitution of Kenya 2010 and this court will not accede to an invitation by the defendant to strike out the plaintiff's suit without any proper justification. The defendant has not demonstrated the nature of the prejudice or injustice they will suffer if the plaintiff's suit is heard on merit. Therefore it is the finding of this court that the argument that the suit should be struck out because the plaintiff is not the registered proprietor of the suit land is baseless, misleading and the same is rejected.
15. On the question of whether this suit is a boundary dispute and that therefore this court lacks jurisdiction by dint of section 18 of the Land Registration Act, I note that the suit property as well as the neighbouring parcel LR No 22069 are all registered under the Registration of Titles Act cap 281 (repealed). Under that Act, the parcel boundaries are fixed as the same are based on a cadastral survey creating linear and angular measurements. Those boundaries should be differentiated from approximate or general boundaries that are indicated in Registry Index Maps (RIM).
16. Section 18 of the Land Registration Act provides in respect of boundaries as follows;
 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.
17. It is therefore clear that where there is a boundary dispute in relation to an approximate or general boundary, such dispute should be determined by the Land Registrar. However, where the boundaries are fixed the dispute ought to be determined by the court.
18. As the boundaries of the two properties in dispute herein are fixed boundaries, the dispute herein is not within the Land Registrar's jurisdiction. Where boundaries are fixed, the surveyor's evidence in respect of the dispute may be presented in court as surveyors are the persons with the technical knowledge on the issue of situation of boundaries.
19. In the premises, the defendant's application dated December 2, 2022 has no merit and the same is dismissed with costs to the plaintiff.
20. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 8TH DAY OF MAY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM



A. NYUKURI

JUDGE

In the Presence of;

Mr. Nganga for Plaintiff/Respondent

Ms Kimona holding brief for Mr. Bundotich for Defendant/Applicant

Ms Josephine – Court Assistant

