



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 95 OF 2019

PJ DAVE FLOWERS LIMITED.....PLAINTIFF

VERSUS

PAUL KUYA KISOSO.....DEFENDANT

DISTRICT LAND REGISTRAR.....1ST INTERESTED PARTY

DISTRICT SURVEYOR KAJIADO.....2ND INTERESTED PARTY

RULING

What is before Court for determination is the 1st Defendant's Notice of Preliminary objection dated the 27th November, 2019, to the Plaintiff's suit and Application both dated 30th October, 2019 and filed on 31st October, 2019, which is based on the following grounds:

1. It offends the provisions of section 18 (2) of the Land Registration Act, as the suit relates to a boundary dispute and this Honourable Court is precluded from entertaining any action or any proceedings relating to a boundary.
2. In the circumstances, the suit and the Application are a clear abuse of the Court process.
3. By reason of the aforesaid provisions of the law, the Suit and Application herein are premature, misconceived, incompetent and complete nullity; and
4. Further, by reason of the aforesaid provisions of the law, this Honourable Court has no Jurisdiction to entertain the Suit and the Application herein, which should therefore be struck out with costs to the 1st Defendant/ Respondent.

The Plaintiff opposed the Preliminary Objection by filing a replying affidavit sworn by HITESH PRAVIN DAVE, its Director who avers that the Defendant is not the registered owner of the adjacent property that borders land parcel number KAJIADO/ KAPUTEI NORTH/ 4320. He insists this case is not a boundary dispute and the court has jurisdiction to entertain it.

Both the Plaintiff and the Defendant filed their respective submissions to canvass the preliminary objection.

Analysis and Determination

Upon consideration of the materials presented in respect of the Preliminary Objection, the only issue for determination is whether the Court has jurisdiction to entertain this matter.

The Plaintiff sued the Defendants and sought for the following orders:

- a) A declaration that the Plaintiff is the legal and lawful owner of the parcel of land known as KAJIADO/ KAPUTEI NORTH/ 4320.
- b) A permanent injunction do issue restraining the Defendant, whether acting by himself, servants, employees, agents including or any other person acting under his instructions from trespassing, repossessing, holding, advertising, offering for sale, selling and/or interfering with the Plaintiff's possession of all that property known as Title Number KAJIADO/ KAPUTEI NORTH/ 4320.
- c) An order of eviction of the Defendant from the parcel of land known as KAJIADO/ KAPUTEI NORTH/ 4320.
- d) An order to Officer Commanding Station Isinya Police Station to provide assistance in enforcing the orders provided by the

Honourable Court.

e) General damages for trespass.

f) Costs of this suit and interest.

The Defendant did not file any Defence to controvert the Plaintiff's averments but proceeded to file the instant Notice of Preliminary Objection. The Interested Parties filed their Defence to controvert the Plaintiff's averments. I note in the Plaintiff's Complaint, the Plaintiff has laid a claim over the suit land as well as pleaded that the Defendant had trespassed on it. In the Notice of Preliminary Objection the Defendant contends that this is a boundary dispute. In the submission, the Defendant states that his wife is the registered proprietor of land parcel number Kajiado/ Kapatiei North/ 1263 and that there is a road which the County Government remapped. Further, the surveyor undertook the remapping exercise but no beacons were placed on the disputed site hence the dispute herein is a boundary dispute and not trespass to land.

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 Defendant has not filed any Defence to plead the averments he has raised in his submissions that his wife is the registered proprietor of land parcel number Kajiado/ Kapatiei North/ 1263 and that there is a road which the County Government remapped. Further, no beacons were placed after the remapping exercise with the dispute herein being a boundary one and not trespass. To my mind the Defendant's averments should be anchored on his pleadings and also require evidentiary proof. The Defendant has 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. Further the Plaintiff's allegations on trespass also require viva voce evidence to be adduced.

Based on the facts as presented while associating myself with the cited decisions, It is my considered view that since no Defence was filed and there are no facts pleaded by the Defendant 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 that this Court does not have 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'

The above provisions are distinct in terms of the jurisdiction of the Environment and Land Court. I note the Plaintiff has alleged trespass in its Complaint 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 Defendant that this Court is devoid of jurisdiction to determine this case. I opine that the Defendant simply seeks 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 Defendant's action of filing a Preliminary Objection before even filing a Defence is indeed a defeated avenue.

In the circumstance, I find the instant Notice of Preliminary objection dated 27th November, 2019 unmerited and will disallow it.

Costs will be in the cause

DATED SIGNED AND DELIVERED IN OPEN COURT AT KAJIADO THIS 13TH DAY OF APRIL, 2021.

CHRISTINE OCHIENG

JUDGE