



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. E018 OF 2020

KITAO RUPANDE PARKINARO.....PLAINTIFF

VERSUS

LETESH PARKINARO.....1ST DEFENDANT

JOSEPH KIRAMAT LETTESH.....2ND DEFENDANT

ISAIAH LETESH.....3RD DEFENDANT

RICHARD LETESH.....4TH DEFENDANT

STANLEY LETESH.....5TH DEFENDANT

RULING

What is before Court for determination is the 1st, 2nd, 3rd and 5th Defendants' Notice of Preliminary Objection dated the 8th December, 2020 where they contend that this suit is fatally defective and incompetent.

The Plaintiff filed a replying affidavit to oppose the Preliminary Objection and insisted that the same was not proper as it does not define exactly what the Defendants are objecting to. He avers that the Preliminary Objection does not state the point of law and does not meet the set criteria. He reiterates that the same should be dismissed with costs.

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 8th December, 2020 including respective submissions, the only issue for determination is whether this suit should be dismissed for being fatally defective and incompetent.

The 1st, 2nd, 3rd 5th Defendants in their submissions aver that this Court does not have jurisdiction to grant the orders sought as the fulcrum of the suit revolves around a boundary dispute which should first be determined by the Land Registrar in accordance with sections 18 and 19 of the Land Registration Act. They claim the Land Registrar was informed of the boundary dispute herein and issued summons dated the 18th September, 2012 which was duly served on the proprietors of the subject land. Further, the said summons mandated the Land Registrar to visit the disputed boundary on 11th October, 2012 but before the dispute could be settled the Plaintiff rushed to court. They reiterate that the suit and the application are fatally defective and incompetent, misconceived, bad in law as they violate the rule which requires registered proprietors of the land with a boundary dispute to first seek redress from the Land Registrar before moving to court. To buttress their averments, they relied on various decisions including **Shadrack Korir V Felix Kipkemboi Simei & 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**. They sought for the application dated the 25th November, 2020 and the Suit to be dismissed with costs.

The Plaintiff in his submissions insists the Preliminary Objection does not stem from pleadings and requires the court to ascertain the facts. Further, they have not stated what they are objecting to and it is thus improper before the court. He contends that the Preliminary Objection is meant to delay the suit and is misconceived and an abuse of the court process. He avers that this court has jurisdiction to entertain, hear or make any determination of the entire suit and application. To support his arguments, he has relied on the following cases: **Mukhisa Biscuit Manufacturers Ltd. vs. West End Distributors Ltd. [1969] E.A. 696**; **Hassan Nyanje Charo V Khatib Mwashetani & 3 Others (20140 eKLR)**; **Dawkins Vs Prince Edward of Save Weimber (1976) 1QBd 499**; **Jasbir Singh Rai & 3 Others V Tarlochan Singh Rai & 4**

Others (2014) eKLR and Oraro V Mbaja (2005) eKLR.

From perusal of the Plaintiff, I note the Plaintiff confirms being the registered proprietor of land parcel number KJD/ KITENGELA/ 30205. Further, at paragraphs 9 and 10 of the Plaintiff, he has pleaded that the Defendants have interfered with his peaceful possession of the land from October, 2020 by cutting down trees and digging a quarry. The Plaintiff has sought for a permanent injunction restraining the Defendants from trespassing, interfering and/ or encroaching on land parcel number KJD/ KITENGELA/ 30205.

Except for filing a replying affidavit to the Plaintiff's Notice of Motion application dated the 25th November, 2020, the Defendants did not file a Defence to deny the Plaintiff's averments but proceeded to file the instant Notice of Preliminary Objection.

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 of 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, I note in the summons from the Land Registrar annexed to the replying affidavit, it is dated 18th September, 2012 and was meant for a site visit to be conducted on 11th October, 2012. This suit is filed eight (8) years after the said summons. Further, there is no indication of the outcome of the said proposed visit. I note the Defendants filed a Surveyor's report prepared by a private surveyor, yet the provisions of sections 18 and 19 of Land Registration Act only mandates the Land Registrar to determine a boundary dispute. The Defendants had not filed any Defence to controvert the Plaintiff's averments nor to anchor the Preliminary Objection.

Based on the facts as presented while associating myself with the decisions cited above, I find that the Defendants' preliminary objection does not raise any points of law. Further, there are no pleadings filed to provide a basis for the same but requires the court to ascertain facts before it can be determined. 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 fulcrum of the dispute herein revolves around trespass to land. 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 8th December, 2020 unmerited and will disallow it.

Costs will be in the cause

Dated signed and delivered Virtually at Kajiado this 31st day of May, 2021.

CHRISTINE OCHIENG

JUDGE