



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 164 OF 2018

GREGORY MUTHEKE NDETI.....1ST PLAINTIFF

VINCENT SOMBA NDETI.....2ND PLAINTIFF

URBANUS KIOKO NDETI.....3RD PLAINTIFF

VERSUS

VICTOR KIOKO MUNYAKA.....1ST DEFENDANT

KIOKO MUSEMBI MUTAVI.....2ND DEFENDANT

MESHACK MAKAU NGUNIA.....3RD DEFENDANT

SETTLEMENT FUNDS TRUSTEES.....4TH DEFENDANT

PATRICK JOHN MBUYA.....5TH DEFENDANT

SINOE CONSTRUCTION LTD.....6TH DEFENDANT

KENYA RURAL ROADS AUTHORITY.....7TH DEFENDANT

RULING

1. This Ruling is in respect to the 1st and 3rd Defendants' Notice of Preliminary Objection dated 17th September, 2018. In the said Notice of Preliminary Objection, the Defendants have averred that the Plaintiffs do not have legal capacity to sue on behalf of the Estates of the deceased proprietors of parcel of land known as L.R. No. 10190.
2. The Defendants have further averred that no cause of action can be sustained as against the 2nd Defendant who is deceased and that the suit offends the mandatory provisions of the law and ought to be dismissed with costs.
3. The Preliminary Objection proceeded by way of written submissions. The 1st and 3rd Defendants' advocate submitted that all the Plaintiffs are co-administrators of different Estates; that an administrator should only do those things he is lawfully authorized to do by the Grant and the law and that none of the Plaintiffs is allowed by law to act unilaterally or deal with the Estate of the deceased persons in a manner that is prejudicial to the beneficiaries or the Estates.
4. Counsel submitted that the Plaintiffs instituted this suit without consent of their fellow administrators; that no consent from any of the Plaintiffs' co-administrators had been filed and that the Plaintiffs lack the requisite *locus standi* to file the current proceedings.
5. The 1st and 3rd Defendants' advocate submitted that in any event, this court does not have jurisdiction to hear and determine this dispute; that the Plaintiffs did not exhaust all the available remedies before instituting the suit; that Section 18(2) of the Land Registration Act provides that a proprietor of registered land with a boundary dispute is obligated to seek redress from the Land Registrar before escalating the case to this court and that the Plaintiffs moved this court prematurely.
6. Counsel submitted that a Surveyor's Report cannot be a substitute of a Land Registrar's determination under Section 18(2) of the Land

Registration Act. Counsel relied on several authorities which I have considered.

7. The Plaintiffs' counsel submitted that all the points raised in the Notice of Preliminary Objection are matters which can only be described as matters of fact; that they are points which would require the Plaintiffs to issue a rebuttal and that the same should have been raised through an Application.

8. Counsel submitted that the policy of the law is to hear and determine all cases and not to summarily dismiss them; that a court should never strike out a case if it has chances of success and that this matter should be heard on merit. The Plaintiffs' advocate relied on numerous authorities.

9. This suit was commenced by way of a Plaint dated 29th August, 2018. In the Plaint, the Plaintiffs deponed that they are co-administrators of the Estates of Mutheke Mutua Ndeti, Julius Kiilu Ndeti and Alfonse Nthiw'a Ndeti respectively.

10. The Plaintiffs' case is that the three deceased persons are brothers and are the registered Lessees as Tenants in common in equal shares of land known as parcel number L.R. No. 10190 located in Mua Hills within Machakos County; that the 1st-5th Defendants parcels of land share common boundaries with the Plaintiffs' land and that sometimes in the year 2016, the Plaintiffs noticed that various plot owners sharing a boundary with parcel number L.R. No. 10190 had encroached on the boundaries of the suit land and were interfering with the beacons marking the boundary.

11. According to the Plaintiffs, they reported the issue of the interference with the boundary of parcel number 10190 to the Land Registrar who in turn instructed the County Surveyor to visit the suit parcels of land for boundary re-establishment and that the Surveyor's report dated 27th July, 2016 confirmed that the 1st- 5th Defendants had encroached on the suit land.

12. In the celebrated case of *Mukisa Biscuit Manufacturing Company vs. West End Distributors Limited (1969) EA 696, at page 701*, the court defined a Preliminary Objection as follows:

“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 in 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 occasion confuse the issues. This improper practice should stop.”

13. In the case of *Grace Mwenda Munjuri vs. Trustees of the Agricultural Society of Kenya (2017) eKLR*, the Court of Appeal held as follows:

“We find that the preliminary objection contained contested matters and was vague as far as the point of law was concerned. See the case of Bashir Haji Abdullahi v Adan Mohammed Noor & 3 others [2004] e KLR, this Court stated as follows:

We must point out from the outset that the preliminary objections as formulated above are bare and bereft of any sufficient material and are couched in such a way that it is not possible for a party to whom they are addressed to sufficiently prepare and be ready to counter them. We are of the considered view that if a party wishes to raise a Preliminary Objection and files in Court a Notice to that effect and is subsequently served on other parties to the suit, the Preliminary points should be sufficiently particularized and detailed to enable the other side and indeed the court to know exactly the nature of the preliminary points of law to be raised. To state that „the application is bad in law? without saying more does not assist the other parties to neither the suit nor the Court to sufficiently prepare to meet the challenge. If it is only at the hearing that the Preliminary Objection is amplified and elaborated, it gets the other side unprepared and is reminiscent of trial by ambush.

Such practice of course ought to be discouraged.”

14. The Supreme Court of Kenya in the case of *Independent Electoral & Boundaries Commission vs. Jane Cheperenger & Others (2015) eKLR* stated as follows:

“[14] As to whether a preliminary objection is one of merit, this Court has already pronounced itself on the threshold to be met. The Court endorsed the principle in Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors [1969] EA 696, in the case of Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others, Petition No. 10 of 2013, [2014] eKLR [paragraph 31]:

“To restate the relevant principle from the precedent-setting case, Mukisa Biscuit Manufacturing Co. Ltd –vs.- West End Distributors (1969) EA 696:

‘a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... 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’.”

[15] The Joho decision has been subsequently cited by this Court in Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others, Civil Application No. 23 of 2014, [2014] eKLR; and in Aviation & Allied Workers Union Kenya v. Kenya Airways Ltd &

3 Others, Application No. 50 of 2014, [2015] eKLR, in which the Court further stated [paragraph 15]:

“Thus a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”

15. Indeed, as correctly submitted by the Defendants’ advocate, the capacity to agitate any suit on behalf of the Estate of the deceased inheres in the administrators duly appointed by the court, and such administrators act jointly at all times (*See Misc. Civil Application No. 103 “b” of 2013, Republic vs. Nairobi City Council as relied upon in the case of Simon Kamau vs. Munica Wambui & Another (2014) eKLR*).

16. Consequently, the Plaintiffs are required to show that indeed they had the requisite consent from their co-administrators before filing the current suit. However, whether the Plaintiffs have the written authority from their co-administrators to commence the current suit can only be ascertained by way of producing such authority.

17. If the Defendants’ position is that the Plaintiffs do not have written authority from their co-administrators to commence the suit, they should have filed a formal Application for the striking out of the suit and not a Notice of Preliminary Objection. It is only upon filing of a formal Application that the Plaintiffs would have an opportunity to explain if indeed they have a written authority or not to commence the suit on behalf of the other administrators. They cannot do so when the issue is raised as a Preliminary Objection, and especially where they cannot respond to the allegation by way of an Affidavit.

18. The other issue raised by the Defendants is that the Plaintiffs did not comply with the provisions of Section 18(2) of the Land Registration Act which provides as follows:

“(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.”

19. The Plaintiffs have pleaded in the Plaint that they reported to the Machakos Land Registrar about the alleged encroachment by the Defendants on their parcel of land being parcel number L.R No. 10190, who in turn instructed the Surveyor to investigate the dispute. According to the Plaintiffs, despite the Surveyor’s Report dated 27th July, 2015, the Defendants have continued trespassing on L.R. No. 10190.

20. The Title document in respect of L.R. No. 10190 was issued under the Registration of Titles Act (*repealed*) and not under the Registered Land Act (*repealed*) or the Land Registration Act. Section 18(2) of the Land Registration Act deals with parcels of land registered under the Registered Land Act (*repealed*) or the Land Registration Act and only in respect to general boundaries. In the case of *Azzuri Limited vs. Pink Properties Limited (2018) eKLR*, the Court of Appeal held as follows:

“22. This means that under the aforesaid provisions, boundary disputes pertaining to lands falling within general boundary areas must be referred to the Land Registrar for resolution; while disputes pertaining to lands with fixed boundaries may be investigated and possibly resolved through a Surveyor.”

21. To the extent that L.R No. 10190 has fixed boundaries, and not general boundaries, the issue of the Land Registrar determining the boundary dispute first before any proceedings could be filed does not arise. In any event, the Plaintiffs reported the dispute to the Land Registrar, which in my view, is in compliance with Section 18(2) of the Land Registration Act.

22. If the Land Registrar does not move to resolve a dispute as mandated by the law after a complaint has been lodged, the complainant has the right to move the court appropriately. That is what the Plaintiffs herein have done.

23. In the circumstances, and for the reasons I have given herein, I find the Notice of Preliminary Objection by the 1st and 3rd Defendants dated 17th September, 2018 to be unmeritorious. The Notice of Preliminary Objection is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 1ST DAY OF NOVEMBER, 2019.

O.A. ANGOTE

JUDGE