



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC NO. 609 OF 2015

NELLY ATIENO OLUOCH.....PLAINTIFF

-VERSUS-

DAMARIS A. NYAWALO.....1ST DEFENDANT

MILTON OBOTE KWACH.....2ND DEFENDANT

KENYA BANKERS CO-OPERATIVE SAVINGS

& CREDIT SOCIETY LTD.....3RD DEFENDANT

RULING

Before this Court is the 3rd Defendants Notice of Preliminary Objection dated 7/07/2020 and filed on 08/07/2020 alleging that this suit violates the mandatory provisions of Section 18(2) of the Land Registration Act, 2012 as the Court lacks the statutory jurisdiction to hear it, and as such the suit should be struck out with the costs to the Defendants. When the Preliminary Objection came up for hearing on 07/12/20, the Court directed that parties file written submissions.

3RD DEFENDANT'S SUBMISSIONS

The 3rd defendant filed its written submissions in support of the preliminary objection on 12/01/21. The highlights of the submissions are:

- a) That the preliminary objection raised before this Court is based on the grounds that this suit is a boundary dispute which ought to be determined by the Land Registrar under section 18(2) of the Land Registration Act.
- b) That section 18(2) of the Land Registration Act, 2012 is couched in mandatory terms, hence once a determination of whether this matter is a boundary dispute is decided in the affirmative, such determination has the potential of finalizing this matter without the need of ascertaining any additional facts. The preliminary objection is therefore well founded.
- c) That one of the prayers sought by the Plaintiff is an order compelling the 3rd Defendant to properly identify the property known as Kisumu/Kogony/2955 as per the sale of land agreement between the Plaintiff and the 3rd Defendant. In determination of this prayer, the Honourable Court has to be guided by the report prepared by the Land Registrar so as to determine whether there was encroachment.
- d) That section 18(2) of the Land Registration Act is clear that the Court is without jurisdiction on boundary disputes of registered land until after the Land Registrar's determination on the same has been rendered. On this, the 3rd Defendant rely on **Willis Ocholla v Mary Ndege [2016] eKLR**.
- e) That the dispute before this Court is a boundary dispute between land parcel number Kisumu/Kogony/2955 and 2956 owned by the Plaintiff and 1st Defendant respectively. Therefore, the correct forum to address the issue in accordance with section 18(2) of the Land Registration Act is the Land Registrar and not this Honourable Court.

1ST & 2ND DEFENDANT'S SUBMISSIONS

The 1st and 2nd Defendants' counsel filed submissions on 2nd March 2021 in opposition to the preliminary objection. It is their submission that:

- a) The 3rd Defendant's submission that this Court lacks jurisdiction as the suit is in the nature of a boundary dispute which ought to be determined by the Land Registrar under section 18(2) of the Land Registration Act is founded upon a total misunderstanding of the said provision.
- b) Section 13(2)(a) of the Environment and Land Court Act expressly provides that the Court has power to handle disputes relating to boundaries to land.
- c) A reading of sections 18(1), 18(2) and 15 of the Land Registration Act clearly shows that the Land Registrar can only determine disputes relating to boundaries to land where boundaries are yet to be established, where land is unsurveyed or boundaries undetermined. On this interpretation, the 1st and 2nd defendants relied on the case of **Thika Environment & Land Court Case No. ELC. 602 of 2017-Fredrick Nganga Thuo v Prof. Peter Mungai Njuho** where the Court held that the registrar would have jurisdiction where the boundaries have not been fixed.
- d) The respective properties of the plaintiff and the 1st Defendant were identified based on maps and boundaries had already been determined and all the parties need to do is to convince the Court where the boundary is located within those maps.
- e) If the position was that there is a requirement for dispute to be first determined by the registrar, the law would also have made provision as to how such dispute is to be handled, the procedures, the preparation of a report and any appellate process to be invoked by an aggrieved party.
- f) The District Surveyor's report dated 16/05/2018 and filed in Court on 22/10/2019 was meant to guide the Court on and to remind the parties where the boundaries that were created when the cadastral map was prepared are, and not to create new boundaries. This goes to show that there were already boundaries in place in respect of the subject properties.
- g) That the plaintiff has not pleaded that the dispute with the defendants is a boundary dispute, but she simply pleaded that the 1st and 2nd defendants had trespassed on her property Kisumu/Kogony/2955 and fenced it off with another property. The question as to whether the Court has jurisdiction to hear and determine a dispute is looked at against what the parties who files the matter has asked the Court to determine.
- h) The plaintiff has sued for an injunction and damages for trespass which this Court has jurisdiction to handle by reason of the provisions of Section 13(2) of the Environment and Land Court Act, 2011. On this, they relied on the cases of **Fredrick Nganga Thuo v Prof. Peter Mungai Njuho (supra)** and **George Mbugua Kirori v Peter Nyaga Kairu [2018] eKLR**.
- i) The 1st and 2nd Defendants relied on the case of **Hon. Henry Kosgey v Brian Cuthbert & Another (2019) eKLR** to submit that the Court need not strike out the suit as sought by the 3rd defendant, but the Court need only refer the matter to the surveyor (or registrar for that matter) to go to the ground and file an appropriate report and to report back to Court.
- j) That in view of the recommendation in the surveyor's report filed in Court on 16/05/2018 that **'an allocation map in possession of the 3rd defendant be used to place beacons because it was the one the buyers were given during the purchase, the existing map was plotted erroneously and does not tally with the ground.'**, it is the 3rd defendant who must help the Court to resolve the dispute justly and expeditiously.
- k) That by filing this preliminary objection, the 3rd defendant is trying to run away yet it is the one responsible for the dispute.
- l) In the circumstances, the preliminary objection is misconceived, is based on literal and wrong interpretation of the law, offends the overriding objective, lacks merit and should be dismissed.

ISSUES FOR DETERMINATION

I have considered the rival submissions and do find that the main issue for determination is whether this suit offends section 18(2) of the Land Registration Act. **Section 13 of the Environment and Land Court Act** provides for the jurisdiction of this Court. Section 13 (2) provides that:

13. Jurisdiction of the Court

(1) ...

(2) **In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—**

(a) **relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;**

(b) **relating to compulsory acquisition of land;**

(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; and

(e) any other dispute relating to environment and land.

The Court in **Hon. Henry Kosgey v Brian Cuthbert & Another (2019) eKLR** stated that the jurisdiction of the Court in determining boundary disputes should be considered in view of section 18 of the Land Registration Act which provides;

18. Boundaries

(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).

The Court in the above case further stated that **unless a boundary is determined by the land registrar, it is premature for a party to come to this Court to ascertain its rights to the land.**

Similarly, the Court in **William Opondo Omalla v Gabriel Ochong Oriwo & another [2019] eKLR** found that **it had jurisdiction to hear and determine the suit as the Land Registrar's office had already made its determination on the boundary.** In the said case the 1st defendant had raised a preliminary objection on the basis of article 165 of the Constitution and Section 19 of the Land Registration Act and stated that the application before Court ought to be struck out as the Land Registrar is the one empowered to define the position of the boundary under Section 19 of the Land Registration Act; that the boundary dispute should be resolved by Land Tribunal and a survey done to clearly mark the boundaries in the presence of the parties. The preliminary objection was dismissed.

I have also looked at the **Thika Environment & Land Court Case No. ELC 602 of 2017-Fredrick Nganga v Prof. Peter Mungai Njuho** (relied on by the 1st and 2nd Defendants in their submissions). The Court was clear that the registrar would have jurisdiction where the boundaries have not been fixed and where the boundaries have been fixed, the Court will have jurisdiction to hear and determine the matter.

I have looked at the amended plaint amended on 25/10/19 and filed on 30/10/19. The plaintiff has averred at paragraph 4 and 5 thereof that the 1st defendant is the registered proprietor of KSM/KOGONY/2956 whereas she (plaintiff) is the registered proprietor of KSM/KOGONY/2955. That both parcels were purchased through the 3rd defendant and the said two parcels share a common boundary. The fact that the two parcels share a common boundary to me is an indication that the boundaries were already fixed.

The Plaintiff has averred at paragraph 7a of the Plaint that;

‘The dimensions and area of the two adjoining properties were confirmed and fixed as per the Land Registration Act (2012) sometimes in 1998 at the request of the 3rd Defendant when the District Surveyor carried out a perimeter survey of the property and recorded precise measurements in a map, the survey results of which were noted in the register.’

The said averments have been confirmed by the 3rd defendant at paragraph 7 of the 3rd defendant's statement of defence filed on 10/12/2019 where it is stated;

‘The 3rd defendant admits the contents of paragraph 7a of the amended plaint that the dimensions and area of the two adjoining properties were confirmed and fixed as per the Land Registration Act (2012) sometime in 1998 at the request of the 3rd defendant when the district surveyor carried out a perimeter survey of the property and recorded precise measurements in a map, the survey results of which were noted in the register.’

The above clearly discloses that the boundaries of the two parcels have already been determined in accordance with the Land Registration Act. As such, I opine that the suit is not in contravention of section 18(2) of the Land Registration Act.

I have also noted from the Court record that the Court has on two occasions ordered for survey to be carried out on the suit properties and the following two reports were filed;

a) Report dated 25th May 2012 and filed on 28th May 2012 (pursuant to the Court order of 21st September 2011 when the Court ordered that the Kisumu District Land Surveyor do visit the site and determine the boundaries of KSM/KOGONY/2955 and KSM/KOGONY/2956). The report found that the map and ground distances differ and recommended for identification of all parcels in the affected block.

b) Report dated 16th May 2018 and filed on 16th May 2018 (Pursuant to the Court Order of 24th June 2014 that a resurvey be carried out by the surveyor, who did the initial survey for the 3rd defendant to identify the boundaries of parcels number KSM/KOGONY/2955 and KSM/KOGONY/2956). The report found that there is discrepancy between the map and the ground and recommended that the allocation map in the possession of the 3rd defendant (initial seller) be used to place the beacons because it is the one the buyers were given during the purchase.

The two reports revealed that the problem is that the existing map at the survey of Kenya is erroneous and does not tally with the ground, and not that boundaries have not been fixed. The 2nd report (dated 16th May 2018) recommended that the allocation map in the possession of the 3rd defendant be used to place the beacons.

I am surprised that the 3rd defendant has rushed to Court to file this preliminary objection instead of availing the original map to enable placing of the beacons as recommended.

I have also noted that the plaintiff's cause of action is based on trespass. The Plaintiff has among others prayed for orders of permanent injunction against the defendants, an order compelling the 3rd defendant to properly identify the property known as KSM/KOGONY/2955 as per the sale and land agreement between the plaintiff and the 3rd defendant and general damages for trespass. It is my view that from the nature of the prayers sought, these are matters that are fit and proper to be argued in the substantive suit. They are also matters that this Court has power to hear and determine under section 13(2) of the Environment and Land Court Act, 2011. On this, I am guided by the Courts finding in **Fredrick Nganga v Prof. Peter Mungai Njuho (supra)** where the Court stated;

‘The Plaintiff has also sought for an order of permanent injunction and damages for trespass. The above prayer falls under the jurisdiction of the Environment and Land Court as provided by Section 13(2) of the Environment and Land Court Act 2011....

The Plaintiff has brought a case for trespass which relates to land use and boundaries. These are disputes mentioned in section 13(2) of the Environment and Land Court Act 2011 and the Court has power to hear and determine them. Therefore, this Court finds and holds that it has jurisdiction to hear and determine the issues raised by the Plaintiff and not the Land Registrar.’

Similarly, the Court in **Hudson Kulundu & 2 others v Martha Chibetti & another, Kakamega ELC Case No. 57 OF 2019 [2020] eKLR** held that;

‘On perusal of the pleadings in this case the plaintiffs prayed for an order directed at the defendants to open the access road. This seems to me to be more than the issue of ownership and boundaries alone and does not fall exclusively as envisage in Section 18 (2) of the Land Registration Act, 2012 which ousts the jurisdiction of the court where the dispute is purely boundary.’

The upshot of the above is that the preliminary objection raised by the 3rd defendant is not merited is dismissed with costs.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 30TH DAY OF JULY, 2021

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE