



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELCA NO. 32 OF 2018

MULU M'INYINGI.....APPELLANT

VERSUS

COUNTY GOVERNMENT OF MERU.....RESPONDENT

JUDGMENT

(Being an Appeal from the Ruling of Hon. Sogomo – SRM, delivered on 16th August 2018

In RMCC No. 122 of 2018 (Tigania)

Introduction

This is an Appeal from the Ruling of the Resident Magistrate, Hon. Sogomo delivered on 16th August 2018 in ELC No. 122 of 2018 (Tigania). The ruling arose from the defendant's Notice of Preliminary Objection dated 8th March 2017. The said Notice read as follows:-

“(a) This Honourable Court has no jurisdiction in the first instance to entertain and determine boundary disputes between two (2) persons in respect to parcels of land without the dispute having been heard and determined by the District Land Registrar.

(b) The plaintiff failed to comply with mandatory provisions of Section 18 (2) of the Land Registration Act, No. 3 of 2012 that provides that this Honourable 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 Section 18 of the Land Registration Act”.

After the parties filed their submissions on the issue, the trial magistrate rendered himself by upholding the same and striking out the primary suit with costs to the defendant (Appellant). Aggrieved by the impugned decision, the defendant/respondent lodged this Appeal and averred that the trial magistrate erred both in law and fact on the following grounds:-

(a) By holding the Appellant suit was a boundary dispute which ought to have been heard by the District Land Registrar.

(b) By failure to find that the Appellant's suit is revolving on the Respondent's taking away his land.

(c) By failure to note that there is no single phrase or word boundary in the Appellant's plaint.

*(d) By upholding Respondent's Preliminary Objection dated 8th/3/2017 which could not be determined without taking facts and evidence hence denying the same a quality of being a pure point of law as demanded of Preliminary Objection in *Mukhisa Biscuit Manufacturing Ltd Vs West End Distribution Ltd (1969) E.A. 697*.*

(e) By failure to consider Appellant's submissions at all in his ruling.

Appellant's Submissions

The Appellant through the firm of M/S Mutembei & Kimathi submitted on whether the Appellant's suit in the primary suit was a boundary dispute and referred to the meaning of a Preliminary Objection as defined in the celebrated case of *Mukhisa Biscuit Manufacturing Ltd Vs West End Distribution Ltd (1969) E.A. 697* where it was held:-

“Preliminary Objection is a pure point of law which is argued on the assumption that all the facts pleaded 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 Appellant also referred to paragraph 7 of the plaint in the primary suit where it averred as follows:-

“7. The plaintiff avers that on 30th June 2016, the defendant’s agents and employees forcefully and illegally invaded the suit land and forcefully attempted to fence half of the said land and further attempted to demolish his buildings purporting to be creating a public market without plaintiff’s awareness, consent and knowledge”.

Again, the Appellant referred to the prayers in the plaint where he is seeking orders as follows:-

(a) A declaration that the plaintiff is the rightful owner of land parcel No. NAATHU/NAATHU 7082.

(b) An order of permanent injunction restraining the defendant by its officials, servants, agents, constructors’ or anyone else acting at its behest from fencing, constructing, demolishing plaintiff’s buildings or in any other manner interfering with the plaintiff’s land parcel No. NAATHU/NAATHU/7082.

(c) Costs of the suit and interest.

It is the Appellant’s contention that he has not mentioned anywhere in the plaint the phrase boundary and that the word boundary was introduced and repeatedly used in the defence to create an impression that the dispute is a boundary dispute. He stated that there is nowhere in the plaint he has sought to establish boundary or fix the same and that the trial Court misdirected itself into framing issues outside the pleadings. In conclusion, the Appellant submitted that the prayers he is seeking in the primary suit are incapable of being determined or granted by the District Land Registrar under Section 18 of the Land Registration Act No. 3 of 2012. He argued that if the Respondent had any boundary dispute with him, she should have filed a separate claim with the Registrar and that he does not share a common boundary with the Respondent.

Respondent’s Submissions

The Respondent on her part through the firm of Kiruki & Kayika Advocates submitted on the following issues:-

(a) Whether the Honourable magistrate erred in law and fact by holding that the Appellant’s suit was on boundary dispute which ought to have been heard by the District Land Registrar.

(b) Whether the Honourable magistrate erred in law and fact by upholding the Respondent’s Preliminary Objection dated 8/3/2017 which could not be determined without taking facts and evidence hence denying the same a quality of being a pure point of law as demanded of Preliminary Objection in *Mukhisa Biscuits Manufacturing Ltd Vs West End Distribution Ltd (1969) E.A 697*.

(c) Whether the Honourable magistrate erred in law and fact by failing to consider the Appellant’s submissions at all in his ruling.

On the first issue, the Respondent submitted that it is not in contention that the disputed land title Number NAATHU/NAATHU/4384 belonging to the Respondent herein borders the Appellant’s land parcel No. NAATHU/NAATHU/7082. He stated that it is not also in dispute that on the Respondent’s land is a cattle dip that serves members of the public for many years. The respondent further submitted that while the Appellant contends that the Respondent has invaded his land title No. NAATHU/NAATHU/7082, he has made no effort to have the boundaries resolve the issue of boundaries between the Appellant and the Respondent. He argued that for that reason, the Appellant’s suit was therefore premature and was rightly dismissed by the Court.

As regards the second issue, the learned counsel submitted that the Respondent’s Preliminary Objection dated 8th March 2017 in the primary suit was premised on the grounds that the Court lacked jurisdiction to entertain the plaintiff’s suit since the primary jurisdiction regarding determination of boundary disputes lies with the Land Registrar. He cited the case of *Owners of the Motor Vessel “Lillians” Vs Caltex Oil (Kenya) Ltd (1989) K.L.R 1*. He also cited the case of *Mutanga Tea & Coffee Company Ltd Vs Shikara Limited & Another (2015) e K.L.R* which cited with approval the case of *Raytheon Aircraft Credit Corp. & Another Vs Air Alfaraj Ltd Ca. No. 326 of 1998*.

In regard to the last issue, the Respondent submitted that it is trite law that submissions cannot take the place of evidence and the Court is not bound to address each party’s submissions in its decision. He cited the case of *Daniel Toroitich Arap Moi Vs Mwangi Stephen Muriithi & Another (2014) e K.L.R*.

Legal Analysis and Decision

I have considered the record of Appeal and the submissions by the parties. I have also considered the applicable law. This Appeal arises from an order by the trial magistrate in the primary suit where he upheld a Preliminary Objection raised by the Respondent as to the jurisdiction of the Court to determine the dispute in that suit. To start with, it is important to define what a Preliminary Objection is all about. The Court of Appeal in the locus classicus case of *Owners of the Motor Vessel “Lillian S” Vs Caltex Oil (Kenya) Limited (1989) K.L.R 1* rendered itself in respect to jurisdiction as follows:-

“Preliminary Objection is a pure point of law which is argued on the assumption that all the facts pleaded are correct. It cannot be

raised if any fact has to be ascertained or if what was being sought is the exercise of judicial discretion.....

Preliminary Objection 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.....”

By a Notice of Preliminary Objection dated 8th March 2017, the Respondent sought to have the primary suit struck out on the following grounds:-

(a) The Honourable Court has no jurisdiction in the first instance to entertain and determine boundary dispute between two (2) persons in respect to parcels of land without the dispute having been heard and determined by a District Land Registrar.

(b) The plaintiff failed to comply with the mandatory provisions of Section 18 (2) of the Registration Act No. 3 of 2012 that provides that this Honourable Court shall not entertain any action or other proceedings relating to a dispute as to boundaries of the Registered land unless the boundaries have been determined in accordance with Section 18 of the Land Registration Act.

I have looked at both the plaint and the defence filed by the Appellant and the Respondent in the primary suit. From a casual glance of the plaint dated 4th July 2016, the claim by the plaintiff is one of ownership and an order of permanent injunction. There is nowhere in the plaint where the plaintiff is seeking determination of boundaries. The issue of boundaries was raised by the Respondent in his statement of defence. The Respondent did not even raise the issue of boundaries by way of a counter-claim to make it qualify even as an issue for determination. This Court cannot discern how the trial magistrate made the issue of boundaries a subject of a Preliminary Objection when the same cannot even qualify as a triable issue for determination in the main hearing. The trial magistrate clearly misdirected himself in upholding the Preliminary Objection dated 8th March 2017 and dismissed the primary suit. I find this Appeal merited and the same is hereby allowed.

Consequently, the order striking the primary suit be and is hereby set aside and the suit thereby reinstated. The Court file in respect of the primary suit is remitted back to the Principle Magistrate’s Court Tigania for hearing and determination. It is so ordered.

DATED, DELIVERED VIRTUALLY AND SIGNED AT GARISSA THIS 28TH DAY OF JULY, 2021.

.....

E.C. CHERONO

ELC JUDGE

In the presence of:

1. M/s Oteko for the Respondent.
2. Appellant/Advocate- Absent
3. Fardowsa-Court Assistant