



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC APPEAL NO. 12 OF 2020**

**KENYA NATIONAL HIGHWAYS AUTHORITY.....APPELLANT**

**VERSUS**

**GEOORGE KIRIMANA ABUABA.....RESPONDENT**

***(Being an appeal against the Ruling of Hon. SOGOMO G –PM in TIGANIA PM***

***ELC NO. 207 OF 2018 delivered on 30<sup>th</sup> January 2020)***

**JUDGMENT**

1. The appellant being the defendant in the trial court was sued by the respondent vide a plaint dated 27/11/2018 where the following orders were sought;

*a. An Order of permanent injunctive preventing the defendant, whether by themselves, their servants, agents, contractors and/or any other persons whatsoever, from damaging, demolishing or otherwise interfering with the perimeter wall and the entire property or in any other manner howsoever interfering with the plaintiff's right to ownership, possession and quiet enjoyment of the property known as LR. NO ATHING'A/ATHANJA 5400 Meru North.*

*b. A declaration that the plaintiff is entitled to quiet enjoyment of his property as the legal and beneficial owner of LR NO. ATHING'A/ATHANJA 5400 Meru North to the exclusion of the defendant's harassment and intimidation.*

*c. A directive directing the defendant to send a surveyor from its office to work with the plaintiff's surveyor to establish the accurate position of the boundary dispute.*

*d. General damages against the defendant and costs of the suit,*

*e. Interest on (d) above at court rates until settlement in full.*

*f. Any other relief that this court may deem fit and just to grant in the circumstances of the case.*

2. Before the suit could proceed to trial, the appellant filed a preliminary objection dated 30/10/2019 on the grounds that the court lacked jurisdiction to determine the suit averring that jurisdiction lies with the Land Registrar as the suit offends Section 18(2) of the Land Registration Act. The trial court in its ruling delivered on 30.1.2020 dismissed the Preliminary Objection. Being aggrieved by the said ruling, the appellant filed his memorandum of appeal dated 10/02/2020 basing his appeal on seven (7) grounds which in summary boils down to the assertion that the trial magistrate erred in law and fact in dismissing the Preliminary Objection.

3. The appeal was canvassed by way of written submissions. The appellant vide submissions dated 16/02/2021 stated that the suit was a boundary dispute, thus in line with the provisions of Section 18 of the Land Registration Act, the first avenue to resolve the dispute was to go to the Land Registrar and therefore the trial court did not have jurisdiction to adjudicate on the matter. Further the court derives its jurisdiction from the Constitution or Legislation and not by concession of the parties to a suit.

4. It was further submitted that the trial magistrate had also directed the Land Registrar to visit the suit land to establish if the same had been encroached upon, that this decision is self-defeating as the trial court is acknowledging that the said boundaries are yet to be determined. The trial court failed to grasp the respondent's cause of action thus dismissed the preliminary objection without considering the issues raised in the preliminary objection.

5. In support of their case, the appellants relied on the cases of; **Cornelius Sylvano Muchilwa & 3 others V Kenya National Highways Authority [2019]eKLR, Samuel Kamau Macharia & another V Kenya Commercial Bank & 2 others [2012]eKLR, Benson Ambuti Adegga & 2 others V Kibos Distillers Limited & 5 others [2020]eKLR, George Kamau Macharia V Dexka Limited[2019]eKLR and William Gacani Mbaria V Charles Kirimi Mbui [2018]eKLR.**

6. The Respondent vide submissions dated 23/02/2021 stated that the appellant's preliminary objection was not based on a point of law but one that needed both parties to adduce evidence, that the Preliminary Objection was raised as an afterthought and as a delay tactic as the suit had been filed 11 months previously and the defendant had been actively engaged in defending the matter. The boundaries are well established, defined and stipulated as shown on the map from the Survey of Kenya as well as the final report filed by the Registrar at the request of the trial court.

7. Further, the respondent in his plaint had sought other prayers other than the boundary determination including an order of permanent injunction, damages and costs which put the matter squarely before the court.

8. The respondent urges the court to strike out the appeal. He relied on the following cases; **Nitin Properties Limited V Jagjit S. Kalsi & another (1995)eKLR, Mukhisa Biscuit Manufacturers Ltd V West End Distributors Ltd [1969] E.A, Fredrick Ng'ang'a Thuo V Peter Mungai Njuho [2017]eKLR.**

### **Analysis and determination**

9. The circumstances in which a preliminary objection may be raised has been the subject of several judicial pronouncements and is well settled. It is now trite that preliminary objections on points of law can be raised at any stage of the proceedings as was held in **Republic v Chief Registrar of the Judiciary & 2 others Ex parte Riley Services Limited [2015] eKLR** , where the court stated that:-

***“...the question of the appropriate time to raise a preliminary objection has been addressed in various decisions in our courts. In the case of Beatrice Cherotich Koskei and Another –vs- Olunguruone Land Dispute Tribunal and 2 Others Misc Civil Appl 861 of 2007, the court observed as follows:***

***“If, as respondents’ counsel contends, the present application is defective and incompetent, any proceedings based on it would be a nullity and a waste of everybody’s time. It is trite law that a preliminary objection can be raised at any time and that if such an objection exists, it is preferable for it to be raised at the earliest possible opportunity. I therefore hold that respondents’ counsel is entitled to raise his preliminary objection to the application as it stands, for the applicants to respond thereto for the court to make a determination thereon.”***

10. It follows that the argument advanced by the respondent that the appellant's Preliminary Objection was raised 11 months after the filing of the suit is irrelevant. It is preferable for the preliminary objection to have been raised at an early stage of proceedings, but still, it could be raised at any time while the suit was still active. Thus the preliminary Objection was properly raised before the trial court.

11. Was the said Preliminary objection merited? In **Oraro vs Mbaja (2005) 1 KLR 141**, the court stated that:

***“A preliminary objection correctly understood is a point of law which must not be blurred with factual details liable to be contested and in any event to be proved through the process of evidence.”***

12. The effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary. 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. The question at the heart of the arguments before the trial court was whether the said court had jurisdiction to hear and determine the suit before it? To answer this, I will have to determine the question as to whether the suit relates to a boundary dispute or not?

13. Under the Registered Land Act Cap 300 (*repealed*), Section 21(4) deprived Courts the power to entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided under the laws. The Court of Appeal in **Wamutu v. Kiarie (1982) KLR 480** had this to say;

***“Section 21(4) of the Registered Land Act (repealed) provides that the court has no jurisdiction to hear a matter relating to boundary disputes of registered land, unless the boundaries have first been determined by the Land Registrar. The court in this case had jurisdiction to hear the matter as the boundary had already been determined.***

14. Section 18(2) of the Land Registration Act, 2012, similarly prohibits the courts from entertaining any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in that section. It provides as follows:

***“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”.***

15. Under Section 19 of the Land Registration Act, 2012, the duty to fix boundaries to registered land is vested in the Land Registrar.

16. It is manifestly clear that the entity which has the statutory mandate to avail an accurate plan of defined boundaries is the Land Registrar.

This is also the entity which has the requisite expertise to undertake the aforementioned task.

17. Having set out the legal position, I now turn to the facts of the case to determine if the dispute before the trial court was a boundary one. The court will therefore have to examine the case of the parties as set out in the pleadings. Although in paragraph 10 of the plaint, the respondent desired the real position of the boundary to be ascertained, the final prayers went beyond the ascertainment of the boundary as the respondent was seeking damages as well as permanent injunctive orders. Thus the claim of the respondent was not a pure boundary dispute.

18. Secondly, the appellant in paragraph 9 of his statement of defence has stated that;

***“The defendant further states that its action to reclaim the road reserve is not in the nature of a boundary dispute as being erroneously misconstrued by the plaintiff and as such, the defendant is not bound to enter into any negotiation of any nature with the plaintiff over the said reclamation and neither is there need for the defendant to engage in any re-surveying exerciser with parties who have illegally encroached onto the said road reserve.***

19. Further in paragraph 13 of the aforementioned defence, the appellant stated that:

***“The defendant restates that the issue herein is about reclamation of a road reserve which is public land, and there is no boundary dispute between the plaintiff and the defendant that would require determination by the surveyor or a land adjudication officer as being erroneously claimed by the plaintiff or at all”.***

20. The appellant is bound by his pleadings and he cannot blow hot and cold at the same time. The preliminary Objection was certainly not in tandem with the pleadings of the appellant and it was not the place of the court to investigate further on the nature of the claim.

21. Finally, I find that none of the parties have expounded on the legal regime governing the registration of the suit parcel no. ATHING'A/ATHANJA/5400. In his plaint as well as in his submissions before the trial court, the respondent states that he had sought help from the District Land Adjudication and Settlement Officer as well as the district surveyor. To this end I find that there is uncertainty as to which law is applicable in relation to the registration of the suit parcel.

22. From the foregoing analysis, it is apparent that the current dispute is distinguishable from the authorities cited by the appellant. In particular, I wish to state that in the case of **Cornelius Sylvano Muchilwa & 3 Others (Supra)**, the pleadings clearly disclosed that the claim was in the nature of a boundary dispute, while in the case of **William Gacani Mbaria vs. Charles Kiriimi (supra)**, the Land Registrar had already determined the boundary dispute of which the plaintiff therein had opted to disregard the said determination.

23. In the final analysis, I find no basis to disturb the ruling of the Hon magistrate. This appeal is therefore dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 14<sup>TH</sup> DAY OF JULY, 2021 IN PRESENCE OF:**

C/A: Kananu

Kimaita for appellant

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**