



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT KERUGOYA

E.L.C CASE NO. 57 OF 2014

STEPHEN MUIGU RURI.....PLAINTIFF

VERSUS

MARY NJOKI FRANCIS.....1ST DEFENDANT

STANLEY NGARI.....2ND DEFENDANT

PETER NJAGI.....3RD DEFENDANT

AND

MADRIN WANGUI NJAGI.....1ST INTERESTED PARTY

JOAN NYAWIRA NJAGI.....2ND INTERESTED PARTY

JUDGMENT

1. The plaintiff instituted this suit by way of a plaint dated 26th June, 2003 whereby he is seeking the following orders:-

(a) The boundaries between the plaintiff's land parcel Number Mutithi/Strip/515, 516, 514 and 512 and the 1st Defendant's land parcel number Mutithi/Strip/366 and 3rd Defendant's land parcel Number Mutithi/Strip/511 be rectified and set out accordingly.

(b) The costs of this suit.

(c) Any other relief this Honourable Court may deem fit to grant.

2. The 1st and 2nd defendant defended the suit by filing an amended defence dated 6th October, 2015 on 23rd October, 2015.

3. The interested parties were enjoined to this matter by consent on 6th October 2015 after which they filed their defence and counterclaim on 26th October, 2015. In the said counter-claim they seek the following orders: -

(a) The plaintiff's suit be dismissed with costs and the plaintiff be ordered to remove the trees planted on the boundary of parcel No. Mutithi Strip/507-511 and the road separating the plaintiff's land and the defendants' land be reinstated.

PLAINTIFF'S CASE: -

4. In a nutshell, the plaintiff's case is as follows: -

a. That the defendants are his neighbours as their parcels of land neighbour each other.

b. He is the registered proprietor of Land parcels No. Mutithi/Strip/512, 513, 514, 515 and 516 and the 1st, 2nd and 3rd defendants are the registered proprietors of Land parcel number Mutithi/Strip/367, Mutithi/Strip/366 and Mutithi/Strip/511 respectively.

c. The 1st, 2nd and 3rd defendants had trespassed into his land parcels Number Mutithi/Strip/515, Mutithi/Strip/516,

Mutithi/Strip/514 and Mutithi/Strip/512 respectively.

5. He therefore prayed that the boundaries of the said suit lands be rectified and set out accordingly.

1ST AND 2ND DEFENDANTS CASE:

6. In a nutshell the 1st and 2nd defendant's case is as follows: -

- a. The boundary dispute arose even before the plaintiff bought his parcels of land and they reported to the assistant chief and land registrar. The then registered proprietor was required to register the dispute with the Land registrar's office but never did.
- b. They averred that the plaintiff ought to have confirmed the boundaries prior to purchasing the suit land.
- c. The 1st Defendant is the registered proprietor of land parcel Nos. Mutithi/Strip/367 and Mutithi/Strip/449 which he purchased from one Samuel Muriithi.
- d. The 2nd defendant is the registered proprietor of land parcel No. Mutithi/Strip/450 also from the said Samuel Muriithi.
- e. The said parcels were resultant subdivisions of Land Parcel Mutithi/Strip/215.
- f. The Land Registrar had visited the suit lands together with the District Surveyor and took measurements and found that their land had not encroached the plaintiff's parcels of lands.

INTERESTED PARTIES' CASE

7. The case for the interested parties is as follows: -

- a. The 1st Interested party is the registered proprietor of land parcels Numbers Mutithi/Strip/510, Mutithi/Strip/509, Mutithi/Strip/508 and Mutithi/Strip/507.
- b. The 2nd interested party is the registered proprietor of land parcel registration Number Mutithi/Strip/511 and thus the 3rd defendant had been wrongly sued in this matter.
- c. Before the plaintiff bought his parcels of land there were no problems over boundaries with the previous owners they'd purchased from
- d. The Land Registrar together with the District Surveyor had visited the suit lands and took measurements and found that their lands aforementioned had not encroached on the plaintiff's lands.
- e. The plaintiff had encroached on the road between their parcels of land that is separated by a road and he cultivated the same and planted the trees next to the 3rd defendant's boundary.
- f. They prayed that the plaintiff be ordered to remove the trees planted on the boundary of parcel No. Mutithi/Strip/507 – 511 and the road separating the plaintiff's land and the defendant be reinstated.

PARTIES SUBMISSIONS

8. On 21st July, 2021 the parties through their advocates on record agreed to file submissions. The defendants filed theirs on 20th September, 2021 and the plaintiff filed his on 13th October, 2021.

PLAINTIFF'S SUBMISSIONS

9. The plaintiff submitted that this suit had dragged on for several years after the plaintiff was stood down on 11th October, 2018 after it emerged that the issues could be resolved by the District Land Registrar and surveyor upon resurveying the suit land.

10. On 31st October, 2018 the parties through their advocates on record signed a consent thereto which was adopted by this Honourable Court on 2nd October, 2018.

11. After adoption of the said consent the plaintiff paid the requisite survey fees to the District Land Registrar however the said exercise was not carried out DUE TO LETTERS BY THE Defendant's counsel.

12. He submitted that the jurisdiction of this Honourable Court flows from *Article 162 (2)(b) and Section 13 (2) of the Environment and Land Court Act* and thus this Honourable Court has jurisdiction to determine boundary disputes. They urged that this Honourable Court be guided by the overriding objectives provided under the Civil Procedure Act.

13. He prayed that this Honourable Court gives life to the consent dated 31st October, 2018 as the final judgment as the same would solve this matter once and for all.

DEFENDANTS' SUBMISSIONS

14. The Defendants submitted that this Honourable Court does not have jurisdiction to grant the orders sought to rectify the boundaries between the lands in dispute in light of *Section 18 (2) and 19 of the Land Registration Act, 2012*. She relied on the cases of *Azzuri Limited Vs Pink Properties Limited (2018) e E.K.R*, *George Kamau Macharia & Dexka Limited (2019)*, *Willis Ocholla Vs Mary Ndege (2016) e K.L.R* and *Estate Sonsira Ltd & Another Vs Samuel Macharia & 2 others (2020) e K.L.R*.

15. They submitted that the suit was filed prematurely in 2003 as the plaintiff did not first file a dispute with the Land Registrar as required by law.

16. They further submitted that the nature of the dispute had not been explained as the plaintiff had not explained that there was any variance between the size of his land on the ground and the size indicated in the title deed. Further that he did not explain to this Honourable Court the extent of any encroachment the defendants had done.

17. They submitted that the plaintiff was not the registered proprietor of land parcels Mutithi/Strip/514 and Mutithi/Strip/515 as the same belonged to one Beatrice Wanjiku Murigu who had not been enjoined to this suit.

18. They further submitted that the plaintiff had admitted that he planted trees where he felt his boundary was supposed to be, adjacent to the 3rd Defendant's Land Parcels Mutithi/Strip/510, Mutithi/Strip/509, Mutithi/Strip/508 and Mutithi/Strip/507 measuring 1 acre each and Mutithi/Strip/511 which is in the name of her daughter Joan Nyawira Njagi.

19. They submitted that the plaintiff planted the said trees and fence forcefully and illegally without involving the 3rd Defendant or any surveyor. They prayed that the plaintiff be ordered to remove the same.

ANALYSIS

20. I have considered the pleadings, statements, documents and rival submissions of the parties herein. The issues for determination are as follows: -

a. Whether this Honourable Court has jurisdiction to determine the claim in the plaint and the counterclaim?

b. If so, whether the plaintiff has proved his case on a balance of probabilities and thus entitled to the prayers sought?

c. Whether the interested parties are entitled to the prayers sought in their counterclaim?

d. Who should bear the costs?

WHETHER THIS HONOURABLE COURT HAS JURISDICTION TO DETERMINE THE CLAIM IN THE PLAINT AND THE COUNTER-CLAIM

21. Jurisdiction is everything and without it, a court has no power to make any step. This was stated in the classic case of *The Owners of the Motor Vessel "Lillian S" Vs Caltex Oil (Kenya) Ltd (1989) KLR 1*. Where Nyarangi J.A. held as follows:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

22. In determining the issue of jurisdiction, the Supreme Court in the case of *Samuel Kamau Macharia & Another Vs Kenya Commercial Bank Limited & 2 others* held as follows:

".... A court can only exercise jurisdiction that has been donated to it by either the constitution or legislation or both. Therefore, it cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."

23. The jurisdiction of this Honourable Court is provided under **Article 162(2) (b) of the Constitution** which is read together with the provisions of **Section 13(2) of the ELC Act** which provides that: -

"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.

24. In determining the issue of jurisdiction this Honourable Court is further guided by the common law doctrine of exhaustion of remedies. The same is defined in the **Black's Law Dictionary** as follows: -

“The doctrine that, if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief is available. The doctrine’s purpose is to maintain comity between the courts and administrative agencies and to ensure that the courts will not be burdened by cases in which judicial relief is unnecessary.”

25. From the foregoing it is clear that litigants are mandated to exhaust the dispute mechanisms availed to them by the statute before approaching court for resolution of the same.

26. In relation to boundary disputes such as the one sought by the Plaintiff, this Honourable Court is guided by **Section 18(2) of the Land Registration Act** which provides that:-

“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”.

27. In the case of **Reuben Kioko Muyaene Vs Hellen Kiunga Miriti & 4 others; Ntalala Eric Mutura & another (Interested Parties) [2021] e KLR**, the Honourable Court held that:

“The aforementioned case law clearly indicates that the dispute relating to boundaries ought to be resolved by the Land Registrar in the first

instance. The decision thereof can then be challenged in court pursuant to the provisions of Sections 79 (3A), 80, 86 and 91 (9) of the Land Registration Act.

35. It is trite law that where the law has given a legal obligation to a department of Government, it is important for the Court to let that department proceed to meet the legal obligations. In this case the office of the Land Registrar is mandated to deal with the general boundary dispute first before the same is escalated to the Court. It is the view of this Court that the dispute is prematurely before the Court.”

28. I note from the proceedings of this Honourable Court that the parties herein have previously entered into several consents to the effect that the dispute be referred to the Land Registrar and District Surveyor in order to resolve the same.

29. The most recent was the one that was adopted by this Honourable Court on 2nd November, 2018. In the said consent the parties were to have the exercise of the resurvey of the suit lands within 90 days.

30. The said exercise was not conducted however, this Honourable Court vide a ruling delivered on 17th December, 2019 the parties were granted a leeway to agree on a mutual extension of time within which the resurvey can be conducted failing to which the matter can be fixed for hearing on a priority basis.

31. However, the counsel for the defendants sought a hearing date instead of pursuing the leeway provided by this Honourable Court for the execution of the said consent entered into on 2nd November 2018. The matter thus proceeded to full hearing.

32. In view of the foregoing, I find that that the claims raised in both the plaint and counterclaims relate to a dispute as to boundaries within the meaning of **Section 18(2) of the Land Registration Act** aforementioned.

33. Given the mandatory nature in which the said provision is couched, this Honourable Court then cannot usurp the mandate of the Land Registrar and District Surveyor to resolve boundary disputes.

34. This suit was commenced over 17 years ago, all along the parties have been guided by this Honourable Court to employ the alternative dispute resolution provided **under Section 18 (2)** but have failed to adhere. I notice that all parties herein are represented by Advocates who ought to have guided their clients otherwise especially in view of **Article 159 (2) (c) of the Constitution of Kenya**. It is thus unfortunate that this legal tussle dragged on that long.

35. Given that the parties have not exhausted the dispute resolution mechanism provided by statute, it therefore follows that this Honourable Court does not have jurisdiction to determine the rest of the issues raised both in the plaint and the counterclaim in the first instance.

CONCLUSION

36. Following the analysis given herein above, I find this Court lacks jurisdiction to hear and determine the dispute and the suit herein is struck out together with the counter-claim with each party to bear their own costs. It is so ordered.

JUDGMENT DATED, DELIVERED PHYSICALLY AND SIGNED IN KERUGOYA THIS 22ND DAY OF OCTOBER, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of: