



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC (S.O.) CASE NO. E003 OF 2020

PATRICK MWONGERA MUGAMBI (Suing in a personal Capacity and also as an

Administrator of the Estate Of the late JULIUS MURINGI MUGAMBI (Deceased)

BEATRICE RIGIRI MURINGI (Suing both in a personal capacity and also as an

Adminstratrix of the late **JULIUS MURINGI MUGAMBI** (Deceased)....**PLAINTIFFS**

ERIC KIOGORA MUGAMBI

MARTIN KOOME MUGAMBI

VERSUS

JENNIFER KAIRIARI

KINYUA HOSEA

NTINYARI AGNES..... **DEFENDANTS**

RULING

1. The respondents have raised a preliminary objection dated **18th January, 2021** that the said offends **Section 18 of the Land Registration Act** and that the court has no jurisdiction to determine such matters.

2. In support of the preliminary objection, the respondents filed written submissions dated **17th March 2021** relying on *Samuel Njoroge Gituku & 6 Others –vs- Kenya Rural Roads Authority & 5 Others (2017) eKLR and Maricus Otieno Okwayo –vs- George Owenge Aluoch (2017) eKLR; Willis Ocholla –vs- Mary Ndege eKLR.*

3. On the other hand the plaintiffs/applicants opposes the preliminary objection through written submissions dated **28th April 2021** taking the view the case before court is not a boundary dispute as there is already a live fence between the properties in question since **1990** and the Registry Index Map boundaries are clear on that issue, and that the prayers being sought in the originating summons are beyond the jurisdiction of a Land Registrar.

4. In order to put the preliminary objection into context, the plaintiffs brought an originating summons under **Order 37 Rule 7, Sections 7,16, 17 and 38 of Limitation of Actions Act Cap 22 dated 19/10/2020** seeking the following questions:-

i. That the application be certified urgent and the same be heard ex-parte in the first instance and on priority basis thereafter.

ii. That the defendants/respondents be restrained by orders of temporary injunction either by themselves, their servants, agents, assigns or anybody else claiming under their names or title from interfering with the physical boundaries on the ground separating L.R No. Ntima/Igoki/9105 – 9108 (inclusive) all being sub-divisions of the former L.R No. Ntima/Igoki/4229 AND L.R No. Ntima/Igoki/1109-111000 (inclusive) all being sub-divisions of the former L.R Ntima/Igoki/4228 as have been in existence since 1991 including but not limited to the late Julius Muringi Mugambi's homestead, residential house and grave pending the hearing and determination of this application.

iii. That the defendants/respondents be restrained by orders of temporary injection either by themselves, their servants, agents, assigns or anybody else claiming under their names or title from interfering with the physical boundaries on the ground separating L.R. No. Ntima/Igoki/9105 – 9108 (inclusive) all being sub-divisions of the former L.R No. Ntima/Igoki/4229 and L.R.

No. Ntima/Igoki/1107 – 111000 (inclusive) all being sub-divisions of the former L/R No. Ntima/Igoki/4228 as have been inexistence since 1991 including but not limited to the late Julius Muringi Mugambi's homestead residential house and grave pending the hearing and determination of this application

iv. That the orders of inhibition do issue to be registered against L.R. No. Ntima/Igoki/1109-11098, 11099 and 111000 pending the hearing and determination of this application.

v. That orders of inhibition do issue to be registered against L.R. No. Ntima/Igoki/11097-11098.

vi. That costs be provided for.

5. According to the applicants the facts are **Parcel No. L.R. No. Ntima/Igoki/5229** initially in the name of the deceased Julius Mugambi, was sub-divided into **L.R Ntima/Igoki/9105 – 9108** which were transferred to the 1-4 plaintiffs as per Meru Succession Cause No. 482 of 2011.

6. It is pleaded the 1st defendant is a registered owner of an adjacent land **No. L.R Ntima/Igoki/4228 since 1991** which was sub-divided in **2020 to 4 parcels No's 11097 – 111000** and which were transferred to 2nd and 3rd defendants. The former number initially belonged to the plaintiff's grandfather together with **Parcel 4229** as part of his then mother **No. Parcel 537**.

7. Further the late grandfather sought to align the common boundaries so as to preserve his permanent buildings and planted a live fence between **Parcels 4228 and 4229**. The deceased summoned a District Surveyor called who conducted the exercise, but the respondent has since declined to attend Land Control Board meeting for implementation.

8. In flagrant disregard to the aforesaid, the defendant resorted to undoing the wishes of the deceased by taking more land than given to him of **Parcels No's 9105, 9108 and 9107** belonging to 3rd and 4th plaintiffs respectively, triggering the instant proceedings.

9. Due to the above, the current Registry Index Map has not been updated to capture the re-alignments for want of Land Control Board. The applicants urges the court to find the Registry Index Map for **Parcels No's 4228 and 4229**, subject to their overriding interests by operation of **Section 28 (h)** of the **Land Registration Act**.

10. Other than the preliminary objection the respondents do not appear to have responded to the originating summons.

11. A preliminary objection as per *Mukisa Biscuits Manufacturing Co. Ltd. –vs- West End Ltd. (1969) E.A 696* must be a point of law which has been pleaded or which arises by clear implication out pleadings and which if argued as a preliminary point may dispose of the suit.

12. Similarly in *Oraro –vs- Mbaja (2005)1 KLR 141* the court held that a preliminary objection is a point of law which must not be blurred with factual details liable to be contested or in any event to be proved through the process of evidence.

13. In the instant case the respondents have not contested the factual basis of the plaintiffs/applicants claim by way of a replying affidavit. Instead the defendants/respondents have only raised a preliminary objection to say the dispute is purely a boundary one and which is within the purview of a Land Registrar.

14. On the other hand the plaintiffs deny those facts and submit the issues are beyond the said Registrar as per the questions raised in the originating summons which would require evidence to establish and verify.

15. Strangely the respondents submissions dated **17th March 2021** only addressed the certificate of urgency dated **23rd October 2020** and the notice of motion dated **19th October 2020** and not the originating summons. The aforesaid certificate and notice of motion are; obviously narrower and subservient to the originating summons.

16. In my view the preliminary objection falls short of the threshold in **Mukisa** decision. The preliminary objection is therefore dismissed with costs. Leave is hereby granted to the respondents to file responses to the originating summons within 14 days from the date hereof.

17. Given there are subsisting orders of status quo as per boundaries of 1990, I direct parties to comply with **Order 11** within 45 days from today so as to fastrack the hearing of this matter.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 18TH DAY OF OCTOBER, 2021

In presence of:

MWENDA MWARANIA FOR PLAINTIFFS

ASHABA FOR DEFENDANTS

HON. C.K. NZILI

ELC JUDGE