



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC NO. 54 OF 2014**

**JANICE ACHIENG OSAWA (Suing as the administratrix of the estate of**

**SERFINE OWITI WANDU a.k.a SERFINE OWITI OSAWA.....PLAINTIFF**

**-VERSUS-**

**NURA RAMADHAN.....DEFENDANT**

**RULING**

**(Introduction)**

This is a matter in which the plaintiff filed suit against the defendant vide the Plaint filed on 6<sup>th</sup> March 2014 alleging trespass on the part of the defendant in respect of property LR NO. **KISUMU/WATHOREGO/1212** (hereinafter 'the suit property') and prays for judgement against the defendant for Possession of the property and an order of injunction permanently restraining the defendant and any other persons acting through him from trespassing or in any other way dealing with the suit property. Moreover, the plaintiff prays for an order compelling the defendant to immediately demolish and remove any structures, buildings and/or material constructed and/or brought and/or left on the suit property. Last but not least, the plaintiff prays for Costs of the suit and any other relief the Honourable Court deems fit to grant.

The Defendant has filed a Notice of Preliminary Objection dated 11/03/2020 and filed on 12/03/2020 alleging that this suit violates the mandatory provisions of Section 18 of the Land Registration Act, 2012 as the Court lacks the statutory jurisdiction to hear it, and as such the suit should be dismissed with costs.

When the Preliminary Objection came up for hearing on 17/03/2020, the Court directed that parties file written submissions.

**DEFENDANT'S SUBMISSIONS**

The defendant filed her written submissions in support of the preliminary objection on 03/05/2021. The highlights of the submissions are that this suit is a boundary dispute for which this Court lacks jurisdiction as Section 18 (2) of the Land Registration Act vests jurisdiction on the land registrar to determine boundary disputes. This matter therefore ought to be determined by the land registrar.

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. That the Plaintiff's case clearly raises an issue of boundary dispute and needs the land registrar to determine whether there was encroachment and report prepared to that effect before the prayers sought are granted.

That where a party comes to Court without first seeking redress from the land registrar, the Court has to remind such a party that she has moved to Court without due regard to the provisions of section 18(2) of the Land Registration Act.

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, and that the surveyor's report attached by the plaintiff in her list of documents does not suffice. On this, the defendant relied on the case of **Willis Ocholla v Mary Ndege [2016] eKLR**.

**PLAINTIFF'S SUBMISSIONS**

The Plaintiff filed submissions on 05/07/2021. It is the plaintiff's submissions that she commenced the suit to stop the defendant from trespassing onto her property and to compel the defendant to remove any and/or all structures put up thereon. As such, the issue at hand is not that of boundaries as envisaged in section 18(2) of the Land Registration Act but of ownership of which this Court has jurisdiction to hear and determine. That further, this Honourable Court issued an order on 26/08/2016 directing the land registrar and surveyor to visit the parcel of land in question which was subsequently done but the respective reports are yet to be filed.

## ANALYSIS AND DETERMINATION

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 1<sup>st</sup> 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.

In **Thika Environment & Land Court Case No. ELC 602 of 2017-Fredrick Nganga v Prof. Peter Mungai Njuho**, 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 pleadings in this matter. The plaintiff has averred at paragraph 4 of the Complaint that the deceased is the registered owner of the property **LR NO. KISUMU/WATHOREGO /1212** whereas the defendant has averred at paragraph 4 of the defence that she is the registered proprietor of the parcel number **KISUMU/WATHOREGO /1211**. The defendant has further averred at paragraph 14 of the defence that her plot and that of the plaintiff share a common fence and attached a map in respect of Wathorego registration section. The map is from survey of Kenya and it is indicated at the bottom thereof that;

**'the boundaries on this preliminary index, diagram, which is prepared from an unrectified photo enlargement, have been identified by the land adjudication department under the survey of Kenya supervision'**

The above clearly discloses that respective properties belonging to the plaintiff and the Defendant can be identified based on the map and boundaries that had already been determined in accordance with the Land Registration Act, and all the parties need to do is to convince the Court where the boundary is located within the map and this can only be done with the assistance of a surveyor's report.

It is also noted from the Court record that on 18/03/2014, it was ordered by the consent of parties that the Kisumu District Land Registrar and the district surveyor visit **LR NO. KISUMU/WATHOREGO /1212** and **1211** to **confirm** the boundaries of both parcels and identify the location of the storied building belonging to the defendant.

My understanding of that order is that the registrar and surveyor's report which was consequently filed on 6/05/2014 was meant to guide the Court on and to remind the parties where the boundaries that were created are, and not to create new boundaries or fix the same. The order issued on 25/05/2016 requiring a further visit by the registrar and the surveyor is equally for purposes of confirming the boundaries between the two parcels of land, but this time in the presence of private surveyors engaged by the parties. The report is yet to be filed in Court.

As such and drawing guidance from the above mentioned cases of **Hon. Henry Kosgey v Brian Cuthbert & Another, William Opondo Omalla v Gabriel Ochong Oriwo & another** and **Thika Environment & Land Court Case No. ELC 602 of 2017-Fredrick Nganga v Prof. Peter Mungai Njuho**, the Court finds that the boundaries of the two parcels of land being **LR NO. KISUMU/WATHOREGO /1212** and **LR NO. KISUMU/WATHOREGO /1211** had already been identified and determined and as such the suit is not in contravention of section 18(2) of the Land Registration Act. This case is not about defining the position of a boundary, but rather to determine whether the defendant has encroached into the Plaintiff's parcel of land.

I have also noted that the plaintiff's cause of action is based on trespass. The Plaintiff has inter alia prayed for orders of permanent injunction against the defendants to restrain the defendant from trespassing onto her property and to compel the defendant to remove any and/or all structures put up thereon. 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.'**

Finally, it beats logic why the defendant filed the preliminary objection challenging the jurisdiction of the Court at this point in time, seven years after the suit was filed and after the Court order of 18/03/2014 which was issued by the consent of parties to the effect that that the Kisumu District Land Registrar and the district surveyor visit the properties to confirm the boundaries of both parcels and identify the location of the storied building belonging to the defendant, and a subsequent report issued in favour of the defendant. The filing of the preliminary objection appears to be an afterthought. It is therefore my finding that the preliminary objection raised by the defendant is not merited and is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 19<sup>TH</sup> DAY OF NOVEMBER, 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 15<sup>th</sup> March 2020.*

**ANTONY OMBWAYO**

**JUDGE**