



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**ENVIRONMENT AND LAND COURT**

**ELC CASE NO 250 OF 2016**

**HAMISI RAMADHAN CHIBENDO.....PLAINTIFF**

**VERSUS**

**HAMISI MWAWIMO.....1<sup>ST</sup> DEFENDANT**

**MSHAMED S MWANAZIKI .....2<sup>ND</sup> DEFENDANT**

**SWALEH SAID.....3<sup>RD</sup> DEFENDANT**

**RULING**

**I PRELIMINARIES**

1. This matter is part heard whereby the Plaintiff's witness - PW-1 has already testified on 1<sup>st</sup> October, 2018. For some unclear reason or the other, from that time the suit stalled to date. On 30<sup>th</sup> September, 2021, when it was mentioned before this Honorable Court, the Learned Counsel Mr. Omollo for the Defendants indicated that he had just taken over the matter from the previous law firm representing the Defendants. Hence, for this reason he sought leave to file a further list of documents specifically to introduce a report by a Land Surveyor.

**A. The Defendant's Opposition.**

The afore stated application for leave by the Defendant's Advocate to file further documents at this stage of the proceedings was strongly opposed by the Learned Counsel for the Plaintiff, Mr. Ondieki on grounds that the only witness who had remained for the Plaintiffs to close their case was the chief. Essentially, according to the Advocate the witness was to appear for purposes of producing a letter dated 3<sup>rd</sup> August, 2016 marked as "PMF -1-3". Therefore, he argued that to allow filing of any new documents would be prejudicial to the Plaintiff at this stage.

**B. Court's decision.**

Despite this objection, the Honorable court in the interest of justice, equity, constitution expeditious disposal proportionate and accessible to resolution it would dispute applied its discretion under the provisions of Sections 1, 1A, 3, 3A of the Civil Procedure Act and Sections 3,14 and 19 of the Environment Land Act, (what has come to be termed as "the overriding objectives/or the Oxygen principles), Sections 101 of Land Registration Act of 2012 and 150 of Land Act of 2012 to grant leave to allowing the Defendants file further list of documents - specifically the Land Surveyor's reports. In addition and in order to balance the scale of justice pursuant to the provision of Order 18 Rule 10 of the Civil Procedure Act, the Plaintiffs were also granted corresponding leave to be at liberty to recall PW - 1 for purposes of adducing evidence in chief and cross examination specifically on the further list of documents.

**C. The filing of the Land Surveyor's report.**

Subsequently, the Defendant filed and served the further list of document. On 11<sup>th</sup> November, 2021, when the matter was slated for further direction on fixing for its further hearing the Learned Counsel, Mr. Omollo for the Defendant raised a pertinent issue arising from the filed Land Surveyor report, dated 26<sup>th</sup> October, 2021, by a private surveyors trading in the names and style of - "Seline Consultants Limited" and its recommendations. He held to that based on the provisions of Section 18 (2) of the Land Registration Act, it was only the Land Registrar who could entertain any action or other proceedings relating to dispute on general boundaries of registered land unless the boundaries were fixed as per the Provisions of Section 19(1) & (3) of the Act thereof. Clearly, the Learned Counsel argued that this matter

involved general boundary which fell under the ambit of the Provisions of Section 18 (2) of the Land Registration Act. This court would have no jurisdiction to hear any further but to let it be heard and finalized by the Land Registrar as required by law. As a rejoinder, Mr. Ondieki opposed the said objection raised by Mr. Omollo. He indicated, that there had never been any Land Surveyor report available. He stated even as based from the averments made out under paragraphs 7,8 and 9 of the filed Plaints.

The Land Surveyor had always been refused and/or cautioned from conducting such a land surveyor on to the two suit parcels of land namely - the land Kwale/Ukunda/5194 and Kwale/Ukunda/5195 as people would always be violent frustrating the efforts by the Land Surveyor. Be that as it may, he reported that pursuant to a meeting convened by the area chief, he now informed court that the parties were willing to conduct a mutual land survey.

It is based on this background that this Honorable Court indicated the need to provide a comprehensive direction on how the matter was to proceed vis-a vis the objections raised on matters of law particularly the provision of Section 18 (2) of the Land Registration Act.

## **II. THE DIRECTION BY COURT.**

6. I have read carefully the pleadings, the Land Surveyors' report and then listened to the oral submissions by counsels for both the Plaintiff and Defendants and the relevant provisions of Land in order for this Honorable Court to make a reasonable decision. I have decided to deal with only one issue – whether this court has jurisdiction to deal on boundaries matters emanating from Section 18 (2) of the Land Registration Act.

7. It is now trite Law that at any stage once a matter of jurisdiction is raised the court has no choice but to down its tools. This legal proposition was well established in the now famous case in the now famous case of **“Owners of Motor Vessel “Lilian S” – Versus - Caltex Oil (Kenya) Limited (1989) IKLR** dealt with a court, jurisdiction thus:-

**“Jurisdiction is everything. Without it, a court has no powers to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of the proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion it is without jurisdiction.....where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgement is given”.**

In this case this court's jurisdiction has been challenged and anything the court does from now onwards will become a nullity whatsoever. The provision of Section 18 (2) of the Land Registration Act provides as follows;

**(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 situations 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.**

Section 19 (3) defines “fixed boundaries” to mean where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for this survey of land.

In the case of **“Ali Mohamed Salim Versus - Faisal Hassan Ali (2014) eKLR** the type of survey that generates the Registered Index Map (RIM) is known as “General boundaries” which has been defined under Section 18 (1) to mean **“the approximate boundaries and the approximate situation only of the parcel”.**

In **“Azzuri Limited – Versus - Pink Properties Limited” (2017) eKLR**, it was held that:-

**“ In his Paper “The role the Registry Index Map ” RIM in land management in Kenya” Peter K. Wanyoike has stated that the Registered Index Map is a very useful document in registration and management of Land in Kenya within the context of “General boundaries “ or approximate boundaries”. The paper defines General Boundaries” as follows:-**

**“A boundary of which the precise line is undetermined in relation to the physical features which demarcate it..... However, it is clear on the ground where the parcel is situated and where the boundaries are, for they are clearly visible and unmistakable physical features though they do not indicate the exact location of the line within the breath which such physical features necessary process.**

8. Most of the titles under Registered Index Map reported were issued on the basis of the general boundaries meaning that such parcel of land had not fixed boundaries. Such features indicate hedges, fences and roads. On the other hand land registered under Registration of Titles Act required a cadastral survey to be prepared which is based on a fixed boundary principle.

Because general boundaries are identifiable by using the existing physical features and by interviewing the owners of the adjacent plots, the law requires disputes relating to such boundaries to be handled by the Land Registrar and not surveyors or court Section 18 (2). In other words all general boundaries are under the mandate of the Land Registrar and no one else.

In this case the Plaintiff filed the case seeking for orders a survey to be conducted over the two parcels of land being

(a) Kwale/Ukunda/5194 and (b) Kwale/Ukunda/5195 respectively both registered under the Registration of Land Act Cap. 300 (Repealed) on 6<sup>th</sup> October, 2015.

### **III. DETERMINATION**

Clearly, the instant case involves general boundaries. Therefore, it is under, the legal mandate of the Land Registrar as empowered by the provision of Section 18 (2) of Land Registration Act. In the given circumstances I do direct as follows;

- 1. THAT this court has no jurisdiction to continue hearing this matter as the right place is the Land Register -18 (2) and has become “functus officio”.**
- 2. THAT the matter is placed before the Land Registrar to deal within the next 180 days from today and furnish this court with a report accordingly.**
- 3. THAT should the parties feel aggrieved by the decision of the Land Registrar the Land Registration Act provides mechanism of preferring an appeal before the Chief Land Registrar under Section 17 is orders.**

**IT IS SO ORDERED.**

**RULING IS DATED, SIGNED and DELIVERED AT MOMBASA THIS 3<sup>RD</sup> DAY OF DECEMBER, 2021**

**HON. JUSTICE L.L NAIKUNI**

**JUDGE**

**ENVIRONMENT AND LAND COURT, MOMBASA**

**In the presence of:-**

M/s. Yumna – the Court Assistant

Mr. Ondieki Advocate for the Plaintiff.

Mr. Omollo Advocate for the Defendants.