



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 17 OF 2018**

**CHARLES NYABENGI MOTENDE.....1<sup>ST</sup> PLAINTIFF**  
**JOSEPH ONDIBA MANGONDI.....2<sup>ND</sup> PLAINTIFF**  
**GEDION ONDARA OBURE.....3<sup>RD</sup> PLAINTIFF**  
**SAMWEL OFIRI MOSIRIMANI.....4<sup>TH</sup> PLAINTIFF**  
**HEZEKIEL OMBASO OCHEGO.....5<sup>TH</sup> PLAINTIFF**

**VERSUS**

**ONEKO MANG'ONG'O S/O MANG'ONG'O (DECEASED)....1<sup>ST</sup> DEFENDANT**  
**MONANDI MANGONGO.....2<sup>ND</sup> DEFENDANT**  
**SAMWEL ONYANGO OMBUI AND LUKAS OMBUI SONS OF**  
**MOKORO OMBUI (DECEASED).....3<sup>RD</sup> DEFENDANT**  
**MOKORO OICHOE S/O OICHOE (DECEASED).....4<sup>TH</sup> DEFENDANT**  
**JAMES SIAMBE S/O SIAMBE (DECEASED).....5<sup>TH</sup> DEFENDANT**  
**ISAAC NYANKANGI A.K.A ISAAC LUCAS.....6<sup>TH</sup> DEFENDANT**

**RULING**

1. The Plaintiffs are the registered proprietors of the land parcels known as MAJONGE/MANGECHE 1280, 1281, 1282, 1283 and 1284 respectively. The Plaintiffs filed suit against the Defendants claiming that the Defendants had encroached on their land. The Defendants are the registered proprietors of Land Parcels No MAJOGE/BOKIMONGE/ 1,2,10 AND 14 respectively which are separated from the Plaintiffs' land by a community marshland. The plaintiffs seek orders of eviction and a permanent injunction to restrain the Defendants from interfering with their parcels of land.

2. In their joint statement of defence the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants deny the Plaintiffs claim and state that they will raise a preliminary objection on the grounds inter alia that the court lacks jurisdiction as the Land Registrar, Kisii County is seized of the matter and his office is yet to conclude its processes having served the parties with boundary dispute summons. The instant suit is therefore prematurely, irregularly, wrongfully and unprocedurally mounted and thus fatally defective.

3. They further contend that the suit parcels of land are the property of deceased persons and the defendants do not have locus standi as they have not yet obtained Letters of Administration. Additionally, the Defendants filed a Notice of preliminary of objection dated 13<sup>th</sup> July 2018 raising the two points of law; lack of jurisdiction and the fact that the Plaintiffs have no locus standi.

4. The parties consented to dispose of the preliminary objection first and the same was canvassed by way of written submissions.

5. In his submissions, counsel for the Defendant submitted that no purpose would be served by proceeding with the hearing of the main suit as the Plaintiffs had lodged a complaint with the Land Registrar and the land Registrar had issued boundary dispute summons. He submitted

that the Land Registrar was properly seized of the matter in accordance with section 18 of the Land Registration Act, 2012 and the court therefore lacked jurisdiction to hear and determine the matter. He further submitted that the Defendants' titles are registered in the names of deceased persons and the defendants had not yet obtained letters of administration and the defendant so they lacked the capacity to be sued.

6. On his part counsel for the Plaintiffs submitted that the Plaintiffs have sued the Defendants for encroaching on the Plaintiffs' parcels of land in their personal and not representative capacity. He further argued that the Plaintiff's claim is not merely a boundary dispute but a claim of wrongful invasion of the plaintiffs' land by the defendants. He submitted that section 13 of the Environment and Land Court Act clothes the Environment and Land Court with jurisdiction to hear and determine cases such as this one.

#### **ISSUES FOR DETERMINATION:**

7. Having considered the pleadings, Notice of Preliminary objection and rival submissions, the following issues arise for determination:

- i. Whether the court has jurisdiction to entertain this suit
- ii. Whether the defendants have locus standi to be sued.

#### **ANALYSIS AND DETERMINATION**

8. Section 13 of the Environment and Land Court Act provides as follows:

(1) The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land

(2) (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 environment planning and protection, climate issues, land use planning title, tenure, boundaries, rates, rents, valuations, mining minerals and other natural resources

9. The court's jurisdiction to deal with boundary disputes is however subject to Section 18 of the Land Registration Act which provides as follows:

Section 18

(1) *"Except where in accordance with section 2, 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 approximate situation of the parcel.*

(2) *The courts shall not entertain any action or other proceedings relating to a dispute as to boundaries of registered land unless the boundaries have been determined in accordance with 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 as may be necessary".*

10. Under section 19 of the said Act the duty to fix boundaries to registered land is vested in the land Registrar. The said section provides that

(1) *If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to fix the boundaries.*

(2) *The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question file a plan containing the necessary particulars and make a not in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.*

11. From the above provisions of the law it is clear that the mandate to determine boundary disputes is vested in the Land Registrar in the first instance. Even when the court has to hear the dispute it relies on the expert input of the Land Registrar and the Government surveyor. It is therefore important to allow the department that has been mandated to deal with boundary disputes to do its work before the matter is escalated to the court.

12. The other issue that has been raised by the Defendant is that the Defendants do not have locus standi to be sued as the parcels of land which they occupy and which appear to have encroached on the Plaintiffs' parcels of land are registered in the names of their deceased parents. The Plaintiffs have argued that the Plaintiffs have not been sued in their representative capacity as they are the ones who have encroached on the plaintiffs' land. This argument would have held water if this was merely a case of trespass whereby the defendants were being accused of entering and remaining on the plaintiffs' land without the plaintiffs' permission.

13. In the instant case, the encroachment complained of involves the parcels of land registered in the names of the Defendants' parents which

have not yet been transferred to the Defendants' names since they have not taken out letters of administration. The said parcels of land therefore constitute the estate of the Defendants' parents. Indeed at paragraph 10 of the plaint the Plaintiffs have stated that the defendants hold legal interests in the land parcels no. MAJOGGE/BOKIMONGE/1, 2 10 AND 14. is trite law that in order for one to have the capacity or locus standi to sue or be sued in respect of a deceased person's property he must have a grant of letters of administration. See the case of **Rajesh Pranjivan Chudasama V Sailesh Pranjivan Chudasama (2014) eKLR** where the court stated that one is clothed with locus standi upon obtaining a limited or full grant of letter of administration in cases of intestate succession.

**14.** In view of the foregoing, I find and hold that the Preliminary Objection is merited and I uphold it. The Plaintiff's suit is hereby struck out with costs to the Defendants.

**Dated, signed and delivered at Kisii via zoom this 20<sup>th</sup> day of May, 2020.**

**J.M ONYANGO**

**JUDGE**