



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MOMBASA

Civil Case 123 of 2011

NOLLY K. MUSANGO PLAINTIFF

=VERSUS=

PETER ODANGA 1ST DEFENDANT

THE ATTORNEY GENERAL sued as the legal representative of the

DISTRICT LAND REGISTRAR KWALE 2ND DEFENDANT

RULING

The 1st Defendants have raised a Preliminary objection captured in paragraph 18 of their Statement of Defence dated 30th November 2011 in the following terms:

“By virtue of Section 21(4) of Cap 300 this Honourable Court has no jurisdiction to entertain any action or other proceedings relating to dispute of boundaries of registered land nor to address itself, hear and or determine issues of boundaries and consequently the question of trespass herein”

The said preliminary Objection was opposed by the Plaintiff by way of their Grounds of Objection filed in court on 18th November 2011. By consent it was agreed that the matter be disposed of by way of written submissions and all parties did file their written submissions in court.

The issue raised by this Preliminary Objection is whether or not the High Court has jurisdiction to hear and determine this matter in light of the provisions of Section 21(4) of the Registered Land Act. For ease of reference S. 21(4) provides as follows:

“(4) No court shall entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in this section” [my emphasis]

S. 21(2) deals with the mandate of the Land Registrar to determine boundaries and provides:

“where any uncertainty or dispute arises as to the position of any boundary, the Registrar, on the application of any interested party, shall, on such evidence as the Registrar considers relevant, determine and indicate the position of the uncertain or disputed boundary”

It is quite clear therefore that S. 21(4) of the Registered Land Act prevents any court from entertaining a dispute relating to the boundaries of any parcel of registered land unless those boundaries have already

been determined in accordance with the Act. The Land Registrar will make such a determination through a survey and after hearing submissions by all the affected parties as set out in Section 21(1) (2) and (3) of the Registered Land Act.

In their submissions the 1st Defendant argues that the process of fixing and ascertaining the boundaries by the Land Registrar having been concluded, the Plaintiffs cannot by way of this suit seek to challenge the decision of the Land Registrar. That can only be done by way of appeal or review – options which the Plaintiffs have chosen not to pursue.

The 2nd Defendants did also file submissions on this Preliminary Objection dated 21st March 2012. In those submissions the 2nd Defendant in supporting the position taken by the 1st Defendant submits that the suit is pre-mature as the Plaintiff ought to have followed the path of appeal or review as set out in the Act.

On their part the Plaintiffs filed submissions in which they opposed the Preliminary Objection. Their argument was that the question of boundaries **was** settled by the Land Registrar by way of his decision dated 17th November 2010. Thus this suit is properly before this court.

I have considered the submissions filed by the parties. I do note that the process of determination of boundaries was indeed undertaken and concluded by the Land Registrar. This is evident from the findings of the Land Registrar made on 17th November 2010. The Defendant was present during this hearing and in fact concedes to this in paragraphs 7 and 8 of the Statement of defence filed on 30th November 2011. Following this determination the 1st Defendant was given 30 days within which to appeal to the High Court. As stated earlier the Defendant did not exercise this option. Therefore as matters stand today the boundaries having already been ascertained and determined as required by S. 21(4) of the Registered Land Act, then this court is possessed of full jurisdiction to proceed with this matter. In the case of **MWANGI MURAGURI –VS- KAMARA RUKENYA Civil Appeal No. 10 of 1983** the Court of Appeal held that the High Court would have jurisdiction where the boundary has been determined by the Land Registrar. This is precisely the position that pertains in this case. As such and for this I do find that this objection must fail. I hereby dismiss this Preliminary Objection and order that costs be in the cause.

Dated and Delivered in Mombasa this 10th day of September 2012.

M. ODERO
JUDGE

In the presence of:

Mr. Sitonik for Defendant

Mr. Mutiso for Plaintiff

No appearance by Attorney General