



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 57 OF 2019**

**HUDSON KULUNDU**

**JOAN ANDOLA**

**JOAN O. MACHIO ..... PLAINTIFFS**

**VERSUS**

**MARTHA CHIBETTI**

**TOM O. OKELLO.....DEFENDANTS**

**RULING**

The defendants filed their notice of preliminary objection dated 12<sup>th</sup> October, 2020 in which they challenged the jurisdiction of this court to hear and determine this suit. The grounds which the preliminary objection are that this court lacks jurisdiction to entertain the plaintiff's claim. That the plaintiffs' claim is against the provision of section 18 (2) of the Land Registration Act No. 3 of 2012. That the defendants have not trespassed on the plaintiffs' land as alleged or at all and the defendants have not blocked the road of access.

That the plaintiffs have not provided any proof that it is noted in the register that boundaries have been fixed. The copy of the register filed herein has no such information. Furthermore, the acreage is indicated as "Approximate area".

That this issue can only be determined by the Land Registrar. Section 18 (2) of the Land Registration Act states as follows:-

*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.*

That by this clear provision of the law, this court is barred from entertaining this matter for lack of jurisdiction. The Land Registrar has powers under section 19 of the Registration of Land Act No. 3 of 2012 to fix boundaries and until that is done, this court cannot determine whether or not the defendants are trespassers or have blocked the road of access. That the prayers sought in the plaint can only be determined upon the Land Registrar complying with section 19 of the Land Registration Act. That with the provisions of section 19 of the Land Registration Act, the District Surveyor visited the disputed parcels of land and filed a report dated 20<sup>th</sup> January, 2019.

They relied on the cases of Mukisa Biscuit Manufacturing Company Limited vs. West End Distributors Limited 1969 EA and Michael Maluti & Others vs. Julius Mbau Nzyuko & 2 others 2019 E KLR.

The plaintiff's submitted that this suit was commenced by way of an originating summons dated 22<sup>nd</sup> February, 2016 and filed on 8<sup>th</sup> August, 2016. Besides seeking declarations as to the registered ownership of land parcel numbers South Wanga/Ekero/1813-2040-2041 and 1812, the applicants sought the rectification and maintenance of boundary features demarcating their common boundaries with the respondents. Having blocked the access to their parcels numbers South Wanga/Ekero/1813, 2140 and 2141, the plaintiffs prayed for an order directed at the defendants to open the access road in accordance with the Survey Registry Diagram No. 8.31<sup>st</sup> Edition for Ekero sub-location. The court is being asked to enforce compliance to re-open the road.

In furtherance to resolving the dispute herein, on the orders of the Senior Principal Magistrate at Mumias, in ELC No. 109 of 2018 the District Surveyor and the Land Registrar visited the land, filed a report on 19<sup>th</sup> February, 2019. The report concluded that "the boundaries to parcels numbers 1813 and 2141 are intact and well defined on the ground tallying with the map. Parcel No. 2140 and 1812 is not clearly defined on the map as it is on the ground. Further, as per the map, there exists a six-meter road separating 1812 and 2140 contrary to what is on the ground. (No existing road on the ground but it exists on the map)" That this case relates to access and the closure of a demarcated road. It has nothing to do with boundaries. That the preliminary Objection filed by the defendants is misplaced

This court has considered the preliminary objection and the submissions therein. 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 envisaged in Section 18 (2) of the Land Registration Act, 2012 which ousts the jurisdiction of the court where the dispute is purely boundary. I find that this court has jurisdiction to determine the case and I find the preliminary objection is not merited and I overrule the same with costs to the plaintiffs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 24<sup>TH</sup> NOVEMBER 2020.**

**N.A. MATHEKA**

**JUDGE**