



**REPUBLIC OF KENYA**

**High Court at Meru**

**Civil Suit 39 of 2012**

**M'MWIRABUA M'AMWARI .....PLAINTIFF**

**VERSUS**

**M'MBIKO THAKUCHIANA.....1<sup>ST</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR MERU NORTH DISTRICT 2<sup>ND</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL .....3<sup>RD</sup> DEFENDANT**

**RULING**

The plaintiff in this suit, sued the defendants seeking a declaration that the 1<sup>st</sup> defendants closure and/or blockage of road of access leading to and serving the plaintiff's land parcel No.ITHIMA/ANTUAMBUI/2773 is illegal and unlawful and further sought an order that 1<sup>st</sup> defendant do unblock and/or open up the road of access leading to and serving the plaintiff's land parcel No.ITHIMA/ANTUAMBURI/2773. The plaintiff further sought permanent injunction to be issued restraining the 1<sup>st</sup> defendant, his employees, servants, agents, assigns and legal representatives from blocking and interfering whatsoever with the road of access leading to and serving the plaintiff's land parcel No.ITHIMA/ANTUAMBUI/2773. The plaintiff also sought an order that the 2<sup>nd</sup> defendant do plot in the registry index map(RIM). The road of access leading to and serving the land parcel No.ITHIMA/ANTUAMBUI/2773. Contemporaneously the plaintiff filed Notice of Motion seeking an order for 1<sup>st</sup> defendant to open up and unblock the road of access passing along and beside the 1<sup>st</sup> defendant's land parcel No.ITHIMA/ANTUAMBUI/3522, leading to and serving the plaintiff's land parcel No.Ithima/Antuambui/2773 and connecting the land parcel No.ITHIMA/ANTUAMBUI/2773 to other roads of access situated within the ITHIMA/ANTUAMBUI area.

The 1<sup>st</sup> defendant appeared through the firm of M/S Maitai Rimita & Co. Advocates, filed defence, replying affidavit, and notice of preliminary objection. The notice of preliminary objection by 1<sup>st</sup> defendant/respondent dated 23<sup>rd</sup> April, 2012 sets out the following 3 grounds of objection.

- 1. That the plaintiff application and the suit are incompetent as they contravene provisions of Section 21 of the Registered Land Act Cap.300 Laws of Kenya.***
- 2. That this honourable court has no jurisdiction to entertain the plaintiff's application and suit in view of the provisions of Section 21 of the Registered Land Act Cap.300 Laws of Kenya.***
- 3. That the plaintiff's suit and the application are frivolous, vexatious and abuse of the court***

**process.**

When the preliminary objection came up for hearing the Counsel agreed to have the preliminary objection heard by way of written submissions. This court has carefully considered the written submissions by Mr. Maitai Rimita, learned Advocate for 1<sup>st</sup> defendant/respondent and Mr. Kaberia Arimba, learned Advocate for the plaintiff/applicant. It has also read the pleadings, and authorities by the parties herein in support of their respective opposing positions.

One of the 1<sup>st</sup> defendant's preliminary objection is that the suit and the application are incompetent as they contravene the provisions of Section 21 of the Registered Land Act(Cap.300) and that the court has no jurisdiction to entertain the plaintiff's application and suit in view of Section 21 of the Registered Land Act(Cap.300).

Section 21 (1) (2),(3) and (4) of the Registered Land Act(Cap.300) (repealed) provided:-

**21. (1) except where, under section 22, it is noted in the register that the boundaries of a parcel have been fixed, the registry map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.**

**(2) 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.**

**(3) Where the Registrar exercises the power conferred by subsection (2), he shall make a note to that effect on the registry map and in the register and shall file such plan or description as may be necessary to record his decision.**

**(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.**

**(5) Except where, as aforesaid, it is noted in the register that the boundaries of a parcel have been fixed, the court or the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as it or he thinks fit.**

The 1<sup>st</sup> defendant's objection is premised on the Registered Land Act(Cap.300) which law has been repealed vide enactment of the following statutes.

1. ***The Land Registration Act (No.3 of 2012) which commenced on 2/5/2012.***
2. ***The Land Act (No.6 of 2012) which commenced on 2/5/2012.***
3. ***The National Land Commission Act (No.5 of 2012) which commenced on 2/5/2012.***
4. ***The Environment and Land Court Act (No.19 of 2009) which commenced on 30/8/2011.***

The Act relied upon by 1<sup>st</sup> defendant is no longer in existence and is absolute following its being repealed. The relevant Act in respect of the 1<sup>st</sup> defendant's preliminary objection is The Land Registration Act 2012 (No.3 of 2012) under Section 18(1) and (2) which provides:-

**18. (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.**

The preliminary objection raised by the 1<sup>st</sup> defendant deals with issues related to suits over boundaries of a registered land and not issues on interest of land in the nature of easement. The court is not barred from entertaining a claim of easement or claim to road of access as is in the present suit. Under Section 28(c) of the Land Registration Act 2012(No.3 of 2012), all registered lands, such as 1<sup>st</sup> defendant's land is subject to overriding interests which interest include right of way, right of water etc. and such overriding interests need not be noted on the register of the lands. Such rights are not under Section 18 of the Land Registration Act. Section 28(c) of the Land Registration Act referred hereinabove provides:-

**28. Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—**

**(a).....**

**(b).....**

**(c).....**

**(c) rights of way, rights of water and profits subsisting at the time of first registration under this Act;”**

Further to the above the Land Registration Act 2012(No.3 of 2012 provides enjoyment of easement and analogous rights. The Act provides that any person who by Section 100 of the Land Registration Act 2012(No.3 of 2012) entitled to benefits of easement or analogous right may take out in their own name, any proceedings necessary for enforcement of easement or the analogous rights. There is no requirement that such rights be determined in accordance with Section 18 of the Land Registration Act 2012(No.3 of 2012) nor is there provision that court shall not entertain any action based on easement.

Section 100(1) (a), (b) and (2) of the Land Registration Act provides:-

**“100. (1) The benefit of an easement, or an analogous right granted under this Part shall be enjoyed, during the term of its existence, by the owner of the dominant land, any successors in title and by—**

**(a) any lessee of the dominant land, or so far as the nature of the easement, or analogous right or part of it permits, and**

**(b) any lender on the security of a charge for the time being in possession of the dominant land, or so far as the nature of the easement or analogous right any part of it permit.**

**(2) Any person referred to in subsection (1) (a) or (b) who is by this section entitled to the benefit of an easement or analogous right may take out, in their own name, any proceedings necessary for the enforcement of the easement or the analogous rights.”**

Further it is provided under Section 101 of the Land Registration Act, 2012 (No.3 of 2012) as follows:-

**“101. The Environment and Land Court established by [the Environment and Land Court Act, 2011 No. 19 of 2011](#) has jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”**

In view of the above I find no merits on grounds NO.1 and 2 of the preliminary objection.

The 1<sup>st</sup> defendant under grounds No.3 of the preliminary objection avers that the plaintiff's suit and application are frivolous, vexatious and an abuse of the court process. The issues raised in support of this ground are issues of fact and/ or evidence and not issues of points of law. The preliminary objection cannot with adducing of evidence stand. The issues cannot without taking any evidence be determined and such the objection I find is not of a point of law.

The upshot is that the 1<sup>st</sup> defendant' preliminary objection is void of merits and the same is dismissed with costs to the plaintiff.

DATED, SIGNED AND DELIVERED AT MERU THIS 6<sup>TH</sup> DAY OF NOVEMBER, 2012.

**J. A. MAKAU**  
**JUDGE**

Delivered in open court in presence of:

1. Mr. Arimba for the plaintiff
2. Mr. Rimita for 1<sup>st</sup> defendant
3. Mr. Mogaka h/b for Mr. Menge for 2<sup>nd</sup> and 3<sup>rd</sup> defendant

**J. A. MAKAU**  
**JUDGE**