



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CASE NO. 228 OF 2015

CONFLUENCE LIMITED.....PLAINTIFF

VERSUS

HOME AFRIKA LIMITED.....DEFENDANT

RULING

Confluence Ltd (*hereinafter referred to as plaintiff*) filed a plaint against Home Afrika Ltd, (*hereinafter referred to as defendant*) claiming to be the registered owner of all that parcel of land known as Ksm/Nyahera/2394 measuring approximately 2.00 Ha having acquired the same on 5/4/2011. She claims that the defendant is the registered owner of all that parcel of land known as Kisumu/Dago/755, wherein she is carrying out a large housing project commonly known as Lakeview Height Project.

The Plaintiff avers that her parcel of land does not have a common boundary with the defendants No. Kisumu/Nyahera/1597 being in between the two parcels and that in 2014 or thereabout the defendant did a public launch of their project and immediately thereafter engaged their surveyors to place beacons on their parcel.

The Plaintiff avers that the defendant surveyors trespassed into their suit parcel of land which has a stone wall and placed beacons therein purporting to hive off their entire 5 acres alleging it belongs to the defendants.

The Plaintiff avers that the Defendant thereafter commenced ground clearing with their graders and has persistently threatened to bring down their stone wall. Further they have commenced building their permanent wall towards the suit parcel. The Plaintiffs aver that the suit parcel is in Nyahera sub-Location while the defendant parcel is Dago Sub Location and there exist a parcel of land in between the two parcels and a public road and are at loss as to why the defendant claims the suit parcel.

The Plaintiff further avers that she has officially communicated to the defendant over this issue and exchange correspondence but no amicable solution has been found and that the defendant has continued with her activities and unless restrained shall unlawfully dispossess the plaintiff of the suit parcel of their loss and detriment.

The plaintiff prays for a permanent injunction do issue restraining the defendant whether by themselves their agents, servants or anybody claim through them from trespassing onto, building or in any manner interfering with the Plaintiff's quiet use and possession of Kisumu/Nyahera/2394. **Costs and interest of this suit. Any other relief which this court may deem fit and proper to grant.**

In her defence, the defendant states that she is the registered proprietor of Kisumu/Dago/755 and does not have a common boundary with Kisumu/Nyahera/2394 and that she has not trespassed on the respondents land. She prays that the respondent suit be dismissed.

On the 17/9/2018, a consent letter duly signed by both parties was received by this court and a consent order issued as follows:

- 1. That the County Lands Registrar and County Lands Surveyor do visit and demarcated the boundaries of parcel KISUMU/NYAHERA/2394, KISUMU/NYAHERA/1597 and KISUMU/DAGO/755.**
- 2. That each party to be at liberty to appoint their own personal surveyor to be present during the exercise.**
- 3. That the costs of Survey process to be shared equally amongst the parties.**
- 4. That the Area Chief Dago and Nyahera to be present during the exercise.**

5. That AP Commandant- Kisumu County to provide security during this exercise.
6. That the survey exercise to be carried out within 60 days of serving the County Lands Registrar and County Lands Surveyor with this order.
7. That the County Lands Registrar and County Lands Surveyor do file their report in Court 30 days of conducting this exercise.
8. That the County Lands Registrar and County Lands Surveyor do file their report in court within 30 days of conducting this exercise.
9. That parties at liberty to apply.

The Regional County Director of Surveys did a re-survey of the disputed parties and found that:

1. The above three parcels cited in the suit are located within two different registration sections/sub-locations i.e. KISUMU/NYAHERA/2394 & 1597 are within Nyahera sub-location while Kisumu/Dago/755 is located within Dago Sub-location.
2. It was established that the petitioner, CONFLUENCE LIMITED of KISUMU/NYAHERA/2394, had erected a stone fence which passes through parcel KISUMU/DAGO/755 belonging to the objector HOME AFRIKA LTD.
3. The region hived out by the stone fence as highlighted in finding number 2 above was computed to be approximately 1.8 ha (4.5 acres) and this has been illustrated in the attached diagram 3.
4. Upon further surveys, it was also established that the rightful spatial ground location of the petitioner, CONFLUENCE LIMITED of KISUMU/NYAHERA/2394, was already occupied by existing homesteads as indicated on the Satellite image extracted from gogo map and illustrated on the attached Diagram 2.
5. It was also established that the right location of parcel KSIUMU/NYAHERA/1597 IS PARTIALLY OCCUPIED BY A HOMESTEAD AS INDICATED ON THE Diagram 3, the attached satellite image on diagram 2 also illustrates the existence of the same homestead.

The general observation was that the petitioner Confluence Limited seems not to be certain on the correct geographical location of the parcel number KSIUMU/NYAHERA/2394. The said parcel of land does not make a common boundary with the parcel number KISUMU/DAGO/755 whatsoever but instead there exists a parcel of land KSIUMU/NYAHERA/1597 in between them. This was observed in the letter dated 13/2/2020.

On the 28/9/2020, the applicant filed a Preliminary Objection whose basis is that the court has no jurisdiction and that the Land Registrar determined the dispute and field a report dated 13/2/2020 and field on 18/2/2020.

Section 18 (2) of the Land Registration Act provides as follows:

“(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.”

I have considered the Preliminary Objection, the submissions by the applicant and do find that the report filed on the 18/2/2020 was not a determination of a boundary dispute between the parties’ properties. In-fact the report shows that the applicant and the respondent do not share a common boundary and therefore this cannot be on boundary dispute. I do find the Preliminary Objection not merited and the same is dismissed with costs.

DATED AND DELIVERED THIS 3rd DAY OF NOVEMBER, 2020.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

In the presence of:

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