



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NYAHURURU**

**ELC NO. 35 OF 2019**

**CYRUS MUNUHE MWANIKI.....1<sup>st</sup> PLAINTIFF**

**CECILIA WANJIRA MURITHI.....2<sup>nd</sup> PLAINTIFF**

**VERSUS**

**COUNTY LAND REGISTRAR, LAIKIPIA.....1<sup>st</sup> DEFENDANT**

**HON ATTORNEY GENERAL.....2<sup>nd</sup> DEFENDANT**

**FRANCIS GIHAIGA GACHAGO.....1<sup>st</sup> INTERESTED PARTY**

**CHARLES KIHUNGI GACHAGO.....2<sup>nd</sup> INTERESTED PARTY**

**RULING**

1. The present suit was brought vide a Complaint dated the 1<sup>st</sup> of August 2019 seeking the following orders:

- i. A declaration that the instructions/findings identified as Report 'A' herein by the 1<sup>st</sup> Defendant over the survey report for land parcels known as Gituamba/Muhotetu Block 2/463, Gituamba/Muhotetu Block 2/417, Gituamba/Muhotetu Block 2/415 and Gituamba/Muhotetu Block 2/416 is inconsistent with Sections 16(1) and (2) of the Land Registration Act 2012 and is therefore null and void.
- ii. An order compelling the 1<sup>st</sup> Defendant to place/move the beacons over the boundary line between land parcels known as Gituamba/Muhotetu Block 2/463, Gituamba/Muhotetu Block 2/417 and the land parcels known as Gituamba/Muhotetu Block 2/415 and Gituamba/Muhotetu Block 2/416 pursuant to the Registry Index Map (field sheet 3) for Gituamba/Muhotetu Block 2.
- iii. Consequently the interested parties do remove any structures and live fence standing on the boundary line between land parcels No. Gituamba/Muhotetu Block 2/463, Gituamba/Muhotetu Block 2/417 and the land parcels known as Gituamba/Muhotetu Block 2/415 and Gituamba/Muhotetu Block 2/416.

iv. Costs of this suit together with interest thereon.

2. Pursuant to the filing of the suit, the 1<sup>st</sup> and 2<sup>nd</sup> interested parties' filed their joint defence in which they raised a preliminary objection attacking the Court's jurisdiction to hear and determine the suit as the matter before it was one based on a boundary dispute.

3. The parties were directed to dispose of the preliminary objection in the first instance by way of written submissions to which the interested parties submitted that the matter in question touched on a boundary dispute between Gituamba/Muhotetu Block 2/415 belonging to the 1<sup>st</sup> interested party, Gituamba/Muhotetu Block 2/416, belonging to the 2<sup>nd</sup> interested party, Gituamba/Muhotetu Block 2/417 belonging to the 2<sup>nd</sup> Plaintiff and Gituamba/Muhotetu Block 2/463 belonging to the 1<sup>st</sup> Plaintiff.

4. That on or about the 6<sup>th</sup> June 2019, following a boundary dispute, a grounds survey over the suit properties had been made by the District Surveyor who had then made his findings vide a report dated 7<sup>th</sup> June 2019.

5. The Plaintiffs, being aggrieved by the report by both the District Surveyor and District Land Registrar sought to impugn the said report by relying on a report that was prepared by a private surveyor dated the 11<sup>th</sup> July 2019.

6. The interested parties' submission was that the legal position where a party is aggrieved by the Land Registrar's decision was found in paragraph 40(6) of the Land Registration and General Regulations, 2017 to wit the Plaintiffs having been aggrieved by the decision of the Land Registrar ought to have filed an Appeal for its nullification instead of filing a Plaint as in the present case.

7. Reference was made to the decided case in **Secretary County Public Service & Another vs Hulbhai Gedi Addille [2017] eKLR** to urge the Court to down its tools, and strike out the suit with costs for lack of jurisdiction to hear the matter.

8. In opposition of the preliminary objection, the Plaintiffs filed their submissions to the effect that parties had raised weighty and triable issues in their pleadings that could only be determined by a Court of law during a hearing. That although the parties to whom the suit was brought against had not raised any preliminary objection yet the same had been raised by the interested parties through their written submissions without any formal notice of preliminary objection.

9. That it was prejudicial for a party to be subjected to reply to a weighty matter in a preliminary objection without first being served with a formal application to appreciate the actual points of law. That further it was equally bad in law for the Courts to entertain such practice as the Courts record would invariably appear lacking in the event that the matter went before another Court.

10. The Plaintiffs admitted that the survey exercise conducted on the 7<sup>th</sup> June 2019 and issuance of the disputed report thereafter had been the subject of the dispute.

11. That pursuant to the decided case in **Republic vs. Chief Registrar of the Judiciary & 2 Others ex parte Railey Services Limited [2015] eKLR**, the interested parties had raised no point of law in their preliminary objection. That the filing of a suit by way of Plaint instead of the Memorandum of Appeal did not qualify as a point of law.

12. That the Environment and Land Court was a Court defined under the Act that had the jurisdiction to hear the matter as filed by the Plaintiffs. Further, that the striking out of the suit was a very drastic action which should be exercised very sparingly. They sought that the preliminary objection be dismissed with costs.

#### **Determination**

13. A Preliminary Objection according to the decided case by the Court of Appeal in the case of **Mukisa Biscuits Manufacturing Co. Ltd- v- West End Distributors Limited (1969) EA. 696** was stated to be thus:-

*“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”*

14. It is evident that a **Preliminary Objection** consists of pure points of law and it is also capable of bringing the matter to an end preliminarily. See the case of **Quick Enterprises Ltd. vs. Kenya Railways Corporation, Kisumu HCCC No.22 of 1999**, where the Court held that:-

*“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”*

15. In the case of **Avtar Singh Bhamra & Another vs Oriental Commercial Bank, Kisumu HCCC No.53 of 2004**, the Court held that:-

*“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”*

16. In its Preliminary objection, the Interested Parties' case at paragraph 11 of the their joint statement of defence dated the 18<sup>th</sup> September 2019 inter alia is that the suit before the Court was fatally defective for reasons that the Court had no jurisdiction to hear it as it was based on a boundary dispute.

17. The matter that therefore arises for determination is whether the Plaintiffs' claim is based on a boundary dispute and whether the Court has the jurisdiction to hear and determine the suit.

18. It is not in dispute that there was a boundary issue between land parcel No. Gituamba/Muhotetu Block 2/463, Gituamba/Muhotetu Block 2/417 and the land parcels known as Gituamba/Muhotetu Block 2/415 and Gituamba/Muhotetu Block 2/416. Indeed it has not been disputed that on or about the 6<sup>th</sup> June 2019 following the said dispute, the District Land Surveyor made a grounds survey over the suit properties wherein the Registrar in exercising his mandate proceeded to determine the dispute on the 6<sup>th</sup> June 2019 where he held that;

*‘After the surveyor had surveyed the subject boundaries, it was found to have anomaly as explained in the surveyor's report.*

*I therefore directed the beacons to be moved to the correct position as shown by the red light.’*

19. The Plaintiffs being aggrieved by the report of both the District Surveyor and District Land Registrar engaged their own *Private Surveyor*

who filed his report dated the 11<sup>th</sup> July 2019 to which report they now seek to impugn the District Land Registrar and District Surveyor's report.

20. The Court finds that once the Land Registrar had made his decision and filed a report, the only way that decision could be challenged was through the proceedings of *Section 149 of the repealed Registered Land Act* which is similar to *Section 86 (1) of the Land Registration Act 2012* that was the applicable law when this dispute was filed.

21. Section 86 (1) of the Land Registration Act 2012 is wide in scope in that apart from the Registrar, it also allows "any aggrieved person" to seek the opinion of the Court. It reads:

*"If any question arises with regard to the exercise of any power or the performance of any duty conferred or imposed on the by this Act, the Registrar or any aggrieved person shall state a case for the opinion of the Court and thereupon the Court shall give its opinion, which shall be binding upon the parties"*

22. The terms of **Section 18 (2)** of the Land Registration Act, are to the effect that proprietors of registered land with a boundary dispute are obligated to first seek redress or solution from the Land Registrar before moving or escalating the dispute to this Court. These provisions show clearly that the Court is without jurisdiction on boundary disputes of registered land until and after the land Registrar's determination on the same has been rendered. See, the case of, **Wamutu vs. Kiarie [1982] KLR 480**.

23. From the materials presented herein, it is evident that the Land Registrar adhered to the law and invited all the parties to deliberate on the boundary dispute wherein they each called their respective witnesses. Further, in exercise of his legal mandate, the Land Registrar proceeded to determine the dispute. It is therefore clear from the provisions of *Section 86 (1) of the Land Registration Act 2012*, as well as the provision of Section 13 of the Environment and Land Court that a review and/or Appeal from the decision of the Land Registrar could only be considered by this Court.

24. I therefore find the present Preliminary Objection **lacks merit** and proceed to dismiss it with costs to the Plaintiffs.

**Dated and delivered at Nakuru this 11<sup>th</sup> day of December 2020.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**