



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 70 OF 2011

ENGLISH VOICE REAL ESTATE LIMITED.....PLAINTIFF

VERSUS

RICHARD BINNS & ANOTHER.....DEFENDANTS

RULING

1. By a Complaint filed herein on 13th June 2011, English Voice Real Estates Ltd (the Plaintiff) prays for a permanent injunction to issue restraining the 1st Defendant from trespassing or encroaching into, erecting buildings, transferring, alienating or in any way dealing with all that parcel of land comprised in the Title No. Gede/Dabaso/576. In addition, the Plaintiff craves an order of injunction compelling the 1st Defendant to remove a wall and borehole erected and developed on the said parcel of land without the Plaintiff's authority. The Plaintiff also seeks general damages and costs.
2. The Plaintiff's claim is premised on the ground that it is the registered proprietor of the said parcel of land measuring 0.2 Ha and situated in Malindi. It is the Plaintiff's case that after it purchased the property and had it transferred into its name on 12th January 2010, it discovered that the 1st Defendant had wrongfully encroached and trespassed into a portion of the property and had unlawfully taken possession thereof. Surveyors sent by the Plaintiff to the property established that the 1st Defendant had indeed unlawfully encroached into the Plaintiff's property and blocked an access road thereto.
3. It is further the Plaintiff's case that the 1st Defendant had also irregularly installed an underground water tank on the Plaintiff's property and all efforts to resolve the matter amicably were not successful hence necessitating this suit.
4. By a Written Statement of Defence and Counterclaim filed herein on 15th December 2011, Richard Binns (the 1st Defendant) contended that the suit as filed is void *ab initio* as the same was filed in contravention of Section 21(4) of the Registered Land Act, Cap 300 of the Laws of Kenya. The 1st Defendant went further to give notice that at the hearing hereof, he would raise a preliminary Point of Objection on that ground.
5. It is the 1st Defendant's case that the claim herein is based on trespass to land and that by dint of Section 3 of the Land Disputes Act 1990 as read with Section 11 of the Civil Procedure Act, the matter ought to have been instituted in the Land Disputes Tribunal.
6. In addition the 1st Defendant averred that he was together with his wife Felicity Binns (the 2nd Defendant) the registered proprietors of title number Gede/Dabaso/520 and 577. They acquired Title for Parcel No. 520 in 1994 and erected a boundary wall along the established boundary.
7. The Defendants aver that if the boundary wall and alleged water tanks are developed outside the boundary of Gede/Dabaso/520, then the said Portion now belongs to the Defendants by dint of the doctrine of adverse possession. The Defendants accordingly claim in their counterclaim the said portion of the Plaintiff's Gede/Dabaso 576 as may be found to have been fenced in by the defendants and joined with the Defendants' portion number Gede/Dabaso/520.
8. Subsequently, by the Defendants' Preliminary Objection dated and filed herein on 14th December 2017, the Defendants aver that the suit and the action by the Plaintiff against them is defective, void *ab initio* and ought to be struck out on the grounds :-

1. That the Court has no jurisdiction to entertain this suit as the same is brought in direct violation of Section 21(4) of the Land Registration Act (Sic) Cap 300 of the Laws of Kenya.

2. The Plaintiff's claim against the Defendants is based on trespass to land. By dint of Section 3 of Land Dispute Act, 1990 as read with Section 11 of the Civil Procedure Act, the matter ought to have been instituted in the Land Disputes Tribunal.

9. The Preliminary Objection was canvassed before me by way of oral submissions. According to Mr. Ole Kina, Learned Counsel for the Defendants, the Court will only assume jurisdiction over a suit related to boundaries of land if the boundaries have been fixed as provided under Section 21(4) of the Registered Land Act.

10. It was Counsel's submissions that two things flow from a perusal of the Plaint as filed. First, there was no allegation that the boundaries were ever fixed by the Registrar and/or that a note was made to that effect by the Registrar. In the absence of any such allegation or reference thereto even in the Plaintiff's Statement, Counsel was of the view that this Court lacked jurisdiction to entertain this dispute.

11. Secondly, Mr. Ole Kina submitted that since the Plaintiff was complaining about trespass to the land at the time of commencement of the suit, that action by dint of Section 3 of the Land Disputes Tribunal Act ought to have been referred to the Land Disputes Tribunal for the area. In this regard, Section 11 of the Civil Procedure Act provided that a suit ought to be commenced at the Lowest Court with jurisdiction to hear the same.

12. In response to the Objection, Mr. Obok, Learned Counsel for the Plaintiff submitted that the jurisdiction of this Court emanates from Article 162 of the Constitution and the Environment and Land Court Act. The Plaintiff were therefore properly before this Court.

13. Counsel for the Plaintiff submitted that the Land Disputes Tribunal Act was repealed by the coming into force of the Land Registration Act and the tribunal no longer existed. If this Court was to uphold the objection, it would be denying the Plaintiff a forum to ventilate its grievance. He therefore asked the Court to dismiss the Objection.

14. I have considered the Preliminary Objection and the response thereto. The Land Disputes Tribunals were established under Section 4 of the Land Dispute Tribunals Act, No. 18 of 1990(now repealed). Section 3(1) of the Act gave the tribunals jurisdiction as follows:-

“Subject to this Act, all cases of a civil nature involving a dispute as to:-

a) The division of, or the determination of boundaries to land, including land held in common;

b) A claim to occupy or work land' or

c) Trespass to land shall be heard and determined by a tribunal established under

Section 4.”

15. As it were, the Land Disputes Tribunal Act was repealed by Section 3(1) of the Environment and Land Court Act, No. 19 of 2011. The Environment and Land Court Act commenced operation on 30th August, 2011 some two and a half months after this suit was filed in the High Court.

16. From the Preliminary Objection as argued before me, the Defendants contend that this matter was filed in a Court without jurisdiction. By jurisdiction of course, is meant the authority which a Court has to decide matters that are litigated before it. The limits of this authority are imposed by the Statute, Charter, or Commission under which the Court is constituted, and may be extended or restricted by like means. Where no restriction or limit is imposed the jurisdiction is normally said to be unlimited.

17. The locus classicus decision on jurisdiction is, of course, the celebrated case of ***Owners of Motor Vessel “Lillian S” –vs- Caltex Oil(Kenya) Ltd*** where the late Justice Nyarangi of the Court of Appeal held as follows:-

“...jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

18. There is no question that the dispute herein touches on matters relating to boundary to land, in particular, whether or not, the Defendants had erected a boundary wall and a borehole on a portion of land belonging to the Plaintiff. The Plaint as we have seen was filed on 13th June 2011 at which time the operative statute in matters of this kind was the Land Disputes Tribunal Act, No. 18 of 1990.

19. As at the date this suit was commenced, the Environment and Land Court Act created pursuant to Article 162(2) of the Constitution was yet to come into existence. The Land Disputes Tribunal was accordingly the proper avenue to ventilate this dispute.

20. Indeed at the time the suit was filed, Article 165(5) of the Constitution of Kenya 2010, had already expressly taken away the jurisdiction of the High Court before which this matter was first filed to hear and determine matters relating to land use, planning and title to land.

21. In the circumstance of this case where notice of the objection was given to the Plaintiff way back in December 2011, there was no justification for the continued existence of this suit as filed to-date.

22. Accordingly, I do find merit in the Defendants Preliminary Objection dated and filed herein on 14th December 2017. This suit is accordingly struck out with costs to the Defendants.

Dated, signed and delivered at Malindi this 24th day of January, 2019.

J.O. OLOLA

JUDGE