



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 195 OF 2017

GEORGE KAMAU MACHARIA.....PLAINTIFF

VERSUS

DEXKA LIMITED.....DEFENDANT

RULING

1. The Plaintiff commenced this suit by a plaint filed on the 26/4/16. By leave of the Court the plaint was amended on 23/10/17. The Plaintiffs complaint against the Defendant is for encroachment of his land SAMURU/MWITINGIRI /BLOCK 1 /219. He sought orders *inter alia*; declaratory orders that he is the sole registered proprietor of the suit land; permanently restrain the Defendant from interfering with the suit land and demolition of the Defendant's wall. He avers that the Defendant is the registered owner of SAMURU/MWITINGIRI /BLOCK 1 /218.

2. The Defendant denied the Plaintiff's claim and undertook under para 5 to raise a Preliminary Objection to the proceedings on the basis that since the cause of action is based on encroachment the Court does not have jurisdiction to hear and determine it given the provisions of section 18(2) of the Land Registration Act, No 3 of 2012.

3. The Defendant filed the Preliminary Objection on 1/11/18 seeking that the entire suit be struck out on the grounds stated as follows;

“ That in so far as the claim is founded on alleged encroachment on the parcel of land known as SAMURU/MWITINGIRI/BLOCK1/219, the Court lacks jurisdiction to hear and determine the claim by virtue of the express provisions of section 18 (2) of the Land Registration Act.And the entire suit is misconceived in law and amounts to abuse of the process of the Court.”

4. Parties elected to argue the Preliminary Objection by way of written submission which I have read and carefully considered.

5. Quoting the case of **Samuel Macharia & Anor Vs Kenya Commercial Bank Limited and & 2 Others (2012) EKLR** the Defendant submitted that the Court does not enjoy the jurisdiction to hear the matter in view of section 18(2) of the Land Registration Act. That the provision of section 18(2) of the Land Registration Act serves to restrict the jurisdiction of the Court by committing boundary disputes to the Land Registrar for determination in the first instance. It is only after the Land Registrar has determined the dispute that the matter is escalated to this Court. The dispute between the parties relates to the position of the boundary between the Plaintiffs parcel No SAMURU/MWITINGIRI/BLOCK1/219 and the Defendants parcel No SAMURU/MWITINGIRI/BLOCK1/218. The Defendant Placed reliance on decided case law which I have read and considered; see **Samuel Njoroge Gituku & 6 others Vs Kenya Rural Road Authority & 5 others (2017) EKLR; Maricus Otieno Okwayo Vs George Owenge Aluoch (2017) EKLR; Willis Ocholla Vs Mary Ndege (2016) EKLR.**

6. The Plaintiff submitted that in his view the boundaries between the two plots were determined at the time that the lands were acquired and registered and it would serve no purposes to refer the matter to the Land Registrar and the Surveyor. He relied on the copy of the certificate of lease, the RIM (Registry Index Map) and the map sheet to support his point. He stated that the Plaintiff is the absolute and legal owner of the suit land and the law protects it under section 24 of the Land Registration Act against any encroachment and trespass from third parties. The Plaintiff pointed out to the Court that is has the requisite jurisdiction to hear and determine the matter as per the provisions of Art 162(2) (b) read together with section 13 of the Environment and Land Court Act.

7. The Court has considered the Preliminary Objection, the rival submissions and the pleadings as a whole and the issues for determination are; Whether the Plaintiffs claim is based on a boundary dispute. If so, whether the same should be dealt with under section 18(2) of the Land Registration Act; Whether the Preliminary Objection is a pure point of law.

8. In order for a matter to be taken by the Court as a Preliminary Objection, guided by the definition of a Preliminary Objection as acknowledged in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, it must be;

"..... 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".

9. In **Oraro vs. Mbaja [2005] 1 KLR 141 Ojwang, J** (as he then was) expressed himself as follows; -

".....a "Preliminary Objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary point... Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence..."

10. The effect of the case law cited above means for one to succeed in putting up a Preliminary Objection, it must meet the following criteria; it must be a pure point of law; it must be pleaded by one party and admitted by the other; it must be a matter of law which is capable of disposing the suit; must not be blurred by factual details calling for evidence and finally must not call upon the Court to exercise discretion.

11. The Plaintiff has stated his cause of action under para 4 as thus;

"The Defendant in order to demarcate his land constructed a stone wall around his plot No. SAMURU/MWITINGIRI/BLOCK1/218. The wall however was built such that it encroached on part of the Plaintiffs land. The Defendant continued construction of the wall on the Plaintiff's land despite protests from him which constitutes unlawful trespass."

The above averment clearly shows that the dispute is a boundary dispute. The Plaintiff accuses the Defendant of building a wall that has encroached on to his land and in his prayers inter alia, include orders of demolition of the said wall.

The Defendant has denied the claim and raised a Preliminary Objection that the suit has been prematurely brought before this Court instead of placing it before the Land Registrar for hearing and determination under section 18(2) of the Land Registration Act.

12. The jurisdiction of this Court flows from Art 162(2) (b) of the Constitution which is read together with the provisions of section 13(2) of the ELC Act. The latter provides as follows;

"In exercise of its jurisdiction under Article 162(2) (b) of the Constitution, the Court shall have power to hear and determine disputes—

- a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
- b) relating to compulsory acquisition of land;
- c) relating to land administration and management;
- d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
- e) any other dispute relating to environment and land

For avoidance of doubt S. 13 of the Environment and Land Act in my view does not oust the jurisdiction of the court to determine boundaries. However when it comes to general boundaries section 18(2) of the Land Registration Act provides in mandatory terms that the dispute should be submitted to the Land Registrar.

13. Under the Land Registration Act Cap 300 (now repealed) Section 21(4) deprived this Court the power to 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 that section. Section 18(2), the Land Registration Act, 2012 (LRA), similarly prohibits this Court from entertaining 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 that section. It provides 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".

14. Under Section 19 of Land Registration Act, 2012 the duty to fix boundaries to registered land is vested in the Land Registrar. It provides as follows:

"19. (1) If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.

2) The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.

(3) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section.

15. From the above provisions of the law, it is manifestly clear that the above section gives the mandate to the Land Registrar to resolve boundary disputes of land with general boundaries. Registry Index Map (RIM) only indicates approximate boundaries and the approximate situation on the ground. Even if this Court was to hear and determine this matter it will still require the input of the Land Registrar. The framers of section 18(2) of the Land Registration Act placed this matter before the Land Registrar who has the technical advice and resources of the District Surveyor to determine and ascertain the boundaries. It is trite law that where the law has given a legal obligation to a department of Government, it is important for the Court to let that department proceed to meet its legal obligations. In this case the office of the Land Registrar is mandated to deal with the general boundary dispute first before the same is escalated to the Court. It is the view of this Court that the dispute is prematurely before the Court.

16. The Plaintiff should take the steps contemplated in **Section 18(2)** of the Land Registration Act, 2012 in resolving the dispute.

17. In the end the Preliminary Objection is upheld. The suit is hereby struck out for being filed prematurely before the Court with costs to the Defendant.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 14TH DAY OF FEBRUARY 2019

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Ms Maina HB for Nyasani for the Plaintiff

Ndegwa HB for Mutue for the Defendant

Irene and Njeri, Court Assistants