



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKEUNI

ELC NO. 69 OF 2018

MICHAEL MALUTI.....1ST PLAINTIFF/APPLICANT
JOHN MATU MALUT.....2ND PLAINTIFF/APPLICANT
BENEDICT MAWIO MALUTI.....3RD PLAINTIFF/APPLICANT
FEDELIS KIMOTE MALUTI.....4TH PLAINTIFF/APPLICANT
MUTISO MALUTI.....5TH PLAINTIFF/APPLICANT
JOSEPHAT WAMBUA MALUTI.....6TH PLAINTIFF/APPLICANT

VERSUS

JULIUS MBAU NZYUKO.....1ST DEFENDANT/RESPONDENT
COUNTY LAND REGISTRAR2ND DEFENDANT/RESPONDENT
MAKUENI COUNTY GOVERNMENT.....3RD DEFENDANT/RESPONDENT

RULING

1. What is before this court for ruling is the 1st Defendant's /Respondent's preliminary objection/grounds of opposition dated 17th July, 2018 and filed in court on even date.
2. The 1st Defendant/Respondent has stated in his preliminary objection/grounds of opposition that;
 1. That the application is brought mala fides.
 2. That the Applicant has not demonstrated that he referred the matter to the Land Registrar Makueni to resolve the boundary dispute and that he failed to do so in accordance with Section 19 of the Land Registration Act.
 3. That it is apparent that the dispute herein had been referred to the Land Registrar for resolution and the same was scheduled for hearing on the 6th day of July, 2018, unfortunately the Applicant prematurely rushed to the court before the Registrar could resolve the dispute.
 4. That pursuant to the aforementioned in clause 3 above, the Applicant mutilated the original summons which we annex herein. The summons in the application read a different date from the original summons. The correct date ought to be 6/7/2018 and not 26th June, 2018.
 5. That the application is unmeritorious as the threshold for the grant of the orders sought has not yet been met.
 6. That the application as filed is premature, a non-starter and an abuse of the court process.

3. In opposition to the preliminary objection the Plaintiffs/Applicants filed a supplementary affidavit sworn at Makueni on the 23rd August, 2018 by Michael Maluti and filed in court on even date.

4. In paragraph 1, 2 and 7 of their supplementary affidavit, Michael Maluti has deposed that he was served with summons whose date of visitation by the surveyor who was to fix a boundary between themselves and the proprietor of parcel number 94 Mbau was unclear. That the Applicant does not know the person who mutilated the summons in question.

5. The court directed that the application be disposed off by way of written submissions.

6. It was submitted on behalf of the 1st Defendant/Respondent that the Respondents objection of the suit and the application is explicit in that;

i. The application and the entire suit has been brought against the Respondent in bad faith for reasons that the Applicants land borders that of the Respondent, it was within the provisions of the law that the Respondent cause the Registrar to issue the summons with a view to determine the boundary dispute between the two parcels of land, notwithstanding this position the Applicants without awaiting for the decision of the Registrar opted to come to court with a view to frustrate that exercise their sincerity in such a move is questionable hence cannot be construed otherwise than mala fide.

ii. The application and the suit contravene the provisions of Section 18 and 19 of Land Registration Act No. 3 of 2012.

This (SIC) sections are clear and explicit in their language as far as boundary disputes are concerned in that “No court shall entertain any action or other boundaries of registered land unless the boundaries have been determined as provided in this section”..... of such the Registrar had not failed in performance and as such the filing of this suit and the subsequent application are pre-mature and to say the least abuse of the court process.

7. The counsel for the 1st Defendant/Respondent went on to submit that the Plaintiffs/Applicants who have alluded to having been served with the summons in the state they were in did not demonstrate that they made efforts to ascertain the date and/or genuineness of the said summons from the relevant office. That they instead opted to rush to court contrary to the provisions of the law. The counsel added that the Applicants have contravened the law and as such, the provisions being mandatory, the entire suit and the application must fail for being unmeritorious and further for want of the requisite threshold of the orders sought to issue.

8. The counsel for the Plaintiffs/Applicants submitted that when the Plaintiffs received the summons, they were not aware that a dispute was reported to the Land Registrar and again the attendance date was forged and/or obliterated. The counsel added that the particulars of the Plaintiffs/Applicants' land were not provided in the summons as is required under the law. He further submitted that since there was a warning that failure to attend would amount to a criminal offence and the date of the hearing indicated in the summons was not clear, the Plaintiffs had no alternative but to file an application to protect their rights and also to be supplied with the information lacking in the said summons. The counsel was of the view that the objection has no merits since firstly the plaint and the application are not made in bad faith, and secondly, there is a cause of action supported by the supreme and common law of this land which is the Constitution.

9. I have read the preliminary objection/grounds of opposition together with the supplementary affidavit as well as the submissions that were filed by the counsel on record. I wish to point out that other than the supporting affidavit sworn at Machakos on the 25th June, 2018 and filed in court on even date together with Plaintiffs'/Applicants' notice of motion application dated 25th June, 2018 as well as the supplementary affidavit sworn on the 23rd August, 2018, the other two supplementary affidavits said to have been filed in court on the 27th August, 2018 and 24th September, 2018 are not in the court file. One would have expected elucidation on the same from the parties herein.

10. The Plaintiffs/Applicants are silent on these two supplementary affidavits in their submissions. Be that as it may, it is clear to me that the Plaintiffs/Applicants appear to have been prompted to come to court by what they have termed as summons with unclear date for hearing. That being the case, I am in agreement with the counsel for the 1st Defendant/Respondent that the Plaintiffs/Applicants had an obligation to seek clarification with the relevant offices as to the genuineness or otherwise of the said summons and more so, the date of visitation by the Land Registrar. Section 18 of the Land Registrar Act No. 3 of 2012 provides as follows:-

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.

(3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary;

Provided that where all the boundaries are defined under section 19(3), the determination of the position of any uncertain boundary shall be done as stipulated in the Survey Act.

11. Further Section 19 of the same Act provides as follows:-

19.(1) if the Registrar considers it desirable to indicate on a field 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.

12. Whereas the Plaintiffs/Applicants have pleaded in their plaint and their application that there has never been any boundary dispute between themselves and the Defendants/Respondents, it is clear to me that they ought to have given the Land Registrar the chance to address the boundary complaint raised by the 1st Defendant/Respondent herein in line with Section 18 and 19 of the aforementioned Land Registration Act. The Plaintiffs/Applicants jumped the gun by rushing to court instead of following the above mentioned provisions of the law. In the circumstances, I hold that the application has merits and I hereby proceed to uphold the same. I therefore, proceed to struck out the Plaintiffs'/Applicants' suit and the application with costs to the 1st Defendant/Respondent. It is so ordered.

SIGNED DATED AND DELIVERED AT MAKUENI THIS 12TH DAY OF FEBRUARY, 2019

MBOGO C.G,

JUDGE

IN THE PRESENCE OF

Mr. Munyasia for the Defendant/Applicant

Ms Nzioka Court Assistant

Mr. Muumbi holdin g brief for Mr. Kisongoa for the Plaintiff/Respondent.

MBOGO C.G, JUDGE

12/2/2019