



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC NO. 1 OF 2018

MUNYWOKI MUSUVA NGAO..... PLAINTIFF

VERSUS

MUTUA MBINDA 1ST DEFENDANT

JACKSON M. MBINDO..... 2ND DEFENDANT

RULING

1) This ruling is in respect of the notice of preliminary objection dated 17th August, 2018 and filed in court on 27th August, 2018.

2) The grounds raised in the preliminary objection are:-

1. The entire suit as filed is defective and bad in law.

2. The verifying affidavit to the plaint borders on perjury.

3. The Defendants are non-suited as they are not registered as owners of any land that borders Okia/Kilala/661 or any other land.

4. The suit as it is, is unmeritorious as the threshold to grant the prayers sought cannot be met.

5. The suit as filed is premature non-starter and if anything is an abuse of the court process.

3) On the 4th October, 2018 the court directed that the preliminary objection be disposed off by way of written submissions.

4) The submissions by the 1st and the 2nd Defendants were as follows;

The entire suit is defective and bad in law

5) That the real dispute between the Plaintiff and the Defendants is boundary on the ground in that the actual boundary between Okia/Kilala/661 and Okia/Kilala/714 was and is not clearly defined hence claims of encroachment cannot arise.

6) The counsel was of the view that the only cure for the dispute is to comply with the Provisions of Sections 18 and 19 of the Land Registration Act No. 3 of 2012 and added that since the Plaintiff has not acted as required by the two sections, this suit is rendered to be defective and bad in law.

The verifying affidavit

7) That under the Oaths and Statutory Declarations Act, if one were to swear to falsehoods, it would amount to a criminal offence of perjury. The counsel pointed out that in paragraph 4 of the verifying affidavit, the Plaintiff has sworn that;

“there are no pending or previous court proceedings between myself and the Defendants touching on the subject issue as contained herein.”

The counsel submitted that in document number 3 of the Plaintiff's list of documents, there is a document headed **“Report on boundary**

dispute plot No. Okia/Kilala/661” and Okia/Kilala/714. The counsel pointed out that the document is from the Ministry of Lands and Physical Planning – County Surveyor -Makueni and that it is addressed to the Principal Magistrate Makueni. The counsel was of the view that its import is that there is another case/dispute which was before the Principal Magistrate where orders were made for the County Surveyor to determine the boundary of the aforementioned land parcels. He submitted that if this is true, then the verifying affidavit is vitiated having been sworn on an untrue position in respect of paragraph 4 thereof and this would attract the offence of perjury.

8) It was also submitted that document number 3 is suspect as the case number under which the said report was ordered has not been indicated. That this may call for further investigations for reasons that the document may have been prepared with a view to hoodwink the court given the position of the Defendants is that no such visit by the County Surveyor is within their knowledge.

9) It was submitted that if the contents of document number 3 were to be believed, then it is not in doubt that the dispute herein is the ground boundary between land parcel number Okia/Kilala/661 and land parcel number Okia/Kilala/714. The counsel added that the latter parcel is registered in the name of Paul Mbinda Musyoki who is deceased and as such, the Defendants are non suited since the orders to be given by the court will affect the latter parcel of land that belongs to a deceased person. The counsel correctly pointed out court orders cannot be made in vain and more so for or against a deceased person. The counsel further submitted that if the Plaintiff has any claim against the Defendants, then he should follow the laid down provisions of the law.

Suit is unmeritorious, premature and abuse of court process

10) The counsel submitted that the dispute herein being a boundary dispute, the Plaintiff has contravened the law and the entire suit must fail as it is without merit. The counsel added that the suit is also pre-mature and an abuse of the court process as the Defendants are non suited parties since the Plaintiff seeks orders which in the event of being granted, they cannot be enforced against the land of a deceased person.

11) On the other hand, the Plaintiff's counsel cited the case of **AKN V JNM (2014) eKLR** where W.Musyoka, J. cited the case of **Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd [1969] EA 696** which defines what a preliminary objection is. In the Mukisa case, preliminary objection is defined as;

“so far as I’m aware, a preliminary objection consists of points of law which has been pleaded, or which arises from the clear implication out of the pleadings, and which if argued as a preliminary point may dispose off the suit. Examples are an objection to jurisdiction of the court, or limitation, a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”

12) Arising from the above, the Plaintiff's counsel submitted that the issues being raised by the preliminary objection are of the nature that would require calling of evidence as they raise questions of fact and law. The counsel cited such questions fact as follows; **whether the Defendants have encroached onto the Plaintiff's land, whether there was previous dispute and whether the letter of the surveyor amounts to previous proceedings since the Defendants have contested it.** The counsel was also of the view that the issue of whether the Defendants should be sued is to be determined since they are the ones who have trespassed onto the Plaintiff's land and termed the preliminary objection as not sustainable.

13) Having read the preliminary objection and submissions that were filed, it is clear to me that point of a preliminary objection arises by clear implication out of the pleadings herein. Firstly, document number 3 in the Plaintiff's list of documents as well as the defence clearly show that this is a boundary dispute. Under Section 18 of the Land Registration Act No. 3 of 2012, it is provided 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.

14) My reading of Section 18(2) of the Act is that the same is couched in mandatory terms and, therefore, this court cannot entertain this action relating to a dispute touching on to the boundaries of land parcel number Okia/Kilala/661 and Okia /Kilala/714 unless the boundaries have been determined in accordance with the said section.

15) Secondly the presence of document number 3 in the Plaintiff's list of documents presupposes that there was a previous suit case concerning the parties herein in view the fact that the letter is addressed to the Principal Magistrate Makueni. This was in the year 2017 before this suit was instituted. This would contradict paragraph 4 of the Plaintiff's verifying affidavit where the Plaintiff has deposed that there are no pending or previous proceedings between himself and the Defendants touching on the subject issues as contained in the plaint.

16) Thirdly as was submitted by the Defendants' counsel, land parcel number Okia/Kilala/714 is registered in the name of a deceased person. In order for the Plaintiff to be able to sue the Defendants he has to follow the provisions of the law so as to move against them in their capacity as legal representatives of the estate of the deceased. As the matter now stands, I am in agreement with the Defendants' counsel that the Defendants are non-suited parties herein since the orders that the Plaintiff seeks will affect the land of a deceased person thus

rendering the orders to be issued to be in vain.

17) The upshot of the foregoing is that the preliminary objection has merits and I hereby proceed to struck out the Plaintiff's suit with costs to the Defendants.

SIGNED, DATED AND DELIVERED AT MAKUENI THIS 7TH DAY OF FEBRUARY, 2019.

MBOGO C.G,

JUDGE

IN THE PRESENCE OF:

Mr. Mutune for Mr. Munyasia for the Defendants.

No appearance for the Plaintiff

Ms Nzioka Court Assistant.

Mbogo C.G, Judge

7/2/2019