



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.24 OF 2018

ONESMUS KAMAU MUNGAI.....PLAINTIFF/APPLICANT

VERSUS

PHARES MWANGI KAMAU.....1ST DEFENDANT/RESPONDENT

THE DISTRICT LAND SURVEYOR,

THIKA DISTRICT.....2ND DEFENDANT/RESPONDENT

THE DISTRICT LAND REGISTRAR,

THIKA LANDS REGISTRY.....3RD DEFENDANT/RESPONDENT

RULING

The Plaintiff/Applicant filed this suit on **26th January 2018**, and sought for **Judgment** against the Defendants herein. Among the orders sought are:-

a) An Order cancelling the relocation of the boundary and Beacons as regards property Title Number Loc.1/Kiriaini/ 634.

b) An Order against the 2nd Defendant to restore the Beacons and boundary to the initial position.

He alleged in the **Plaint** that he is the registered owner of the property **Loc.1/Kiriaini/634**, measuring **1.42 Hectares** which is adjacent to the 1st Defendant's property. That he continued to enjoy quiet occupation of his property until **late 2017**, when the 2nd Defendant visited his property and purported to relocate the boundary between his parcels of land and the 1st Defendant. Further that upon the said relocation of the Beacons, the 1st Defendant entered into his portion of land and proceeded to cut down the trees and harvested his tea leaves. He contended that he engaged a private Surveyor who confirmed that the Beacons had been irregularly relocated from their original positions based on the title measurements and the **Registry Index Map** and that has resulted in a parcel of land measuring **0.138 Hectares** being irregularly hived off from his property and allocated to the 1st Defendant.

Simultaneously, the Plaintiff filed a **Notice of Motion** application even dated and sought for injunctive and restraining orders against the 1st Defendant from cutting down trees, harvesting tea leaves, developing and/or otherwise undertaking any activity on the portion of land hived off from the Plaintiff's property. He also sought for restraining orders against the Defendants, themselves or agents from interfering with the Plaintiff's quiet enjoyment of the suit property plus costs of the application.

He based the said application on various grounds stated on the face of his application and on his **Supporting Affidavit** which reiterated the contents of the **Plaint**.

The application is opposed. The 1st Defendant filed a **Notice of Preliminary Objection** dated **11th June 2018**, and his **Replying Affidavit** and averred that he is the **bonafide** registered owner of land parcel **No.Loc.1/Kiriaini/638**, which borders the Plaintiff's **Loc.1/Kiriaini/634**. He averred that the application is **incompetent, misconceived, bad in law** and **violates** the provisions of **Section 18(2)** of the **Land Registration Act 2012**, which requires registered proprietors of the land with a boundary dispute to first seek redress from the **Land Registrar** before moving to court. Further that the application is full of falsehoods as he has never harvested tea leaves from the Plaintiff's parcel of land nor cut down his trees.

The 1st Defendant's **Notice of Preliminary Objection** is as follows:-

1) *The court has no jurisdiction in this matter in view of Section 18(2) of the Land Registration Act, 2012 that require proprietors of registered land with a boundary dispute to first seek redress or solution from the Land Registrar before moving to court.*

2) *The suit is premature, misconceived, vexatious, frivolous, scandalous and a blatant abuse of due process of the court.*

3) *The in the premises, the court herein lacks jurisdiction as the suit is premature and as such the same ought to be dismissed with costs.*

Mr. Franklin M. Muyonga, a District Surveyor from Thika District Survey Office swore a **Replying Affidavit** on 7th June 2018. He averred that the Plaintiff and four others who are registered proprietors of the resultant land parcels of the subdivision of **Loc.1/Kiriaini/87**, went to the **Thika District Land Survey Office** seeking assistance in confirmation of their boundaries and map amendment of land parcels **Loc.1/Kiriaini/634 – 638** which were all subdivisions arising from **Loc.1/Kiriaini/87**.

That the 2nd Defendant visited the affected parcels of land and undertook the exercise of confirming the boundaries and map amendment as requested by the parties. He produced **FMM-1** which detailed the re-alignment of the boundaries. He contended that the acreage of the suit land did not change as confirmed by **FMM-2**.

It was his contention that since the dispute herein is a boundary dispute, the court should order for a site visit by the **Land Registrar**, the **District Surveyor** and both parties and their independent Surveyors for purposes of picking the boundaries and settling the matter once and for all.

The Court directed the **Preliminary Objection** and the main **Notice of Motion** to be canvassed together by way of written submissions.

The court will deal with the **Preliminary Objection** first since if the same is upheld, it is capable of bringing the whole matter to a halt.

The Court will first determine whether what has been filed by the 1st Defendant amounts to a **Preliminary Objection** as envisaged in the case of **Mukisa Biscuits & Co. Ltd....Vs...West End Distributors Ltd (1969) EA 696**;

“...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”.

The 1st Defendant/Respondent has questioned jurisdiction of this Court. Jurisdiction is everything and if the court lacks the requisite jurisdiction, it has no option but to down its tools. See the case of **Owners of Motor Vessel 'Lilian S'...Vs...Caltex Oil (Kenya) LTD (1989) 1 KLR**.

where the Court held that:-

“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 its tools in respect of the matter before it at the moment it holds the opinion that it is without Jurisdiction”.

Therefore the Court finds that the **Notice of Preliminary Objection** as filed by the 1st Defendant falls under the category of what amounts to a **Preliminary Objection** as described in the **Mukisa Biscuits Case (Supra)**.

The next question is whether the **Preliminary Objection** herein is merited?

There is no doubt that the dispute herein arose after the parties on their own volition invited the **District Surveyor** to confirm the boundaries of their respective parcels of land. The Plaintiff and 2nd Defendant are both registered owners of land parcels which were resultant subdivisions of **Loc.1/Kiriaini/87**. Both of them bounders each other. **Franklin M. Muyonga** in his **Affidavit** averred that the **District Surveyor** visited the parcels of land and re-aligned the boundaries. In the **Report** filed by the **Surveyor**, the re-alignment was mostly between land parcel **No.634** and **638**. He averred that even after the alignment, the acreage of the parcels of land did not change. The Plaintiff/Applicant was dissatisfied with the said report and he engaged his own **Private Surveyor**, without involving the 2nd Defendant. It is clear therefore the issue herein is boundary dispute and nothing more.

The main issue herein is whether the Court has jurisdiction to determine this matter given that it is a boundary dispute.

This Court has carefully considered the rival written submissions and the pleadings in general. The Court has also considered **Section 18(2)** of the **Land Registration Act** which provides:-

“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”.

The above provisions are coached in mandatory terms and as was held in the case of **Ratilal Ghela Shah & 2 Others...Vs...Menkar Ltd (2018) eKLR**,

“It means that any issue relating to a dispute as to boundaries are within the Land Registrar’s mandate.”

The Court will also concur with the findings in the case of Willis Ocholla...Vs...Mary Ndege (20160 eKLR, where the Court held that:-

“In terms of Section 18(2) of the Land Registration Act, 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. That where such a party fails to do so and comes to court without first seeking redress from the Land Registry, the court being a court of law has to remind such a party that he/she has moved the court prematurely. That the provisions of Section 18(2) of the Land Registration Act shows clearly that the court is without jurisdiction on boundary dispute of registered land until after the Land Registrar’s determination of the same has been rendered.”

Equally in this matter, the Court finds that since the parties herein had invited the **District Surveyor** over confirmation of this boundaries once dissatisfied with the **Surveyors Report**, they ought to have escalated the matter to the **Land Registrar** and not to rush to court.

The Court of Appeal had this to say in the case of Geoffrey Muthinja Kabiru & 2 Others....Vs....Samuel Munga Henry & 1756 Others (2015)eKLR, where it stated that:-

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the court.... This accords the Article 159 of the Constitution which commands courts to encourage alternative means of dispute resolution.”

This Court therefore finds that the Plaintiff jumped the gun and failed to adhere to the procedure provided by the Statute on how to address any grievances related to boundary dispute. The Court finds that it is divested by jurisdiction by virtue of the provisions of **Section 18(2)** of the **Land Registration Act**.

For the above reason, the **Court upholds the 1st Defendant’s Notice of Preliminary Objection and finds that it has no jurisdiction over this matter.**

Having found that the Court has no jurisdiction, it has no option but to down its tools.

Consequently, the **Court strikes out the Plaintiff’s entire suit and all the consequential pleadings for lack of jurisdiction with costs to the 1st and 2nd Defendants who filed their Responses.**

For avoidance of doubt, **the interim orders in place are hereby vacated.**

It is so ordered.

Dated, Signed and Delivered at Thika this 18th day of March 2019.

L. GACHERU

JUDGE

18/3/2019

In the presence of

M/S Chepngeno holding brief for Mr. Kiplagat for Plaintiff/Applicant

M/S Mokaya holding brief for Mr. Gachau for 1st Defendant/Respondent

No appearance for 2nd Defendant/Respondent

No appearance for 3rd Defendant/Respondent

Lucy - Court Assistant

L. GACHERU

JUDGE

Court – Ruling read in open court in the presence of the above advocates.

L. GACHERU

JUDGE

18/3/2019