



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CASE NO. 36 OF 2018 (O.S)

IN THE MATTER OF BOUNDARY DISPUTE BETWEEN LAND

PARCEL NOS. KISUMU/KASULE/2180/1918/2162 AND 2163

BETWEEN

MAURICE OMORO OUDU.....APPLICANT

WASHINGTON OKOTH SULE

WUODGOT ODHIAMBO MIGOT.....INTERESTED PARTIES

VERSUS

KISUMU DISTRICT LAND REGISTRAR.....1ST RESPONDENT

ELIZABETH ATIENO OGENO.....2ND RESPONDENT

MESHACK OTIENO OGENO.....3RD RESPONDENT

RULING

1. Elizabeth Atieno Ogeno, the 2nd Respondent, filed the notice of Preliminary Objection dated the 24th September, 2018 to the “Applicant’s application dated the 24th July 2018 and the entire suit” seeking to have it struck out with costs on the following grounds;

(i) “That this Honourable Court is not seized with the competent Jurisdiction to hear and determine this suit at first instance, as the subject matter herein is a land boundary dispute which ought to be exhausted before the Land Registrar as a remedy vide Section 18 (2) of the Land Registration Act.

(ii) That the entire suit is therefore an abuse of the court process as the prayers sought seek to forestall the application of a statutory provision and or intended to circumvent provisions of statute.

(iii) That the Interested Parties herein have not demonstrated their interest in this suit and as a consequence lack any *locus standi* in this suit.”

2. That in response to the notice of Preliminary Objection Maurice Omoro Oudu, Washington Okello Sule and Wuodogot Odhiambo Migot, the Applicants/Interested Parties, filed the joint Replying Affidavit sworn on the 16th October 2018, among others deponing as follows;

a) That the 2nd Respondent’s replying affidavit and notice of Preliminary Objection should be dismissed with costs.

b) That they do not dispute paragraphs 1 to 4 of the replying affidavit.

c) That they dispute paragraph 5, 6, 7, 8, 10 and 11 of the replying affidavit while paragraph 9 has been overtaken by events.

d) That the Interested Parties are owners of Kisumu/Kasule/1918 and hence have locus standi.

3. The Preliminary Objection was heard orally in Court on the 30th January 2019 when the Learned Counsel for the 2nd Respondent, and Wuodagot Odhiambo Migot, the 2nd Interested Party/Applicant, for himself and the two others, presented their submissions.

4. The Court has considered the grounds on the notice of Preliminary Objection, the Applicant/Interested Parties replying affidavit, the oral submissions, the pleadings so far filed and come to the following determinations;

a) That this suit was commenced by Maurice Omoro Oudu, the Applicant, with Washingne Okoth Sule and Wuodgot Odhiambo Migot, the Interested Parties, through the Originating Summons dated the 24th July 2018, seeking primarily for the following;

- **That the boundary dispute settlement between Kisumu/Kasule/1918 and 2180 scheduled for 14th August 2018 be declared void.**

- **The Land Registrar be compelled to comply with the advice given by “the Surveyor on the 13th April 2017 to use the ground to correct the Cadastral Map Sheet No. 5 Kasule Registration Section’s aerial scaling errors prior to embarking on boundary dispute.”**

- **That the Applicant’s and Interested Parties application dated the 13th April 2017 to the Land Registrar be acted upon first.**

- **That status quo be maintained.**

- **Costs and mesne profits.**

That the Applicant and Interested Parties contemporaneously filed the notice of motion of even date seeking for “***an injunction (stay) of the boundary dispute exercise scheduled on the 14th day of August 2018***” “***until the determination and or direction of this Honourable Court,***” and costs. That application is based on the four (4) grounds on its face and supported by the affidavits sworn by the Applicant and the two Interested Parties on the 24th July 2018.

b) That the 2nd Respondent’s Preliminary Objection appear to be based on whether or not the Court has Jurisdiction in view of the provision of **Section 18 (2) of the Land Registration Act No. 3 of 2012**; and whether or not the two Interested Parties have locus to file and sustain the Originating Summons and motion in Court. That both the Applicant, Interested Parties and the 2nd Respondent are in agreement that the aim of the suit and application is to stop a boundary dispute exercise that had been commenced by the 2nd Respondent for reasons that the Applicant and Interested Parties are not happy with the way the Land Registrar was handling the exercise. This finding brings into the fore the provision of **Section 18 (2) of the Land Registration Act** that provides that “***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.***” That subsection 3 proceeds to provide that the Land Registrar may in any proceedings concerning a parcel receive such evidence as to its boundaries and situation as may be necessary.

c) That the foregoing confirms that the first forum to deal with a boundary dispute of registered land is the Land Registrar. That what the Applicant and Interested Parties appear to do through these proceedings is to scuttle the exercise already commenced by the Land Registrar under the powers conferred to that office by the law. The Court is therefore without Jurisdiction to deal with the boundary dispute until such a time the Land Registrar will first make their determination. That thereafter any party not satisfied with the Land Registrar’s determination may then consider moving the court as appropriate.

d) That the Interested Parties appear not to have been involved in the exercise before the Land Registrar but for reasons of the finding in (c) above, the Court need not to determine their locus, or absence of it, in these proceedings.

e) That having found that the suit and application was prematurely filed before the Court, the Land Registrar is at liberty to continue with the boundary dispute resolution exercise to completion.

5. That for reasons set out above, the 2nd Respondent’s preliminary Objection is hereby upheld, and the suit commenced through the Originating Summons and the notice of motion, all dated the 24th July 2018 are hereby struck out with costs to the 2nd Respondent.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 10TH DAY OF APRIL 2019

In the presence of:

Applicant

Present

Interested Parties	Present
Respondents	Absent
Counsel	Mr. Otuoma for Jumba for 2 nd Respondent

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE