



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 158 OF 2016

ERNEST AURA EJAKAIT.....PLAINTIFF

= VERSUS =

CHRISTANTUS OSAMAI.....1ST DEFENDANT

FRANCIS PADE OSAMAI.....2ND DEFENDANT

BASIL OTUYA.....3RD DEFENDANT

CORNELI OKISAI EKAKORO.....4TH DEFENDANT

RULING

1. This ruling is on a preliminary objection canvassed by way of written rival submissions filed here by counsel on both sides on 1/2/2018 and 13/2/2018. The objection was based on a notice to raise it dated 20/11/2017 and filed here on the same date. The pith and marrow of the objection is that the court lacks jurisdiction to entertain the suit as the dispute relates to boundary and express provisions of the applicable law – in this matter said to Registration of Land Act – that prohibit the court from entertaining it.

2. In the suit as filed, the Plaintiff – **ERNEST AURA EJAKAIT** – pleaded, *inter alia*, that he is the registered owner of land parcel No. LRS. TESO/AMUKURA/327 while the Defendants – **CHRISTANTUS OSAMAI, FRANCIS PADE OSAMAI, BASIL OTUYA** and **CORNELI OKISAI EKAKORO** – reside on adjacent parcels of land, some of which are LRS TESO/AMUKURA/1556, 351, and 348. The Defendants are said to have entered the Plaintiff's land on diverse dates without his permission and embarked on tree cutting, ploughing and planting of crops. The Plaintiff is complaining that by so doing, the Defendants have denied him quiet possession and use of his land and have thus caused him damage and loss.

3. The Plaintiff pleaded that he wants a permanent injunction against the Defendants, reinstatement of the boundaries, and mesne profits.

4. The Defendants filed a defence on 18/7/2017 and denied the Plaintiff's claim. In the same defence, the jurisdiction of the court is admitted but the cause of action is denied.

5. In the Defendants' submissions, the court was said to lack jurisdiction as the matter is a boundary dispute. The jurisdiction is said to be vested in the County Land Registrar and/or the County Surveyor. In the Defendants opinion, these two should visit the land, mark the boundary and note the extent of trespass or encroachment if any, compile a report, and then file it in court. For the issue of lack of jurisdiction the court was referred to Section 18(2) of Registration of Land Act.

6. The Plaintiff's submission however had a different thrust and focus. This court was said to have jurisdiction derived from both constitutional and statutory provisions. And the objection raised was said not to qualify as one in law since a preliminary objection cannot be raised if facts are disputed or if what is sought involves the use of discretion. In this regard, the cases of **NJOYA & 6 others Vs AG & Another: (2004) IKLR 232** and **SIRMA Vs KIPRONO: (2005) IKLR 197** were cited as examples.

7. I have considered the preliminary objection as raised, the rival submissions, and the pleadings filed by both sides. It is easy to fault the defence. The defence filed admits the jurisdiction at paragraph 9. Then later on, this objection was raised denying the same jurisdiction and without first amending the defence. By denying and admitting jurisdiction in the same proceedings, the defence is engaging in double-speak and that generally comes from those who are less than honest.

8. It is also true, as pointed out by the Plaintiff, that facts are not admitted. The defence filed is essentially a denial of the Plaintiff's claim. As correctly pointed out by the Plaintiff, a preliminary objection is usually based on a pure point of law. It cannot be raised where facts are

contested or if what is sought involves the use of discretion. (See the cited Njoya and Sirma's case (supra)). (See also **MUKISA BISCUIT CO. LTD Vs WEST END DISTRIBUTORS LTD: [1969] EA 196** and **MUIRURI Vs KIMEMIA: [2002] KLR 677**).

9. It is necessary to point out also that apart from seeking an order to fix the boundary, the Plaintiff also pleaded that he has suffered damage and loss. He pleads that he wants mesne profits. An order of injunction is also sought. If the Defendants had properly thought through the issue, they would have appreciated that an injunction involves the exercise of judicial discretion. They would have known too that no Land Registrar or County Surveyor can grant damages or mesne profits. Only a court of law can do that.

10. It is for all these reasons that the objection raised here is rejected not only for want of merits, but also for lacking proper foundational basis. The objection is hereby dismissed with costs.

Dated signed and delivered at Busia this 28th day of May, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff: Absent

Defendants: Absent

Counsel for the Plaintiff: Present

Counsel for the Defendants: Present

Court Assistant: Nelson Odame