



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC CASE NO. 57 OF 2018.

EDWARD LILUMBI.....1ST PLAINTIFF

GEOFFREY MUHANDA.....2ND PLAINTIFF

MICHAEL TAABU MACHISU.....3RD PLAINTIFF

CHARLES ASHIHUNDU MUKHAVALI.....4TH PLAINTIFF

VERSUS

DIPHINA AHMBELWA.....1ST DEFENDANT

SELINA WENDO.....2ND DEFENDANT

SABETI ITECHESI.....3RD DEFENDANT

KENNEDY WENDO.....4TH DEFENDANT

PETER MBALILWA.....5TH DEFENDANT

BENARD ITECHESI.....6TH DEFENDANT

ANTONY MUHATI MUCHIMBA.....7TH DEFENDANT

RULING

Although the application pending my determination in this case is the Preliminary Objection dated 14th June 2018 raised by the 1st, 3rd, 6th and 7th defendants and challenging the plaintiffs locus standi to institute this suit by virtue of the provisions of Section 37 of the Trustee Act, it has become clear to me upon perusal of the pleadings herein that infact this Court has no jurisdiction to determine this dispute. I shall therefore determine the issue of my jurisdiction to handle this suit because that is an impediment that must be placed out of the way before I proceed.

The locus classicus on the issue of jurisdiction in this country is the case of **OWNERS OF MOTOR VESSEL "LILLIAN S" .V. CALTEX OIL KENYA LTD 1989 KLR 1** where the late **NYARANGI J A** stated as follows:-

"I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. 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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

Jurisdiction of a Court or Tribunal is donated by the constitution or other written law. It is the foundation upon which a Court of law determining any dispute before it must base it's decision because any orders made without jurisdiction are a nullity. That is why the issue of jurisdiction must be raised at the earliest stage in the trial process but there is nothing to stop the Court, suo moto, from raising and determining it at any stage of the proceedings.

In OWNERS & MASTERS OF THE MOTOR VESSEL "JOEY" .V. OWNERS & MASTERS OF THE MOTOR TUG "BARBARA AND "STEVE b" 2008 1 E.A 367, the Court of Appeal expressed itself as follows on that issue:-

"The question of jurisdiction is a threshold issue and must be determined by a Judge at the threshold stage using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it."

The Court then went on to add that:-

"It is for that reason that a question of jurisdiction once raised by a party or by a Court on its own motion must be decided forthwith on the evidence before the Court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the Court." Emphasis added.

Therefore, although the jurisdiction of this Court to determine the dispute before it has not been pleaded, this Court will nonetheless proceed to determine it.

Having said so, jurisdiction is determined on the basis of the parties' pleadings because that is what the Court is called upon to resolve. In their plaint filed herein on 10th March 2016, the plaintiffs sought Judgment against the defendants in the following terms:-

(a) An order directing the Land Registrar and District Surveyor Kakamega County to fix boundaries between land parcel NO ISUKHA/ SHIRERE /2168, land parcel NO ISUKHA/SHIRERE/2169 and land parcel NO ISUKHA/SHIRERE/2217.

(b) A permanent injunction do issue against the defendants either by themselves, their agents, servants, representatives or any persons acting under their instructions from entering into, cultivating, intermeddling with or in any other manner dealing with land parcel NO ISUKHA/SHIRERE/2168.

The basis of the plaintiffs claim is that in 2014 the defendants trespassed into land parcels **NO ISUKHA/SHIRERE/2168** and **ISUKHA/SHIRERE/2169** and that there are no boundaries between the said parcels of land. In paragraph 23 of the said plaint, the plaintiffs have pleaded as follows:-

"The plaintiffs prayer is for order directing the Land Registrar and District Surveyor Kakamega County to fix the boundaries between land parcel NO ISUKHA/SHIRERE/2168, land parcel NO ISUKHA/ SHIRERE/ 2169 and land parcel NO ISUKHA/SHIRERE/2217."

The record shows that only the 2nd, 4th and 5th defendants filed their defence on 16th May 2005 and in paragraph 15, they pleaded that they are not averse to the orders sought by the plaintiffs but added

"..... that since to their knowledge the boundaries between the title numbers ISUKHA/SHIRERE/2168 and ISUKHA/SHIRERE/2169 are well delineated, then the plaintiffs should bear the entire cost of the process envisaged therein."

However, on 24th October 2016, the plaintiffs withdrew the suit against the 2nd 4th and 5th defendants before **KIBUNJA J.**

On the basis of those pleadings by the plaintiffs themselves, it is clear to me that what this Court is called upon to determine is a boundary dispute. **Section 18(2) of the Land Registration Act 2012** provides that:-

"That Court shall not entertain any action or other proceeding relating to a dispute as to boundaries of registered land unless the boundaries have been determined in accordance with this section."

A similar provision was found in **Section 21(4) of the repealed Registered Land Act** and was considered by the Court of Appeal in the case of **WAMUTU .V. KIARIE 1982 KLR 480** where in an appeal against the decision of a Judge who had struck out a case involving a boundary dispute, the Court said:-

"The Judge was right in striking out the plaint as the boundary between the parties not having been determined as provided in Section 21, the Court had no jurisdiction to entertain the plaintiff's action. With respect, on the previous occasion, the Judge erred in making the order referring the matter to Land Authorities for he too had no jurisdiction to hear and determine the suit because of the provisions of Section 21(4) of the Act which deprives the Court of jurisdiction in cases involving boundary disputes under the Act. Even if the defendants had not applied to strike out the plaint the Court was bound to take note of the provisions of Sub Section (4) and do so of its own motion."

I am bound by that decision.

I note from the proceedings of 23rd May 2016 that this suit was, with the consent of the parties, referred to the County Land Registrar and Surveyor Kakamega by **KIBUNJA J** and among the orders made was an order that:-

(a) "The County Land Registrar and Surveyor Kakamega do visit land parcel NO ISUKHA/SHIRERE/2168, 2169 and 2217 and confirm the ground positions of the three parcels boundaries."

A report was to be filed in Court within 40 days. Acting on that order, the District Surveyor Kakamega in the company of the Land Registrar and others visited the land in dispute and filed a report dated 13th July 2016. Among the findings in that report is that:-

“The boundary between parcels 2168 and 2177 (along n-p-g-m) could however not be established because of the following reasons:”

On the authority of **WAMUTU .V. KIARIE** (supra) it is clear that the orders of 23rd May 2016 were made in excess of jurisdiction. This Court cannot of course sit on appeal over orders of a Court of equal jurisdiction and in any event, the orders of **KIBUNJA J** dated 23rd May 2016 are not before me for consideration. What is important however is that notwithstanding those orders which were obviously made in good faith for the purposes of expediting these proceedings, the Land Registrar and District Surveyor were still un-able to determine the boundaries yet the law has clothed them with the jurisdiction to do so. Indeed the report concludes by seeking **“further directions”** from the Court.

I have said enough to show that this Court has no jurisdiction to determine this dispute.

The up-shot of the above is that this suit is struck out with no order as to costs.

Boaz N. Olao.

J U D G E

23rd May 2019.

Ruling dated, delivered and signed this 23rd day of May 2019 at Bungoma.

Mr Onyonyi for Mr Mukolwe for defendant present

Mr Onkangi for Mr Shivega for plaintiff present

Parties absent

Joy/Felix – Court Assistants present

Boaz N. Olao.

J U D G E

23rd May 2019.