



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC CASE NO. 67A OF 2018**

**WILLIAM OPONDO OMALLA.....PLAINTIFF**

**VERSUS**

**GABRIEL OCHONG ORIWO.....1<sup>ST</sup> DEFENDANT**

**FHILISTER ACHAPA OBUOR....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Plaintiffs commenced this suit through the plaint dated the 18<sup>th</sup> December 2018, filed contemporaneously with the notice of motion of even date, seeking for injunctive order restraining ***“the Defendants, their agents, servants and or workmen from encroaching onto the Plaintiff’s property title Number North Ugenya/Sega/12”***, the suit property, pending the hearing and determination of this suit. The application is based on the five (5) grounds on its face and supported by the affidavit sworn by William Opondo Omalla, the Plaintiff, on the 8<sup>th</sup> December 2018, among others deponing as follows;

**a) That the suit land is registered in the names of the late Augustino Omwanda, late Henry Mutula, Late Dismas Othwillla and himself while the Defendants are registered with the neighbouring parcels North Ugenya/Sega/1216 and 1217.**

**b) That the District Surveyor and Land Registrar reestablished the boundaries of the parcels on the 1<sup>st</sup> to 3<sup>rd</sup> August 2012 and no appeal has been filed since then. That the Defendants had however challenged the establishment of the boundaries through Kisumu ELC Petition No. 13 of 2012 but lost.**

**c) That the 1<sup>st</sup> Defendant has erected houses on the suit land while the 2<sup>nd</sup> Defendant has extended her farm onto it and should be restrained.**

2. The application is opposed by the 1<sup>st</sup> Defendant through the grounds of opposition, preliminary objection and replying affidavit all dated the 13<sup>th</sup> February 2019. The preliminary objection raises two issues that the application offends **Article 165 of the Constitution** and **Section 19 of the Land Registration Act**. The three (3) grounds of opposition are that the Land Registrar is the one empowered to define the position of the boundary under **Section 19 of the Land Registration Act**; that the boundary dispute should be resolved by Land Tribunal and a survey done to clearly mark the boundaries in the presence of the parties; and that the application is an abuse of the court process and ought to be struck out with costs. The 1<sup>st</sup> Defendant deposition in the replying affidavit includes the following;

**a) That parcel North Ugenya/Sega/13 was sub-divided into parcels North Ugenya/Sega/1216 and 1217 which borders parcel North Ugenya/Sega/12, suit land.**

**b) That he learnt of the boundaries reestablishment of the 1<sup>st</sup> to 3<sup>rd</sup> August 2012 on the evening of the last day when he saw the Land Registrar’s vehicle leaving the area. That he went to the land and found beacons had been planted taking a big chunk of his land.**

**c) That the decision in ELC Petition No. 13 of 2012 is pending appeal and a copy of the Notice of Appeal dated 23<sup>rd</sup> November 2015, is annexed.**

**d) That the boundaries reestablished are not clear and hence the dispute.**

3. The application came up for hearing on the 14<sup>th</sup> February 2019 when counsel agreed that the preliminary objection by the 1<sup>st</sup> Defendant be heard first, and directions on filing and exchanging written submissions were given. That during the subsequent mention of the 3<sup>rd</sup> April 2019, the counsel for the 1<sup>st</sup> Defendant confirmed that they had filed their written submissions dated the 5<sup>th</sup> March 2019, on the 7<sup>th</sup> March

2019 and served. The counsel for the Plaintiff reported that they had filed theirs that morning but none has been traced by the Court on the record.

4. That from the submissions filed by the 1<sup>st</sup> Defendant, the following are the notable highlights;

**a) That matters boundary dispute should be determined by the Land Registrar in the first instance and not by the court in view of the provision of Section 18 (2) of Land Registration Act 2012. That the Plaintiff has chosen the wrong forum and in view of the decision in Owners of Motor Vessel Lilian "S" vs Caltex Oil (Kenya) Ltd (1989) KLRI and Willis Ochola vs Mary Ndege (2016) eKLR, the court is without Jurisdiction and to continue with the case would offend Article 165 of the Constitution 2010.**

**b) That as the 1<sup>st</sup> Defendant did not participate in the reestablishment of the boundaries of 1<sup>st</sup> to 3<sup>rd</sup> August 2012, the Land Registrar should be directed to visit the parcels and clearly mark the boundaries.**

**c) That the preliminary objection be upheld with costs to the "defendants."**

5. The following are the issues for the court's determinations;

**a) Whether this court has Jurisdiction to hear and determine this suit in view of the provisions of Section 18 (2) and 19 of the Land Registration Act No. 3 of 2012.**

**b) Who pays the costs of the Preliminary Objection.**

6. The Court has carefully considered the Preliminary Objection, pleadings filed, written submissions by the learned Counsel of the 1<sup>st</sup> Defendant and come to the following findings;

a) That as submitted by the Learned Counsel for the 1<sup>st</sup> Defendant, the first forum under **Sections 18 and 19 of the Land Registration Act No. 3 of 2012** in settling boundary disputes is the Land Registrar. That the court, in the case of **Willis Ocholla vs Mary Ndege [2016] eKLR** made the following finding at paragraph 4 (a) on a similar issue;

**"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 the provisions of Section 18 (2) of the Land Registration shows clearly that the court is without Jurisdiction on boundary disputes of registered land until after the Land Registrar's determination on the same has been rendered."**

b) That further to the (a) above, the court has noted that the Plaintiff has in his supporting affidavit annexed a document marked "WOO-2" at paragraph 9. That document is headed **"Boundary Re-establishment North Ugenya/Sega/12 & 1216, 1217, 1513, 2235, 2237, 2238, 2239 & 1573 on this 1<sup>st</sup> August & 2<sup>nd</sup> 2012 at the site."** The document shows that one Augustino Omwanda was the only party present while the Land Registrar, Surveyor and Area Assistant Chief were in attendance. The document contains the proceedings and under **"OBSERVATION"** is the following statement;

***"The Assistant Chief who was present at the site said that he had informed the concerned parties through summons served by his office."***

The proceedings under the heading "RULING" contains the following;

- 1. "That the District Surveyor to mark on the ground the parcel for North Ugenya/Sega/12 and other Lands.**
- 2. That the Applicant to await for any objection for thirty days before fencing his land as shown by the Surveyor.**
- 3. That the proceeding be availed to any of the two parties on official payment.**
- 4. That any aggrieved party is given a grace period of thirty (30) days from the date hereof to appeal against my decision to a court of law or the Chief Land Registrar."**

c) That further to (a) and (b) above the court has taken note of the pleading at paragraph 4 of the plaint, paragraph 2 of the Plaintiff's supporting affidavit and the certificate of official search dated the 28<sup>th</sup> November 2018 marked **"WOO-1"** that shows Augustino Omwanda is one of the registered owners of the suit land. The court takes the said Augustino Omwanda, who the Plaintiff has through his pleading and deposition described as the **"late"** to be the applicant in the boundary re-establishment exercise of 1<sup>st</sup> to 3<sup>rd</sup> August 2012 by the Land Registrar and Surveyor. That as the **Land Registration Act No. 3 of 2012** commenced on the 2<sup>nd</sup> May 2012, which was about three (3) months before the Land Registrars exercise of reestablishing the boundary of the suit land, with those others on the 1<sup>st</sup> to 3<sup>rd</sup> August 2012, then this court is with Jurisdiction to hear and determine this suit as the Land Registrar's office has already made its determination on the boundary. That the preliminary objection raised by the 1<sup>st</sup> Defendant on the basis of Jurisdiction is therefore unfounded and without merit.

d) That even though the notice of motion dated the 18<sup>th</sup> December 2018 was not heard together with the preliminary objection, the court finds it appropriate to deal with it in this ruling based on the affidavit evidence filed by the Plaintiff and 1<sup>st</sup> Defendant so as to expedite the hearing and determination of the main suit now that the preliminary objection has been dealt with. The court is of the view that doing so will ensure justice is not delayed and is administered without undue regard to procedural technicalities in line with **Article 159 (2) (b) and (d) of the Constitution 2010**. That it will also assist the Court to further the overriding objective set out under **Section 1A of Civil Procedure Act Chapter 21 of Laws of Kenya** which is to facilitate the just, expeditious, proportionate and affordable resolution of the civil dispute before the court.

e) That paragraphs 6, 11 and 12 of the supporting affidavit set out the Plaintiff's complaint that the 1<sup>st</sup> Defendant has encroached onto the suit land by building his houses on it, while the 2<sup>nd</sup> defendant has extended her farm onto a portion thereof. The 2<sup>nd</sup> Defendant though served has not filed any response to the application and the court takes it that she conceded to the same. That the 1<sup>st</sup> Defendant reply to the Plaintiff complaint are found at paragraphs 4, 5, 6, 8 and 9 of the replying affidavit. That his position seems to be that the boundary re-establishment was done in his absence and when he later went to the land he found **"a big chunk of my land was taken away"**. That confirms the Plaintiff's complaint that the 1<sup>st</sup> Defendant has encroached onto the suit land. That however, the court is of the considered view that granting prayer (c) of the motion as prayed may be used to demolish the houses the 1<sup>st</sup> Defendant has erected on the suit land, which the court finds should await the determination of the main suit. That however, there should be no new construction or developments by the 1<sup>st</sup> defendant, his agents or servants on the portion of the suit land that is under his occupation before the hearing and determination of the suit.

7. That flowing from the foregoing, the court orders as follows in respect of the Preliminary Objection by the 1<sup>st</sup> Defendant and the Plaintiff's notice of motion;

**a) That the 1<sup>st</sup> Defendant Preliminary Objection dated and filed on the 13<sup>th</sup> February 2019 is without merit and is rejected with costs.**

**b) That the Plaintiff's notice of motion dated the 18<sup>th</sup> December 2018, and filed on the 19<sup>th</sup> December 2018, is allowed in the following terms;**

**i) That the 2<sup>nd</sup> Defendant be and is hereby restrained by herself, agents and servants from encroaching onto Land Parcel North Ugenya/Sega/12 beyond the boundary erected by the Land Registrar and Surveyor during the 1<sup>st</sup> to 3<sup>rd</sup> August 2012 exercise without the consent or authority of the Plaintiff, pending the hearing and determination of this suit.**

**ii) That the 1<sup>st</sup> Defendant be and is hereby restrained by himself, agents or servants from erecting or continuing to erect any new developments or structures or farming on that portion of North Ugenya/Sega/12 that was found to be under his possession following the Land Registrar's and Surveyor's boundary determination of 1<sup>st</sup> to 3<sup>rd</sup> August 2012 without the Plaintiff's consent or authority, pending the hearing and determination of this case.**

**c) That 1<sup>st</sup> Defendant to meet the Plaintiff's costs of the motion.**

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**

**DATED AND DELIVERED THIS 26<sup>TH</sup> DAY OF JUNE 2019**

**In the presence of:**

Plaintiff Absent

Defendants Absent

Counsel Mr. Ojuro for 1<sup>st</sup> Defendant

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**