



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**ELC CASE NO. 42 OF 2018**

**CORNELIUS SYLVANO MUCHILWA.....1<sup>ST</sup> PLAINTIFF**

**ROBERT OTOKO KHAYUNDI.....2<sup>ND</sup> PLAINTIFF**

**LEONARD INDIAZI OJANGO.....3<sup>RD</sup> PLAINTIFF**

**MILTON OMBUYA.....4<sup>TH</sup> PLAINTIFF**

**(Suing in their own interest and in a representative capacity representing  
the residents of Luanda Township affected by the illegal and un-procedural  
intended expansion of Kisian-Yala Road in Luanda Township)**

**VERSUS**

**KENYA NATIONAL HIGHWAYS AUTHORITY.....DEFENDANT**

**RULING**

1. The Kenya National Highways Authority, the Defendant, has through the Notice of Preliminary Objection dated the 29<sup>th</sup> October 2018 raised four (4) points of law in opposition to the notice of motion dated 17<sup>th</sup> August 2018 and the entire suit filed by Cornelius Sylvano Muchilwa, Robert Otoko Khayundi, Leonard Indiazzi Onyango and Milton Ombuya, the Plaintiffs, who are suing in their own interest and in a representative capacity representing the residents of Luanda Township affected by the illegal and un-procedural intended expansion of Kisian-Yala Road in Luanda Township. The four (4) points are as summarized herein below:

- a. That the pleadings filed by the Plaintiffs discloses that their claim is in the nature of a boundary dispute between their alleged parcels of land and the land constituting the road reserve for Kisumu-Yala road that is under the Defendant.**
- b. That the said pleadings shows the boundary dispute commenced in 2014 and this suit has been filed before the Land Registrar could determine it in accordance with Section 19 (1), (2) and (3) of the Land Registration Act, 2012.**
- c. That as the Land Registrar is yet to make a determination on the boundary dispute, the court is without jurisdiction to deal with the matter in terms of Section 18 (2) of the Land Registration Act, 2012.**
- d. That the suit against the Defendant ought to be struck out with costs for not disclosing a cause of action and being an abuse of the court process.**

2. The Preliminary Objection was fixed for hearing on the 18<sup>th</sup> January 2019, and then the 6<sup>th</sup> March 2019. That on the latter date Counsel for the Plaintiffs and Defendant informed the Court that they had filed and exchanged submissions and the matter was fixed for ruling on the 19<sup>th</sup> June 2019. That it later became apparent that the Defendant's submissions was not on the court record as explained in their learned Counsel's letters dated 20<sup>th</sup> March 2019 and 10<sup>th</sup> April 2019. The record shows that the Plaintiffs' advocates filed their submissions dated the 7<sup>th</sup> February 2019, while that of the Defendant is date stamped the 5<sup>th</sup> March 2019 while the filing receipt No. 9767631 is dated 6<sup>th</sup> March 2019.

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

**a. Whether the notice of preliminary objection raise proper points of law.**

**b. Whether the court has jurisdiction to hear and determine this suit**

**c. Who pays the costs.**

4. The Court has carefully considered the Preliminary Objection raised by the Defendant, the written submissions by both Counsel, the pleadings filed, and come to the following findings:

a. That whereas the twenty two (22) paragraphs of the Plaintiffs' plaint dated the 17<sup>th</sup> August 2018, and filed on the 22<sup>nd</sup> August 2018, do not mention the existence of boundary dispute between the parcels the Plaintiffs have interests over, and the land for the road that they describe as Kisian-Yala Road, prayer (a) leaves no doubt that they want the Defendant restrained from interfering with their parcels of land and the developments thereon. That the obvious inference is that there is a dispute on the ground position of the road in relation to the Plaintiffs' parcels of land and or the developments thereon.

b. That the pleadings in the statement of defence dated and filed on the 29<sup>th</sup> October 2018 leaves no doubt about the Defendant's position being that those of the Plaintiffs served with eviction and demolition notices, are those with buildings and structures encroaching on the road reserve of Kisumu – Busia road, which the Plaintiffs have referred to as Kisian-Yala Road.

c. That in view of the findings in (a) and (b) above, the issue of whether or not structures and buildings that the Defendant has marked for demolition are on the reportedly 120 meters road reserve or on the Plaintiffs' parcels of land must be resolved first before the issue of permanent injunction or compensation can be considered. That as submitted by Counsel for the Defendant, the provision of **Section 18 (2) of the Land Registration Act No. 3 of 2012** leaves no doubt that the first forum to resolve the disputes over boundaries is with the Land Registrar. That it is only after the Land Registrar has rendered their determination on the boundary dispute that the issue matures for court's determination

d. That further to the findings in (c) above, there is nothing in the pleadings filed by the parties herein to confirm that the Land Registrar had made a determination on whether or not the structures and the buildings marked for demolition were within their owners' parcels, or on the Kisian-Yala, (Kisumu-Busia), road before this suit was filed. That it follows that the jurisdiction of this court on the matter was invoked prematurely, and the court is therefore without jurisdiction. That the decisions in the case of **Willis Ochola vs Mary Ndege [2016] eKLR**, and **William Gacani Mbaria vs Charles Kirimi Mbui [2018] eKLR** are relevant in this issue.

e. That the Court is satisfied that the Defendant's notice of preliminary objection raises a pure point of law on whether or not this court has jurisdiction to deal and determine with the suit primarily based on boundary dispute, where the Land Registrar has not made a resolution as the first arbiter under **Section 18 of the Land Registration Act**.

5. That in view of the foregoing, the Court upholds the Defendant's Preliminary Objection and the Plaintiffs' suit commenced through the plaint dated the 17<sup>th</sup> August 2018, and the motion of even date are hereby struck out with costs.

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**

**DATED AND DELIVERED THIS 19<sup>TH</sup> DAY OF JUNE 2019**

**In the presence of:**

Plaintiffs Absent

Defendant Absent

Counsel M/s Adwar for Mwamu for Plaintiff and

M/s Onsongo for Ragot for Defendant

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**