



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

E.L.C SUIT NO.76 OF 2018

SAMMY MUTUA MUSWII.....PLAINTIFF

-VERSUS-

FRANCIS WAITAH DAVID.....1ST DEFENDANT

FRANK MWANTHI MUTISYA.....2ND DEFENDANT

MWANZIA DAVID.....3RD DEFENDANT

DAVID MUTISYA.....4TH DEFENDANT

MUSYOKA MUTISYA.....5TH DEFENDANT

MORRIS MUTISYA6TH DEFENDANT

RULING

1) What is before this court for ruling is the Defendant's Preliminary Objection dated 10th December, 2018 and filed in court on 13th December, 2018.

2) In the Preliminary notice, the Defendants contend that: -

1. The suit is a non-starter and bad in law as the same is pleaded and founded on the Registered Lands Act Cap 300 to apply in a cause of action that arose in May, 2018 long after the Act was repealed and in particular the provisions of Section 21(2) did not find any life upon repealing of the Act.

2. That the boundary dispute determination report by the District Land Registrar dated 6th of December, 2014 was not done in accordance to the then existing laws governing the substance and procedure in determination of boundary disputes and therefore does not comply with the provisions of Sections 18 and Section 19 of the Land Registration Act 2012.

3. That the suit herein is premature as the same does not comply with the provisions of Section 18(2) of the Land Registration Act 2012.

3) Parties filed their submissions pursuant to the directions by the court to dispose of the Preliminary Objection by way of written submissions.

4) The Counsel for the Defendants submitted that from the pleadings and the supporting document, the cause of action arose on the 19th November, 2013, when the boundary dispute was purportedly determined, that that law which was applied from the point of summoning, procedure applied and the substance was the Registered Land Act Cap 300 and in particular Section 21(2) of the said Act.

5) The Counsel went on to submit that the date when the cause of action arose the said Registered Land Act Cap 300 was not in existence as it had already been repealed and replaced by the Land Registration Act 2012 with effect from 02nd May, 2012. That Section 21(2) of the repealed Act did not find its way into the Land Registration Act, 2012 through the saving and transitional provisions contained in Section 108 of the Land Registration Act. That the suit as pleaded, the Plaintiff is asking the court to enforce a boundary dispute report through the non-existing provisions of the parent law which had long way back been repealed before the cause of action arose and as such, the court has no jurisdiction to entertain the matter. That the suit is incurably defective and cannot be saved either by way of amendment.

6) It was further submitted that boundary determination is a *quasi judicial* function that is dealt by the Registrar of Land. That the Plaintiff is seeking to enforce that which was prepared by a Mr. Gabriel Maingi who signs for the District Surveyor. That under Section 19(2) of the Land Registration Act, there is no provision for delegation of the function that is reserved for the Land Registrar.

7) On his part, the Plaintiff's Counsel cited the case of **Mukisa Biscuits Co. Ltd vs. West End Distributors [1969] EA 696** where Sir Charles Newbold P stated thus: -

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

The Counsel pointed out that the Preliminary Objection is merely challenging the Plaintiff's evidence which is contained in document number 6 of his list of documents. That the claim herein is one of trespass and that the document in question is to show that there is no boundary dispute as the same was settled way back in the year 2013. That it is incumbent upon the Defendants to challenge the said report via judicial review. That it is the Defendants who have purported to turn the dispute into a boundary dispute yet in paragraph 4 of their defence, they claim land parcels No.Makueni/Unoa/207 and Makueni/Unoa/395.

8) It was further submitted that from the amended plaint, this suit is not founded on a repealed law as sought to be portrayed by the Defendants. That this court has jurisdiction to deal with the suit pursuant to Section 13 of the Environment and Land Court Act.

9) In reply to the Plaintiff's submissions, the Defendant's Counsel reiterated his earlier submissions.

10) Having read the submissions filed by the Counsel for the parties on record, it is clear to me that the Preliminary Objection herein does not raise a pure point of law since the facts pleaded by the Plaintiff have to be ascertained. This is because the defence by the 2nd to the 6th Defendants does not admit that the facts as pleaded by the Plaintiff are correct. The Land Registrar's or District surveyor's report alluded to by the Defendants is but one of the pieces of evidence which the Plaintiff seeks to adduce. The Defendants will have the chance to impugn it during cross-examination.

11) The upshot of the foregoing is that the point of Preliminary Objection has no merits and same is dismissed with costs to the Plaintiff.

Signed, dated and delivered at Makueni this 12th day of July, 2019.

MBOGO C. G.,

JUDGE.

In the presence of: -

Mr. Mutia holding brief for Mr. Kituku for the Plaintiff

Mr. Momanyi for the Defendants

Ms. C. Nzioka – Court Assistant

MBOGO C. G. (JUDGE),

12/07/2019.