



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 373 OF 2017

JOHNSTONE KYALO WATHI.....PLAINTIFF

VERSUS

ROBERT MUMINA SAMUEL.....1ST DEFENDANT

REGISTRAR FOR LANDS MACHAKOS.....2ND DEFENDANT

ATTORNEY GENERAL.....3RD DEFENDANT

RULING

1. In his Notice of Preliminary Objection dated 1st October, 2018, the 1st Defendant's averred that by virtue of the provisions of Section 18 of the Land Registration Act, this court is divested of jurisdiction; that the Plaintiff's suit is about a boundary dispute and that the Plaintiff's first port of call should have been the office of the County Land Registrar, Machakos.

2. The 1st Defendant's counsel submitted that the Plaintiff's suit makes reference to parcels of land numbers Machakos/Kiandani/576 and 1248; that there is no nexus between parcel numbers 576 and 1248 and that the Plaintiff was to cause for the preparation of a Report by the Registrar of Lands and if the Registrar declined to act on it, move the court to issue an order of mandamus.

3. Counsel submitted that the Plaintiff's suit is null and void and that the suit should be struck out in *limine* with costs. Counsel relied on the case of *Nelson Muturi Dumbeya vs. Eliud Waititu Kimeria; Machakos HCCC No. 101 of 2009*.

4. On his part, the Plaintiff's advocate submitted that the Preliminary Objection relies on a fact that must be proved and does not raise a purely point of law; that in the Plaintiff's List of Documents, there is a report showing that the District Surveyor visited the suit land and that after implementation of the Surveyor's report, the 1st Defendant uprooted the sisal boundary planted by the Surveyor.

5. In the Complaint dated 11th September, 2017, the Plaintiff averred that he is the registered proprietor of land known as Machakos/Kiandani/576; that the Machakos County Surveyor prepared a report made on 16th September, 2015 pursuant to the decision of the Minister in Appeal No. 375 of 1986 and that the long standing dispute between the Plaintiff and the 1st Defendant over parcels number Machakos/Kiandani/576 and 1248 was resolved.

6. It is the Plaintiff's averment that the 1st Defendant has not been co-operative to have the positioning of the boundaries of parcels numbers 576 and 1248 rectified on the ground.

7. In his Defence, the 1st Defendant averred that he has never trespassed into any land owned by the Plaintiff; that there is an existing suit in respect to the same property and that in any event; this court is divested of jurisdiction to entertain the suit by virtue of Section 18(2) of the Land Registration Act.

8. The 1st Defendant is seeking for the dismissal of the suit pursuant to the provisions of Section 18(2) of the Land Registration Act which provides as follows:

“(2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.”

9. From the Complaint, the Plaintiff's position is that the issue of boundaries in respect of the Plaintiff's parcel of land known as Machakos/Kiandani/576 and the Defendants' parcel of land known as Machakos/Kiandani/1248 was determined by the decision of the District Commissioner in Appeal Case No. 375 of 1986 and the Surveyor's report of 16th September, 2015. According to the Plaintiff, the

Defendant has declined to honour the contents of the said Report.

10. In view of the averments in the Plaint, the issue of if indeed the boundary dispute was resolved as between the parties can only be ascertained by the court after trial. The Plaintiff having averred that the boundary dispute between him and the 1st Defendant was resolved, and that the suit is meant to compel the 1st Defendant to comply with either the Report of the Surveyor or the order of the District Commissioner in Appeal No. 375 of 1986, I find and hold that the matter should proceed to trial to ascertain the correct position.

11. Indeed, the Preliminary Objection raised by the Plaintiff cannot be determined by this court at this stage without delving into documentary evidence to ascertain what transpired in Appeal Case No. 375 of 1986, which seems to have culminated into the preparation of a Surveyor's report of 16th September, 2015.

12. For those reasons, I find the Notice of Preliminary Objection dated 1st October, 2018 to be unmeritorious. The same is dismissed with costs to the Plaintiff.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 12TH DAY OF JULY, 2019.

O.A. ANGOTE

JUDGE