



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

PETITION NO. 3 OF 2019

LUCY AGAPE WAYODIPETITIONER

VERSUS

KENYA NATIONAL HIGHWAYS AUTHORITY.....1ST RESPONDENT

NATIONAL LAND COMMISSION.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

The 1st Respondent filed a Notice of Preliminary Objection dated 7th October 2019 opposing the entire suit and a Notice of Motion application dated 1st April 2019 against the respondents on the grounds that the suit and application disclose that the Petitioner's claim is a boundary dispute over the proper location of the boundary between the Petitioner's alleged parcel and the road reserve along the Kisumu – Kakamega – Webuye – Kitale Highway. That the dispute has been presented before a determination of the alleged boundary by the relevant Land Registrar within the meaning of **Sections 19 (1), (2), and (3) of the Land Registration Act 2012 as read with Section 18 (2) of the Land Registration Act 2012**. That the court or any other court is divested of jurisdiction to hear and determine the suit and the Petition as presented does not disclose any cause of action against the Respondent. The Respondent prays that the suit be struck off with costs for disclosing no cause of action and constituting an abuse of the court process.

The gist of the 1st Respondent's submissions is that the dispute is on where, on the actual ground, the correct boundary between the Petitioner's parcel and the road reserve is. Whether or not the Petitioner is entitled to any of the relief she has sought depends on a determination as to the precise boundary between the two parcels, which should commence through the Land Registrar as per **Sections 18 (2) and 19 (1), (2) and (3) of the Land Registration Act**.

According to the respondent, the determination of the boundary by the Land Registrar necessitates a quasi-judicial process in which both parties are heard and representations made by their respective surveyors.

The Petitioner presenting her own independent surveyor's report does not constitute a boundary determination as contemplated by Section 18 and 19 of the Land Registration Act.

The court therefore lacks jurisdiction as the suit was filed prematurely. Petitioner has no cause of action until a determination by the Land Registrar is made. The court must therefore down its tools as per ***Lilian S v Caltex Oil (K) Ltd (1986 – 1989) 1 EA 305***

Where the legislative framework has provided an alternative dispute resolution in such mandatory terms, the courts should decline jurisdiction in line with **Article 159 of the Constitution** which promotes alternative forms of dispute resolution.

The gist of the Petitioner's submissions is that the issue at hand is not a boundary dispute but a constitutional petition. That the Petitioner's constitutional rights are being infringed by the Respondents. The Land Registrar has no jurisdiction to address issues of infringement of the constitution or bill of rights such as social and economic rights. The Land Registrar has no role to play in compulsory acquisition of land and compensation thereof of land owners. The ELC has exclusive jurisdiction to hear and determine disputes relating to the environment and the use and occupation of, and title to, land by dint of **Article 162 (2) of the Constitution and Section 13 (1) of the ELC Act**.

The Petitioner is complaining of the illegal acquisition of extra land from her parcel without gazettelement and compensation. She complains of the destruction of her properties which are her source of income. These issues fall squarely under the **Constitution, the Land Act and the Land Acquisition Act**.

Issues for Determination

1. Whether the main issue in the petition is a boundary dispute

On scrutiny of the pleadings in the petition and the 1st Respondent's Response to the Petition, it is clear that the dispute is centred on establishing the limit of the road reserve compulsorily acquired from the Petitioner's land. The trigger for the Petitioner was the 1st Respondent's surveyor's action of placing beacons within the Petitioner's shops to suggest that the beacons marked the boundary between the acquired road reserve and the Petitioner's land. It is only after this dispute is resolved that a determination on whether the Petitioner is entitled to the reliefs sought can be made.

2. Whether the Court has jurisdiction to hear and determine the petition

Section 18 (2) of the Land Registration Act provides that the determination of the boundaries of a parcel is initially the preserve of the Land Registrar:

“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.”

Sections 18 (3) and 19 then follows with further provisions as to how the Land Registrar may go about making the determination, including receiving evidence as to the parcel's boundaries and situation as may be necessary.

Further, Mutungi J. in *Ali Farah v Moses Ole Nasisit & 9 others* [2016] eKLR held that the courts are not a suitable venue to begin resolving such disputes that are of a technical nature:

“Sections 18 and 19 of the Land Registration Act 2012 gives power to the land registrar to have the boundary of any parcel of land established and fixed in the event of any dispute and in carrying out such exercise the land registrar is at liberty to receive such evidence as to the situation of the land parcel boundaries as may be necessary. Hence the Act recognizes that it is the land registrar acting in concert with the surveyor who would be best suited to resolve any issues relating to boundary disputes and not the courts. The land registrar has custody of all the necessary records and the surveyor in case of need renders the necessary technical support.”

There is no indication within the pleadings filed that an inquiry as to the boundary between the Petitioner's land and the road reserve was placed before the relevant Land Registrar for determination. The Petitioner's own independent survey and surveyor's report cannot substitute the determination of the boundary by the Land Registrar as provided for in **Section 18 and 19 of the Land Registration Act**.

It therefore follows that the court lacks jurisdiction to hear the petition as it was brought prematurely before ascertaining the boundary in the manner contemplated by the **Land Registration Act**.

The upshot of the above is that the Preliminary Objection is upheld and the Petitioner's Petition and application struck out with costs.

A. O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 22nd DAY OF NOVEMBER, 2019.

In the presence of:

Mr. Odeny for Petitioner

Mr. Oriero for Respondent

Mr. Langat for 1st & 3rd Respondents

A. O. OMBWAYO

ENVIRONMENT & LAND

JUDGE