



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 178 OF 2015

EPHANTUS MUTERO RIBUTHI.....PLAINTIFF

-VERSUS-

DOUGLAS WANJOHI.....DEFENDANT

JUDGEMENT

1. By a plaint dated **15th June, 2015** and filed on the same day the plaintiff herein, **Ephantus Mutero Ributhi**, brought the suit herein to compel the defendant, Douglas Wanjohi, to avail himself during the exercise of ascertaining and fixing the boundary to the parcels of land known as **Githi/Kirerema/831** and **Githi/Kirerema/197**.
2. The plaintiff's claim is premised on the ground that there exists an unresolved boundary dispute between his family and the family of the defendant.
3. According to the plaintiff, on 27th May 2014, his family and that of the defendant met and agreed that the Nyeri Land Registrar and Surveyor were to ascertain and fix the boundaries to the parcels of land herein and that the parties to this dispute were to abide with the findings of those officers.
4. Despite having signed an agreement to that effect, the plaintiff laments that efforts to get the boundary dispute resolved in accordance with their agreement had been thwarted by the defendant's failure to avail himself whenever the boundary ascertaining and fixing exercise was scheduled to take place.
5. Because of the defendant's alleged failure to cooperate in the boundary ascertaining and fixing exercise, the plaintiff moved to this court to compel the defendant to avail himself for the exercise when scheduled failing which the boundary dispute will be determined in his absence.
6. Despite having being served with summons to enter appearance, the defendant failed to enter appearance or file a defence within the time stipulated in law.
7. On request of the plaintiff, interlocutory judgment was entered against the defendant on 4th August, 2015 and thereafter the matter was set down for formal proof.
8. When the matter came up for hearing/formal proof, the plaintiff reiterated his contention that despite their families having entered into an agreement to have the boundary to the parcels of land herein ascertained and fixed, the defendant had refused to avail himself for the exercise thus stalling it.
9. Concerning ownership of the parcel known as Githi/Kirerema/831 the plaintiff informed the court that it belongs to his father, now deceased.

Analysis and determination

10. Although not defended, the plaintiff's suit raises a number of legal issues which this court must address in determining whether or not to allow the plaintiff's suit. These are:-

- (a) Whether issuance of interlocutory judgment in favour of the plaintiff in the circumstances of this case was proper?

(b) Whether the plaintiff has capacity to bring and prosecute the suit herein?

(c) Whether this court has jurisdiction to entertain the proceedings herein?

11. With regard to the 1st issue, under **Order 10 Rules 4, 6, 9 and 10**, interlocutory judgment cannot issue in land matters unless the claim is accompanied by a prayer for pecuniary damages or for detention of goods in which case, interlocutory judgment shall be entered in respect of the prayer for liquidated damages or for detention of goods only and the other claim ordered to proceed in the normal way. In this regard, see the case of **Solomon Mwobobia Nkuraaru v. Jacob Mwiti (2015) eKLR** where this court stated:

“The subject matter of the suit herein being land, the question which arises is whether given the fact that the plaintiff’s claim is not a liquidated one, the entry of interlocutory judgment in favour of the plaintiff had any basis in law. Concerning this question, it is noteworthy that the law contemplates that interlocutory judgment could only be entered in respect of the liquidated claim only. In this regard see Order 10 Rule 2 of the Civil Procedure Rules which provides as follows:-

“Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the date fixed in the summons or all the defendants fail to so appear, the court shall, on

request of in Form 13 of the Appendix A enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of judgment, and costs.”

10. Liquidated demand was explained in the case of **Serraco Limited v. Attorney General (2009) eKLR** thus:-

“JOWITT’S Dictionary of English law, second Edition volume 2, L-Z. At page 1105 there is found definition for a liquidated demand which is defined as:-

“Liquidated demand where an action is brought for a debt or liquidated demand only, the writ must be endorsed with a statement of the amount claimed and for costs and also with a statement that further proceedings will be stayed if within time limited for appearing, the defendant pays the amount claimed to the plaintiff, his solicitor or agent or into court.

Liquidated on the other hand is defined as: “a sum is said to be liquidated when it is fixed or ascertained. The term is usually employed with reference to damages.” Whereas liquidated

damages is defined as:- “ The amount agreed upon by a party to a contract to be paid as compensation for the breach of it and intended to be recovered whether the actual damages sustained by the breach are more or less in contrary distinction to a penalty.”

11. The plaintiff’s case being for recovery of land, does not fall under the claims for which interlocutory judgment could have been entered in favour of the plaintiff under Order 10 Rule 2.

12. The plaintiff ought to have proceeded under Order 10 Rule 9 which provides as follows:-

“Subject to rule 4, in all suits not otherwise specifically provided for by this Order, where any party served does not appear the plaintiff may set down the suit for hearing.”

13. In my view it is in the proceedings contemplated under Order 10 Rule 9 where the plaintiff would prove service of summons and failure to enter appearance as contemplated in

law, if the trial court is satisfied that service was effected as by law required, it would proceed and hear the plaintiff’s case for purposes of determining whether the plaintiff has made up a case of being granted the orders sought.”

12. In view of the foregoing, I find the interlocutory judgment entered in favour of the plaintiff in this matter to have been irregular and I hereby set it aside.

13. With regard to the second issue, from the plaint filed in this matter and the testimony of the plaintiff, it is clear that the property in respect of which the suit is brought does not belong to the plaintiff but his father who is deceased.

14. As the subject matter relates to the estate of a deceased person, an issue of law arises concerning the plaintiff’s capacity to bring and prosecute a suit in respect of that property bearing in mind that he has not brought the suit as the legal representative or administrator of the estate of his father or even as a beneficiary thereof.

15. Under **Section 82** of the Law of Succession Act, only a legal representative or an administrator of the estate of a deceased person has power to institute a suit on behalf of the estate of a deceased person.

16. There being no evidence to show that the plaintiff has capacity to bring and institute this suit, I find the suit herein to be bad in law for offending the provisions of **Section 82** of the Law of Succession Act, Cap 160 Laws of Kenya. In this regard see the case of **Re-estate of Richard Nderi Wangome (Deceased) (2011) e KLR** where it was held:

“This court cannot sanction an illegality which has taken place. It is a requirement of law that before one institutes a suit on behalf of an Estate that person must first obtain a grant of letters of administration. In Troustic Union International & Another vs. Jane Mbeyu & Another C.A No. 145 of 1991 the Court of Appeal *inter alia* held that an administrator is not entitled to bring an action as an administrator before he has taken letters of administration.”

17. As to whether this court has jurisdiction to hear and determine the suit, **Section 18(2)** of the Land Registration Act, 2012 prohibits this court from entertaining any action or proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been fixed in accordance with the provisions of that section.

18. Although the proceedings herein are merely aimed at assisting the Registrar to carry out his/her duty by ordering the defendant to avail himself during the boundary fixing exercise, being of the view that the proceedings herein are equally prohibited by **Section 18(2)** of the Land Registration Act, 2012 I find and hold that this court lacks jurisdiction to entertain this suit and make the orders therein sought.

19. On the merits of the suit, whereas the plaintiff claims that there have been several attempts to have the boundary dispute which is the subject matter of this suit determined by the Land Registrar which were thwarted by the defendant's none cooperation, I note that apart from the agreement allegedly executed between his family and the family of the defendant to have the dispute resolved by the Land Registrar and the District Surveyor, there is no evidence of any attempt by the Land Registrar to resolve the dispute.

20. Under **Section 14** of the Land Registration Act, 2012, the Land Registrar has power to *inter alia* summon any person to appear and give any information or explanation in respect to land, a lease, charge, instrument, certificate, document or plan relating to the land, lease or charge in question, and that person shall appear and give the information or explanation.

21. Being of the view that the plaintiff's suit is on account of the above cited grounds either bad in law or premature, I decline to grant the order sought.

22. The upshot of the foregoing is that the suit herein is found to be lacking in merit and is dismissed.

Dated, signed and delivered in open court at Nyeri this 22nd day of February, 2018.

L N WAITHAKA

JUDGE

Coram:

Ephantus Mutero Ributhi – plaintiff

Defendant not present – (formal proof)

Court assistant - Esther