



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO.274 OF 2014

JOHN EZEKIEL OKOTH OWINO.....1ST PLAINTIFF

PAMELA AKINYI OTIENO.....2ND PLAINTIFF

VERSUS

NEHEMIAH INTERNATIONAL REGISTERED TRUSTEES....DEFENDANT

RULING

1. Nehemiah International Registered Trustees, the Defendant, issued the notice of preliminary objection dated 9th March 2017 to the suit commenced by **John Ezekiel Okoth Owino and Pamela Akinyi Otieno**, the Plaintiffs, citing out the following three grounds;

- 1) That the honourable court lacks jurisdiction to entertain and determine this matter.
- 2) That this case entirely violates the provision of **Section 18 (2) of the Land Registration Act 2012**.
- 3) Reasons wherefore the suit should be struck out and or dismissed with costs to the Defendant.

2. The preliminary objection came up for hearing on the 13th November 2017 with Mr. Mweisigwa and Mr. Ogonda advocates making their oral submissions on behalf of the Plaintiffs and Defendant respectively. The following is a summary of the counsel's submissions;

A: DEFENDANTS COUNSEL'S SUBMISSIONS:

- That the Plaintiffs claim against the Defendant is a boundary dispute and under **Section 18 (2) of Land Registration Act 2012**, the power to settle such a dispute is bestowed on the Land Registrar.
- The jurisdiction of this court to deal with boundary disputes under **Section 13 of the Environment and Land Court Act** only arises after the Land Registrar's decision under **Section 18 (2) of the Land Registration Act**.
- That the court has no jurisdiction to deal with this suit and should strike it out with costs.
- That paragraphs 10 and 11 of the plaint refers to two parcel numbers 10416/2 and 10416/3 clearly disclosing the existence of the dispute, being one of boundary.
- That prayers (b) and (c) would only stand if prayer (a), which is about boundary dispute, is upheld.
- That the Defendant's preliminary objection satisfies the principle in **Mukhisa Biscuits** case that held that preliminary objection be limited to questions of law only.

B. PLAINTIFF COUNSEL'S SUBMISSIONS:

- That the plaintiffs case raises the issue of encroachment of their land at paragraph 11 of their plaint and the issue of trespass at paragraph 12 of the said plant.
- That prayer (c) of the plaint seeks for damages for trespass.
- That the question of trespass and damages lies within the jurisdiction of this court under **Section 13 of Environment and land Court Act No.19 of 2011**.
- **That** the provisions of **Section 13 (2) (a) of the Environment and Land Court Act and Article 162 (2) (b) of the Constitution** donates to this court the original and appellate jurisdiction to hear and determine boundary dispute issues.
- That the preliminary objection is supposed to be based on a pure point of law and does not arise where any facts are to be ascertained or where judicial discretion is to be executed [**Mukhisa Biscuits –V-Westend Distributors**].

- That the suit is not about boundary dispute as the pleadings do not make reference to any other parcel of land other than the suit land.
- That the preliminary objection dated 9th March 2017 is devoid of merit, it misconceived and should be rejected and dismissed with costs.

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

a) Whether this suit is about boundary dispute, and if so, whether the court has jurisdiction on the matter in view of Section **18 (2) of Land Registration Act No.3 of 2012.**

b) Who pays the costs of the application.

4. The court has after carefully considering the grounds on the notice of motion, affidavit evidence, submissions by counsel come to the following determination;

a) That from the Plaintiff's averments in paragraphs 4 to 7 of the Plaintiff dated 17th September 2014, the Plaintiffs bought land parcel L.R. No. **10416/3 (I.R.21117/160)** from the Defendant under the sale agreement dated 2nd December 2013. That the Plaintiffs became the registered proprietors of the leasehold interest over the said land on the 25th March 2014.

b) That the averments in paragraphs 9 to 12 of the said plaintiff clearly shows that there has been a dispute on the extent and position of the boundary of the Plaintiffs' land with land parcel L.R. No.10416/2.

c) That this suit seems to seek courts confirmation that the Plaintiffs' land's beacons (boundary) is as it appears on the deed plan. That while that may be so, it is clear from the pleadings filed that the Defendant's trustees have been disputing the beacon marks (boundaries) planted or elected by the Plaintiffs which clearly shows that the Defendant dispute the ground position of the beacons (boundary) planted by the Plaintiffs.

d) That prayers (a) and (b) of the plaintiff cannot be issued in favour of the Plaintiffs without first confirming that the ground position of the beacons (boundary) of the said land is on the correct position now that the Defendant appears to challenge or dispute it.

e) That prayers (c) and (d) of the plaintiff would only arise if the court makes a finding that the position of the beacons (boundary) ,as planted by the Plaintiffs, is on the correct ground position and that the Defendant had indeed encroached onto the Plaintiffs' land, plus a determination of the acreage of encroachment.

f) That in view of the findings above, the court uphold the preliminary objection raised by the counsel for the Defendant, for the reason that there are no averments in the plaintiff that the county Land Registrar has settled the boundary dispute in accordance with provisions of **Section 18 (2) of the Land Registration Act No.3 of 2012.** That the jurisdiction of this court to deal with the matter was prematurely invoked.

5. That for reasons set out above the Defendant's counsel's preliminary objection is upheld and the Plaintiffs' suit commenced vide the plaintiff dated the 17th September 2014 is hereby struck out with costs.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 21ST DAY OF FEBRUARY 2018

In presence of;

Plaintiffs Absent

Defendant Absent

Counsel M/S Mileli for M/S Ngala for Plaintiff

Mr. Oteino D. for Ogonda for Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

21/2/2017

21/2/2018

S.M. Kibunja Judge

Joane court assistant

Parties absent

Mr. Otieno D. for Oganda for Defendant/Applicant

M/S Mileli for M/S Ngala for Plaintiff/Respondent.

Court: The Ruling dated and delivered in the presence of M/S Mileli for M/S Ngala and Mr. Otieno D. for Mr. Ogonda for the Plaintiff/Respondent and Defendant/Applicant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

21/2/2017