



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**LAND CASE NO. 134 OF 2017**

**JONATHAN SAVAGE.....PLAINTIFF**

**VERSUS**

**PATRICK OKEEFF.....DEFENDANT**

**RULING**

**BACKGROUND**

1. By a Plaint dated 20<sup>th</sup> June 2017 and filed on 21<sup>st</sup> June 2017, the Plaintiff Jonathan Savage prays for Judgment against the Defendant for:-

***a) A permanent injunction order restraining the Defendant, his servants, agents, from trespassing, encroaching or building any wall along the boundary of Kilifi/Jimba 1138/1139 and Kilifi/Jimba 1139/1190 after the establishment of boundary beacons respectively;***

***b) Any other order that this Honourable Court deems fit.***

2. The said prayers are premised on the fact that the Plaintiff is the Managing Director of Digitel Communications Systems Ltd, the registered proprietor of two parcels of land namely; LR No. Kilifi/Jimba/1138/1139 originally sub-divided from Plot No. Kilifi/Jimba 380.

3. It is the Plaintiff's case that the Defendant-Patrick Okeeff is the registered proprietor of two parcels of land namely; LR No. Kilifi/Jimba 1189/1190 originally sub-divided from Plot No. Kilifi/Jimba 397 and that there exists a boundary dispute between the Plaintiff's parcel of land and that belonging to the Defendant. The Plaintiff accuses the Defendant of illegally trespassing, encroaching and building a wall 62 metres into his land and refusing to allow the Plaintiff entry thereon and hence the prayer sought in the Plaint.

4. The Plaintiff also filed on the same day a Notice of Motion application seeking temporary injunction and an order for a surveyor to re-establish the boundary beacons pending the hearing and determination of the suit.

5. In a Statement of Defence dated and filed herein on 9<sup>th</sup> November 2017, the Defendant avers inter alia that the Plaint as drawn and filed does not disclose any or any reasonable cause of action against them and that they shall at the first hearing hereof crave the leave of this Court to raise a preliminary Point of objection on that ground.

6. The Defendant further avers that this Court has no jurisdiction to entertain this suit as the same is brought in direct violation of Section 18(2) of the Land Registration Act No. 3 of 2012.

7. It is further the Defendant's case that land parcel Number Kilifi/Jimba/1138 is registered in the name of Digi-Tel Communications Systems Ltd and that the Plaintiff has no capacity in law to bring this action. The Defendant avers that this Court has no jurisdiction to hear such an incompetent action and the same must therefore be struck out with costs.

8. Filed contemporaneously with the Statement of Defence and dated the same 9<sup>th</sup> day of November 2017 is the Defendant's Preliminary Objection in which he states that the Plaintiff's suit and the Notice of Motion application are defective and ought to be struck out on the grounds that:-

***i. The Court has no jurisdiction to entertain this suit as the same is brought in direct violation of Section 18(2) of the Land Registration Act No. 3 of 2012.***

ii. *The Plaintiff has no locus standi to bring about this action as the Plaintiff is not the owner of the suit premises.*

iii. *The Supporting Affidavit of Jonathan Savage is defective and all the exhibits annexed thereto are not sealed with the seal of a Commissioner of Oaths in violation of Rule 9 of the Oaths and Statutory Declaration Rules.*

iv. *There is no evidence placed before the Court to suggest the Defendant has violated the Order made by the Registrar on 5<sup>th</sup> March 2017.*

v. *The Plaintiff has failed to satisfy the conditions necessary for the grant of the Orders of injunction.*

9. In addition to the Statement of Defence and the Notice of Preliminary Objection, the Defendant has also sworn a Replying Affidavit filed on the same 9<sup>th</sup> November 2017 giving details of the history of the dispute herein.

10. On 23<sup>rd</sup> November 2017 when the Plaintiff's Notice of Motion came up for hearing, it was agreed that the Defendant's preliminary Objection would be dealt with first as it delved into the matter of whether or not this Court has jurisdiction to entertain the suit and the application. Parties were accordingly granted time to consider the same and file written submissions thereon.

11. I have considered the Preliminary Objection and the submissions filed by the Learned Counsels representing the parties herein. I have equally taken into account the oral submissions made by the counsels before me as well as the various authorities each one of them referred me to.

## DEFENDANT'S SUBMISSIONS

12. Mr. Tukero Ole Kina, Learned Counsel for the Defendant urged Grounds 1, 2 and 3 of the Preliminary Objection and thereby abandoned the other grounds stated therein.

13. Urging the first ground, counsel submitted that the title that is annexed to the affidavit of the Plaintiff as well as the Search Certificate do not show that the boundaries were fixed. He submitted that Section 18(2) of the Land Registration Act takes away the jurisdiction of the Court to deal with a matter such as this one where the boundaries have not been fixed. Counsel submitted that at this very earliest stage, when a question of jurisdiction is raised, the Court must examine the records before it. He submitted that a perusal of the pleadings herein clearly shows that the boundaries of the disputed portion of land have not been fixed and this suit ought not to have been filed until that was done.

14. In regard to the Second Ground of his objection, Mr. Ole Kina submitted that a party has no business filing a suit against another unless he can show a direct connection between himself and the party he wants to sue. Counsel submitted that paragraph 1 of the Plaint shows clearly that the owner of the land is not the Plaintiff but a Limited Liability Company. On the authority of ***Salomon vs Salomon Company Limited(1895-1899) All ER 33***, counsel submitted that a company is distinct from its directors and shareholders and that there was nothing to show that the Plaintiff had been authorized to file the suit on behalf of the registered proprietor of the land.

15. On the Third Ground of Objection, Mr. Ole kina urged that none of the exhibits in Mr. Jonathan Savage's affidavit sworn on 19<sup>th</sup> June 2017 in support of the Notice of Motion had been sealed with the seal of a Commissioner for Oaths. That, counsel submitted, was in violation of Rule 9 of the Oaths and Statutory Declaration Rules which is couched in mandatory terms. There being no observance thereof, counsel urged the Court to follow the decision in ***Solomon Software (EA) Ltd and Another vs Microsoft Corporation(2003)1EA 300*** and strike out the affidavit in question.

## PLAINTIFF'S RESPONSE.

16. In response to the objections raised, Mr. Ojwang Agina, Learned Counsel for the Plaintiff submitted that the issues raised in the Preliminary Objection did not meet the threshold set in the celebrated case of ***Mukhisa Biscuit Manufacturing Company Ltd –vs- West End Distributors Ltd(1969) EA 696***, and hence should be disregarded by this Court. Counsel submitted that the jurisdiction of this Court is granted by Articles 162 and 165 of the Constitution. Accordingly, the Land Registration Act 2012 cannot oust the jurisdiction of this Court and the claim that Section 18(2) thereof ousted the jurisdiction of the Court was therefore not founded in law.

17. Mr. Agina submitted that the Constitution gives this Court power over quasi-judicial bodies established under the law. He stated that when the Land Registrar sits to make a decision, it is quasi-judicial and whatever decision he makes, there is nothing to stop the High Court from questioning what the quasi-judicial body was doing. It was Leaned Counsel's submissions that the dispute herein had long been settled on paper but for some reason, the Registrar had failed to implement the same on the ground. Counsel therefore submitted that this Court has jurisdiction to find out why that decision had been made on paper but not on the ground.

18. In regard to the Plaintiff's locus standi to bring this suit, Mr. Agina submitted that paragraph 1 of the Plaint clearly identifies who owns the land and the status of the Plaintiff. It was his case that a look at that paragraph reveals that there was a misjoinder of parties. It was therefore his submissions that Order 1 Rules 9 and 10 of the Civil Procedure Rules empowers the Court, even suo moto, to engineer an amendment to bring the correct parties into the suit. Further, Counsel submitted that order 11 of the Civil Procedure Rules allows for proper determination of parties and the issues. The case was yet to reach the stage for such determination and the Court should therefore not strike out any pleadings on the issue of misjoinder.

19. In regard to the Plaintiff's affidavit as filed, Counsel submitted that the Court should only dismiss a suit on a matter of substance and not that of form. It was his submission that in any event, Order 19 of the Civil Procedure Rules empowers the Court to allow any affidavit with any imperfections for purposes of ensuring justice.

20. I have considered the submissions in their totality. The first Ground of Objection pertains to the jurisdiction of this Court to deal with disputes as to the boundaries of registered land. In this regard, Section 18 of the Land Registration Act provides that:-

***(1) Except where, in accordance with Section 20, it is noted in the register that the boundaries of a parcel of land have been fixed, the cadastral map and any filed plan shall be deemed to indicate the appropriate boundaries and the approximate situation only of the parcel.***

***(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.***

***(3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary.***

21. Urging this ground, Counsel for the Defendant submitted that both the title annexed to the affidavit of the Plaintiff as well as the Certificate of Search do not show that the boundaries are fixed. Accordingly, it was his case that Section 18(2) of the Land Registration Act aforementioned takes away the jurisdiction of this Court to deal with such land.

22. I note however from a reading of the law as set out above that the word "fixed" is only used at Section 18(3) in regard to the requirement for the Registrar to receive evidence for purposes of fixing the boundaries. Section 18(2) of the Act on the other hand excludes the jurisdiction of the Court when the boundaries have not been "determined".

23. From the record herein, it is evident that there has been a long outstanding dispute in relation to the matter herein. In the correspondence attached to the Plaintiff's Supporting Affidavit to the Notice of Motion, there is letter dated 20<sup>th</sup> February 2012 from the Ministry of Lands addressed to the District Commissioner which states in the relevant portion as follows:-

**RE: BOUNDARY DISPUTE KILIFI JIMBA 380 AND 397**

***The owner of parcel No. Kilifi/Jimba/380 has lodged a complaint with the Permanent Secretary about the boundary dispute which has been unresolved for the last six years.***

***The Permanent Secretary sent a team of the Public Complaints and Resolutions Committee to visit the site with a view to resolve the dispute...***

***On visiting the site, the Public Complaints and Resolution Committee established that the complainant has a genuine case, his land has been encroached into almost half way. However it was resolved that if the boundary dispute is resolved between the two parcels 380 and 397 only the problem would not be over as this would create (a) subsequent dispute involving parcels 395 and 390.***

***In view of the above and due to the sensitivity of the issue, you are requested to assist the Permanent Secretary in three ways which are:-***

***i) In liaison with Ministry of Lands officers on the ground, convene a meeting of the owners of parcels 380, 397, 395 and 290***

***ii) Fix a date when the dispute would be resolved. This is mainly because there is reluctance on the side of the owner of 397 to co-operate. The District land Officer and the District Surveyor would be present in the meeting and finally dispose the dispute on the date agreed upon...."***

24. It is apparent from the subsequent correspondence that such a meeting was held and, the Land Registrar made what in my view amounts to a 'determination' in regard to the boundary in dispute. In his letter dated 5<sup>th</sup> March 2014, the Kilifi Country Land Registrar wrote to the Principal Secretary in the Ministry enclosing "a duly signed boundary dispute proceedings report with regard to the .....parcels of land which his office had authorized the Public Complaint Resolution Committee in conjunction with the Kilifi County Land officials to arbitrate."

25. A perusal of the Report enclosed in the Land Registrar's letter aforesaid reveals that all the parties were heard and survey measurements were carried out. In what he terms as "findings", the Land Registrar notes as follows:-

***"That generally findings revealed that the lower side of the applicant parcel of land had a deficit by 62m and when the 62 metres are splayed(sic) they would land in the defendants parcel of land and hence the defendants would face the same problem.***

***That the ground measurements of Plot No. 380 Jimba is 1.76 Hectares while the scaled measurements adds to 2.1 hectares. It was also revealed that the defendants parcel of land provides approximately 2.3 hectares being the ground measurement while the scaled measurements adds to 2.4 hectares. Kindly see the attached documents.***

26. From the said findings, the Land Registrar then makes what he terms as the "Land Registrar's Decision" as follows:-

***Based on the above findings, the applicant claim had a basis, because it was generally established that he had lost land bearing the fact that the boundaries against the R.I. M. are formed straight and runs parallel down to the sea as opposed to the common wall fenced boundary.***

***However, though physically erected wall fence of the defendant can be contained under the existing boundaries of the particular plot the shortage of approximately 62 metres of the applicant parcel of land clarifies that the dispute has attracted several other parcels in the neighbourhood, to start with between parcels 380 Jimba to Plot No. Kilifi/Jimba/390.***

***I therefore directed that a status quo be maintained until when the Ministry would obtain a Court order from the High Court of Kenya to correct erroneously erected boundaries affecting listed parcels of land as indicated in the attached sketches.”***

27. Arising from the foregoing, I am not prepared to accept that this is a matter in which the boundaries remain undetermined as to oust the jurisdiction of this Court as stipulated under Section 18(2) of the Land Registration Act. As is clear from the correspondence cited, the claimant has sought to have the Registrar to clearly demarcate the boundaries in dispute for more than 10 years now. But even where the Registrar determined that the claimant had been short-changed, the Registrar has for some reason beyond the comprehension of the claimant dragged his feet and to-date is yet to take corrective measures herein.

28. Article 159(2) (d) of the Constitution provides that justice shall be administered without undue regard to procedural technicalities. In addition, this Court is enjoined to give effect to the overriding objectives provided at Section 1A, 1B and 3A of the Civil Procedure Act which includes the just, expeditious, proportionate, efficient and affordable resolution of civil disputes governed by the Act. In an instance like this where the Land Registrar has himself made a determination and indicated his intention to go to Court to effect the same, the Plaintiff cannot be blamed when he comes to Court three years after to enforce his rights upon the realization that the Land Registrar is pussy-footing and unwilling to take any action in regard to his own determination.

29. In regard to the issue of locus standi, for the Plaintiff to bring this suit I am in agreement with the Defendant that the Company Digi-tel Communications System Ltd is a separate and distinct legal personality from the Plaintiff (*see Salomon vs Salomon Company Ltd (1895-1899) All ER 33*). It is however clear to me that at paragraph 1 of the Plaintiff makes it clear that the parcel of land in dispute belongs to the said Digi-tel Communication Systems Ltd and not to himself. A perusal of the entire Plaintiff reveals to me that the Plaintiff completely misapprehended the law in filing the suit as it currently is. A perusal of the Plaintiff reveals that the rightful Plaintiff herein, as correctly stated by the Defendant, ought to have been the said Digi-tel Communications System Ltd.

30. However, where a suit has been instituted in the name of the wrong person or where the Court is doubtful that the suit has been instituted in the name of the right plaintiff, a remedy may still be found in the Rules. Order 1 Rule 10(1) of the Civil Procedure Rules provides as follows:-

***“.....the Court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order that any other person be substituted or added as a Plaintiff upon such terms as the Court may think fit.”***

31. In addition, Order 1 Rule 10(2) of the Civil Procedure Rules provides that:-

***(2)The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as a Plaintiff or a defendant, be struck out, and that the name of any person who ought to have been joined, whether as a Plaintiff or a defendant, or whose presence before the Court may be necessary in order to enable the Court effectively and completely to adjudicate upon and settle all questions involved in the suit be added.”***

32. Indeed as was stated in *Skair Associates Architects vs Evangelical Lutheran Church of Kenya & 4 Others (2015) eKLR*, Order 1 Rule 9 of the Civil Procedure Rules is clear that no suit shall be defeated by reason of misjoinder or non-joinder of parties. The Court can strike out parties who had been improperly enjoined in a suit and order that the correct parties be added to enable it to adjudicate upon the question before it.

33. Finally in regard to the Supporting Affidavit of Jonathan Savage sworn on 19<sup>th</sup> June 2017, it is indeed conceded that the annexure thereon were not sealed with the seal of a Commissioner of Oaths as required under Rule 9 of the Oaths and Statutory Declarations Rules. It was the Defendant’s submissions that the said Rule is couched in mandatory terms and that the failure to conform thereto was fatal to the application. In this regard, I was referred to the decision of Khaminwa Commissioner of Assize (as she then was) in *Solomon Software(EA) Ltd and Another –vs- Microsoft Corporation (2003)1EA 300(HCK)* where the Court stated:-

***“An affidavit that does not comply with the provisions of statute as to form cannot be admitted under the Civil Procedure Rules.***

34. Rules 9 and 10 of the Oaths and Statutory Declaration Rules provide as follows:-

***9. All exhibits to affidavits shall be securely sealed thereto under the seal of the Commissioner, and shall be marked with serial letters of identification.***

***10. The forms of jurat and of identification of exhibits shall be those set out in the Third Schedule.***

35. Considering the meaning of the word “shall” as used in the above rules in *Standard Chartered Bank Ltd –vs- Lucton(Kenya) Ltd Milimani HCCC No. 462 of 1997*(Unreported); Ringeria J( as he then was) observed that:-

***“There appears to be a common belief by many in these Courts that the use of the word “shall” in a statute makes the provision under construction a mandatory one in all circumstances. That belief is in my discernment of the law a fallacious one. As I***

*understand the canons of statutory interpretation, the use of the word “shall” in a statute only signifies that the matter is prima facie mandatory. The use of the word is not conclusive or decisive. It may be shown by a consideration of the object of the enactment and other factors that the word is used in a directory sense only.*

36. The above position was indeed followed in *Patrick Thinguri & 1006 Others –vs- Kenya Tea Development Agency Company & Another (Milimani HCCC No. 26 of 2004)* (Unreported) where the Court considering certain shortcomings of an affidavit ruled as follows:-

*“Turning to the defects concerning the Jurat it is important to consider whether the defect as described is as to form or is fundamental and likely to touch on jurisdiction. Firstly, it is not alleged that apart from appearing on a separate page there is any other defect like the name or place of swearing for example. The Court finds that this is not a fundamental defect or irregularity and is both curable under the order on affidavits namely Order 18 Rule 8 which reads:-*

*“7. The Court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the style or other irregularity in the form thereof.”*

37. In view of the foregoing, and in light of Article 159 of the Constitution as cited hereabove, I am persuaded that the word “shall” as used in Rule 9 of the Oaths and Statutory Declaration Rules should be interpreted in a directory and not in a mandatory sense. I shall therefore proceed to construe violation of Rule 9 by the annexures herein as a matter of form and not substance. Accordingly, I find the affidavit herein to be competent and shall so treat them.

38. As was stated by Gikonyo J in *Litein Tea Factory Company Ltd & Another –vs- Davis Kiplangat Mutai & 5 Others (2015)eKLR*, the remedy to a defective annexure would not be to dismiss or strike out the annexures but to have them correctly, separately and sequentially sealed and/or stamped.

39. The upshot is that I do not find merit in the Preliminary Objection dated 9<sup>th</sup> November 2017.

40. That is however not to say that the suit as filed herein is entirely without blemish. The suit as filed has numerous shortcomings. The same can however in my view be cured by amendment and not by striking out.

41. Accordingly, the Plaintiff is hereby directed to make the necessary application to enjoin all the proper and necessary parties herein within 30 days from today. In the event of failure to bring the necessary application within the said time the suit shall stand dismissed without any further reference to this Court.

42. Each party shall bear their own costs.

**Dated, signed and delivered at Malindi this 21<sup>st</sup> day of March, 2018.**

**J.O. OLOLA**

**JUDGE**