



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO 18 OF 2017

SALIM JUMA SILAHA

HAMISI ALI CHIREMA.....PLAINTIFFS

-VERSUS-

MWABAYA JUBA CHITSAMBA.....1ST DEFENDANT

AISHA ABDULKADIR.....2ND DEFENDANT

JEDDY MUENI SAMMY 3RD DEFENDANT

RULING

1. By a Plaint dated 30th January, 2017, the Plaintiffs filed this suit against the Defendants jointly and severally seeking;

- i) An order for survey and boundary remarking of the two parcels.**
- ii) An order of eviction of the Defendants from the encroached portion.**
- iii) Costs of the suit.**
- iv) Any other relief that the Honourable Court may deem just and fit to grant.**

2. Upon being served the 1st & 2nd Defendants filed a statement of defence dated 16th March 2017. They also filed a preliminary objection on the grounds;

- i) That there is no registrars report on the issue of boundaries filed in this suit and thus the court cannot entertain this suit being an issue of boundaries as envisaged under Section 18, 19 & 20 of the Land Registration Act No 3 of 2012.**
- ii) That there being no Registrars report on the issue of boundaries this Honourable Court cannot entertain the suit. They pray that the Plaintiff's suit be dismissed with costs to the Defendants.**

3. On the 15th June, 2017, it was agreed among the parties that the preliminary objection be disposed with by way of written submissions.

THE 1ST & 2ND DEFENDANTS' SUBMISSIONS

4. It is the Defendants contention that Section 18 (2) of the Land Registration No 3 of 2012 completely ousts the jurisdiction of this Honourable Court where boundaries have not been determined and a Land Registrar issued a report.

5. That the Plaintiffs have not shown that there is Land Registrars report on the issue of boundaries hence the Plaintiffs came to this court prematurely.

6. They have relied on the cases of;

1. *Willis Ocholla –versus- Mary Ndege Kisumu ELC Land case No, 137 of 2015.*
2. *Amos Mpeshe And 3 Others –versus- Salau Ole Soken Modo, Nairobi ELC No. 760 of 2014.*
3. *Maricus Otieno Okwoyo –versus- George Owenge Aluoch, Kisumu ELC Land case nO. 123 of 2014.*

7. Further that the suit herein is premature as there is no Land Registrar's report in the Plaintiff's list of documents.

PLAINTIFFS' SUBMISSIONS

8. It is the Plaintiff's contention that the suit herein is not a boundary dispute. That the encroachment occurred following the sub-division of the 1st Defendant's parent title. The Plaintiffs pray for resurvey and boundary remarking of the two parcels. That the preliminary objection herein is not confined to matters of law. The issue of whether the Land Registrars report is on record or not cannot be determined without adducing evidence. They pray that the preliminary objection be dismissed.

9. I have considered the pleadings and the written submissions of counsel. The issue for determination is whether the suit before court is premature.

10. I have looked at the Plaint dated 30th January, 2017 and filed in court on the same day. Prayer i) states;

“An order for resurvey and boundary remarking of the two parcels.”

11. Section 18(2) of the Land Registration Act, No of 2012 states;

“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.”

This means the issue is relating to dispute as to boundaries are within the Land Registrars mandate.

12. I agree with the Defendants counsel that Section 18(2) of the Land Registration Act, No. 3 of 2012 ousts the jurisdiction of the court as no report has been issued by the Land Registrar.

In the case of *Willis Ocholla –Versus- Mary Ndege Kisumu ELC Land case No, 137 of 2015;*

It was held;

“That in terms of Section 18(2) of the Land Registration Act, proprietors of registered land with a boundary dispute are obligated to first seek redress or solution form the Land Registrar before moving or escalating the dispute to this court. That where such a party fails to do so and comes to court without first seeking redress from the Land Registrar, the court being a court of law has to remind such a party that he/she has moved the court prematurely. That the provisions of Section 18(2) of the Land Registration Act shows clearly that the court is without jurisdiction on boundary disputes of registered Land after the Land Registrar's determination on the same has been rendered.”

I am guided by the above authority in coming to the conclusion that the suit herein is premature.

13. The Plaintiffs ought to have first taken to despire to the Land Registrar in accordance with Section 18 of the Land Registration Act.

14. I uphold the preliminary objection and strike out the suit, commenced by the Plaint dated 30th January, 2017 with costs to the 1st & 2nd Defendants.

It is ordered.

Dated, signed and delivered at Mombasa on the 8th day of March 2018.

L. KOMINGOI

JUDGE

8/3/2018