



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

LAND & ENVIRONMENTAL DIVISION

ELC NO. 57 OF 2016

OBONDO OWUNGO AWOKO.....PLAINTIFF

VERSUS

PATRICK BUKAKI AWOKO.....DEFENDANT

RULING

1. The Plaintiff – **OBONDO OWUNGO AWOKO** – sued the Defendant – **PATRICK BUKAKI AWOKO** – vide a suit filed on 22/6/2016. To that suit, the Defendant filed a defence on 21/7/2016 and pleaded, *inter alia*, that it is a boundary dispute which should be handled by the relevant officials of the lands office. And as the matter is allegedly a boundary dispute, this court was said to have no jurisdiction. In the defence, the Defendant expressed intention to raise a Preliminary Objection on the issue of jurisdiction.

2. The notice of the intended Preliminary Objection was filed here on 6/3/2018. Simply put, the Defendant is saying that the court has no jurisdiction to hear and determine a matter touching on a boundary dispute if the same has not been heard and determined by the office of the County Land Surveyor.

3. The objection was canvassed by way of written submissions. The Defendant's submissions were filed on 8/3/2018. The submissions are essentially a repeat or re-statement of what the notice of preliminary objection contains. It is the Defendant's position that the Plaintiff's complaint is that he uprooted the boundary of the land. This, to him, makes it a boundary dispute.

4. The Plaintiff's submissions were filed on 9/3/2018. To the Plaintiff, the suit is about trespass and the issue of the boundary just happens to be incidental to the allegation of trespass.

5. I have considered the objection raised and the rival submissions. For a just determination of the objection, a proper appreciation of the Plaintiff's suit is necessary. The Plaintiff's land is MARACHI/ELUKONGO/4337. This is the land onto which the Defendant, who owns land parcel No. MARACHI/ELUKONGO/4339, is said to have trespassed and occupied. The essence of the complaint therefore is trespass and forcible occupation, not destruction of boundary. And when one looks at the prayers sought, one notices that in addition to the prayer for re-establishment of the uprooted boundary, there is also a prayer of eviction. One therefore is bound to ask whether the lands office can also issue an order of eviction. And the answer to such question would obviously be NO.

6. Besides, it seems clear that the land officials had had occasion to visit the site in the past. It was during such visit that the original land parcel No. MARACHI/ELUKONGO/234 was subdivided to create, *inter alia*, both the Plaintiff's and Defendant's land parcels. The boundaries had therefore been put and the problem now before court came later. If one agrees with the Defendant, it is easy to foresee a situation where land officials will re-visit the site to fix the boundary. The Defendant can then decide to uproot or destroy the boundary and if brought to court, he can argue yet again that the matter is a boundary dispute. And this can be repeated many times over. That is why it is foolhardy in my view to agree with the Defendant.

7. I need to add further that the Defendant did not clearly articulate the law that supports his position. I am alive to that law but I will not state it. The Defendant had a duty to state it and articulate it well. As things stand, the Defendant approached the issue in a very general manner. This is unhelpful to his cause.

8. The upshot is that the objection raised is misplaced effort. There is a clear misapprehension on the part of the Defendant as to what the suit is all about. The suit is merely not about boundary. It has more to do with trespass and illegal occupation. I find no merits in the objection and I hereby dismiss it with costs to the Plaintiff.

Dated, signed and delivered at Busia this 9th day of May, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff:

Defendant:

Counsel of Plaintiff:

Counsel of Defendant: