



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 179 OF 2017

RATILAL GHELA SHSH

DI NUMATI RATILAL GHELA SHAH

BHIKHU RATILAL GHELA SHAH.....PLAINTIFFS/APPLICANTS

VERSUS

MENKAR LIMITED.....DEFENDANT/RESPONDENT

RULING

1. This is the Notice of Motion dated 6th July, 2017. It is brought under Order 2 Rule 15(i) (d) and Order 51 Rule 1 of the Civil Procedure Rules, Section 1A, 1b AND 3A of the Civil Procedure Act, Section 13(i) and 19(2) of the Environment and Land Court Act 2011 Section 18(2) of the Land Registration Act, 2012 and all other enabling provisions of the law.

2. It seeks orders;

1) That this Honourable Court do find it has no jurisdiction to entertain this suit by virtue of the explicit and mandatory provisions of Section 18(2) of the Land Registration Act, 2012.

2) That the plaint dated 22nd may, 2017 be and is hereby struck out and the suit herein be and is hereby dismissed.

3) That the Defendant shall have the costs of this application and this suit.

3. The grounds are on the face of the application and are;

a) That a review of the plaint and prayers sought therein will reveal that this is a boundary dispute where the Plaintiffs are claiming encroachment by the Defendant's property in to the Plaintiffs' property.

b) That the boundaries of the Plaintiffs' title No. Mombasa/Block 1/409 have not been determined in accordance with the provisions of the Land Registration Act 2012.

c) That consequently this Honourable Court is barred by statute, namely Section 18(2) of the Land Registration Act, 2012 from entertaining the present suit and this suit having been filed in contravention of clear and express mandatory statutory provisions, is an abuse of the court process and ought to be struck out and/or dismissed in limine with costs to the Defendants/Applicant.

4. The application is supported by the affidavit of Harmeet Singh, the property manager of the Defendant/Applicant sworn on the 6th July, 2017.

5. The application is opposed. There is a replying affidavit sworn by Ratilal Ghela Samat Shah, the 1st plaintiff/Applicant sworn on the 24th August, 2017.

6. On the 11th December, 2017 by consent of counsels, the court directed that the application be disposed of by way of written submissions.

7. THE DEFENDANT/APPLICANTS' SUBMISSIONS.

The jurisdiction of this Honorable Court has been restricted by statute, section 18(2) of the Land Registration Act 2012. The dispute herein relates to the boundaries of registered land.

The certified copies of the register clearly shown no entry by the Land registrar that the boundaries have been fixed. That therefore the boundaries of registered land have therefore not been fixed in accordance with the provisions of Section 19 of the Land Registration Act 2012. That this court has no jurisdiction to entertain these proceedings.

They have put forward the cases of;

1. *Amos Mpeshe And 3 Others –versus- Salau Ole Soken Modo, (2015) eKLR.*
2. *Willis Ocholla –versus- Mary Ndege (2016) eKLR.*
3. *Alex Gichira Mwatha –versus- Samuel Mwangi Shabana (2017) eKLR.*
4. *Maricus Otieno Okwayo –versus- George Owenge Aluoch, (2017) eKLR.*

That this suit has been filed prematurely and in contravention of clear legal provisions hence the same is an abuse of the court process.

8. THE PLAINTIFFS/RESPONDENTS SUBMISSIONS.

Under Section 13(1) of the Environment and Land Court Act, 2011 the court has jurisdiction to determine every kind of dispute (including a boundary dispute).

There exists a cadastral map and surveyor's report confirming the boundaries and the previous owner was convicted of encroachment.

That there are already approximate boundaries in the register of the two parcels of land necessitating a claim in trespass which only this court can determine.

They have put forward the case of *Gospel Evangelistic Church of Kenya (suing through the National overseer, General Secretary and National Treasurer) –versus- Buruburu Riverside S.H.G. Committee & 2 Others (2017) eKLR, Chemoiwa Ole Saiyalel & Another –versus- Joseph Saitian & 2 Others (2015) eKLR.*

That the court ought to be guided by Article 159(2)(b) and (d) of the Constitution which require that justice should be delivered without delay and undue regard to procedural technicalities. The court should not strike out the suit.

Pleadings should only be struck out where it is clear that it cannot be salvaged and procedural technicalities should not override the main issues in dispute.

They have relied in the case of *Nicholus Kiptoo Arap Korir Salat –versus- Independent Electoral and Boundaries Commission & 6 Others (2013) eKLR.*

The Defendant would not suffer any prejudice if the issue were determined and the suit thereafter determined on merit. That this court should apply the overriding principle and Article 159 of the Constitution.

9. I have considered the pleadings, the notice of motion and the supporting affidavit plus the annexures. I have also considered the relying affidavit and the annexures. I have considered the written submissions and the authorities cited.

The issues for determination are;

- i) **Whether or not this court has jurisdiction to entertain this suit.**
- ii) **What orders should the court make?**
- iii) **Who should bear costs?**

10. Section 18 of the Land registration Act 2012 states;

i) **“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 approximate boundaries and the approximate situation only of the parcel.**

ii) **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.**

11. Section 18(2) of Land Registration Act is set in mandatory terms. It means any issue relating to a dispute as to boundaries are within the Land Registrars mandate. I agree that the Plaintiffs ought to have taken the dispute to the Land Registrar in accordance with Section 18 of the Land Registration Act, 2012.

I agree totally with the holding of S. Kibunja J *Willis Ocholla –versus- Mary Ndege Kisumu ELC Land Case No. 137 of 2015 (2016) eKLR.*

12. However I have considered the circumstances in this case. In the case of *D.T. Dobie Company (k) Limited –versus- Muchina (1982) KLR* where the then Madan J.A enunciated the principles applicable in considering whether or not the strike out pleadings. The judge cited the case of *Wenlock –versus- Moloney (1965) IWL R 1238* and stated as follows;

“This summary jurisdiction of the court was never intended to be exercised by a minute and a protracted examination of documents and the facts for the case in order to see whether the Plaintiff really has a cause of action. To do this is to usurp the position of the trial Judge and to produce a trial of the case in chambers on affidavits only without discovery and without oral evidence tested by cross examination in the ordinary way. This seems to be an abuse of the court and not a proper exercise of that power.”

Madan J. A. added,

“No suit ought to be summarily dismissed unless it appears so hopeless that it is plainly and obviously so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action provided it can be injected with real life by amendment it ought to be allowed to go forward for a court of justice ought not to act in darkness without full facts of the case before it.”

I am guided by the above authority.

13. It is on record that the previous owner of Title No. Mombasa Block 1/409 was charged and convicted of encroachment. The Plaintiffs/Respondents have also stated there is currently a case against the Defendant. The same is pending. These facts have not been challenged.

14. I am guided by Article 50 and 159 of the Constitution in directing that the Land Registrar Mombasa do conduct the required process of determining the boundaries of the two parcels of land as envisaged under Section 18, 19 and 20 of the Land Registration Act, 2012 and thereafter a report be filed in court within sixty (60) days from the date of this ruling.

In essence, I find this application to have no merit. I decline to grant the orders sought.

The application is dismissed with no orders as to costs.

It is so ordered.

DATED and SIGNED at MOMBASA on the 28th day of June 2018.

L. KOMINGOI

JUDGE

DATED, SIGNED and DELIVERED at MOMBASA on the 28th day of June 2018.

A. OMOLLO

JUDGE