



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC CASE NO. 151 OF 2016**

**DR. WILLIAM GACANI MBARIA..... PLAINTIFF**

**VERSUS**

**CHARLES KIRIMI MBUI .....DEFENDANT**

**RULING**

1. The ruling is in respect of the preliminary objection dated 19.4.2017, where the defendant avers that this court has no jurisdiction to determine the dispute since jurisdiction lies with the land registrar pursuant to provisions of the land registration Act.
2. Plaintiff has opposed the preliminary objection through the grounds of opposition filed on 27.4.2017. Plaintiff has averred that the dispute is not a boundary one but a case of theft of plaintiff's land which was annexed off by the defendant.
3. On 20.2.2018, the court gave directions for the preliminary objection to be canvassed by way of written submissions.

**Defendant's submissions**

4. Defendant has submitted that there is no dispute regarding ownership, possession and occupation of plaintiff's land parcel no. Ntirimiti/Settlement scheme/417. The dispute concerned the issue of plaintiff's unlawfully and stealthily moving his boundary into the access road that separates the plaintiff's parcel land Ntirimiti Settlement scheme/417 and defendants parcel NO. Ntirimiti Settlement scheme/484.
5. When this happened defendant lodged a boundary dispute case with the district land registrar Meru central and a hearing of the dispute was convened. Both parties were heard and the correct boundary was marked on the ground by the land registrar in the company of the county surveyor. It is thereafter that plaintiff opted to file this suit.
6. Citing the provisions of section **18 (2) of Land Registration Act**, defendant avers that this court has no jurisdiction to determine the dispute. In support of his argument, defendant has cited the case of **Seven seas Technologies Limited vs. Eric Chege (2014) eKLR**, where the court had cited the Court of Appeal case in **Owners of Motor Vessel Lillian S' vs. Caltex Oil (Kenya) Limited (1989) KLR 1** where it was stated that; "*a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction*".
7. In **Wills Ocholla vs. Mary Ndege (2016)eKLR**, a case also cited by the defendant, it was held that "*in terms of section 18 (2) of the Land Registration Act, proprietors of registered land with a boundary dispute are obliged to first seek redress or resolution from the land registrar before moving or escalating the dispute to this court.....*".
8. Other cases cited by defendant include **Alice Mweru Ngai vs. Kenya Power and Lighting Co. (2015) eKLR**, **Joseph Njuguna Mwaura & 2 others vs. Republic (2013) Eklr**, **Mukisa Biscuit Manufacturing Co. ltd vs. West End Distributors (1968)EA698** and the case of **Independent Electoral & boundaries Commission vs. Jane Cheperenger %2 others (2015)eKLR**.
9. Defendant avers that plaintiff has chosen the wrong forum to agitate his claims since his only point to the doors of justice lacks foundation and should not be sustained.

**Plaintiff's submissions**

10. Plaintiff has submitted that the issues raised in this suit are not pure points of law, and they cannot be determined without evidence being adduced on whether or not the boundary dispute alleged has been determined by the land registrar.

11. He also avers that in the boundary dispute resolution mechanism conducted by the land registrar, he was not involved or notified of the process and that the surveyors report was done quickly and without following the required methodology.

12. Plaintiff further avers that the question for determination is that of trespass and damages noting that defendant is claiming for damages in the counter claim.

### **Determination**

13. I have considered all the issues raised herein including the submissions of the parties. Both parties are in agreement that a preliminary objection is supposed to be based on a pure point of law and does not arise where any facts are to be ascertained. In **Mukhisa Biscuits vs. Western Distributors**, it was held that *“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose off the suit”*.

14. The issue for determination is whether this court has jurisdiction to hear the dispute at hand or not. In paragraph 4 of the plaint, it is pleaded that defendant when purchasing his land parcel no. Ntirimiti/Settlement scheme/484 went ahead and fraudulently annexed plaintiff's land no. Ntirimiti/Settlement scheme/417. This is a clear indication that plaintiff's complaint was anchored on interference of the boundary between the two parcels. This has come out more clearly in defence pleadings whereby defendant is making counter accusations against the plaintiff. In particular, defendant is accusing plaintiff of illegally destroying defendant's fence by cutting off the barbed wire and removing the poles.

15. From the foregoing, I have no doubts that the dispute at hand is a boundary one.

16. The next issue to determine is whether this court can now resolve the aforementioned dispute.

17. Section 18 (2) of the land registration Act provides that; “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”.

18. It has emerged that defendant did lodge a complaint with the land registrar. A hearing thereof was conducted and a decision was made. A report to that effect has been availed as item 2 in the list of documents of defendant dated 20.9.2016. The land registrar's report is dated 26.7.2016. If the plaintiff was dissatisfied with the decision of the registrar, then he ought to have challenged the same through the available legal mechanisms. Nowhere in the plaint, has the plaintiff alluded to his dissatisfaction with this report. If anything, plaintiff has given the report a black out. Going by the provisions of the applicable law, the land registrar is the first point of call in a boundary disputes, see **Willis Ocholla versus Mary Ndege ELC 137 of 2015 Kisumu**, (supra).

19. In the present suit, the land registrar has even resolved the dispute. The problem is that plaintiff does not recognize the decision of the Land Registrar as binding. I therefore have to remind the plaintiff that the powers bestowed upon the land registrar to resolve boundary disputes are anchored on a statute and can't be wished away.

20. I am in agreement with defendant's submissions that this court has no jurisdiction to resolve the dispute as the same has already been resolved. Parties should abide by the decision of the Land Registrar.

21. This suit is incompetent and is dismissed with costs to the defendant.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 11<sup>TH</sup> DAY OF JULY, 2018 IN THE PRESENCE OF:-**

**Court Assistant:** Janet/Galgalo

Munga for plaintiff present

Wambugu & Muriuki for defendant absent

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**