



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC CASE NO.832 OF 2017**

**GEORGE MBUGUA KIRORI.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**PETER NYAGA KAIRU.....DEFENDANT/RESPONDENT**

**RULING**

The Plaintiff herein **George Mbugua Kirori**, filed this suit on **15<sup>th</sup> November 2017**, and sought for an order of permanent injunction restraining the Defendant, his agents, servants and/or employees from taking possession, closing, acquiring or in any other way interfering with the access road/easement existing at the Northern end of plot **LR.No.13537/104** towards the **Nairobi-Thika Super Highway** and further that **Juja Sub-County Physical Planner** do insert the said access road/easement in the **Survey Plan Map Sheet** of the area as to formally/officially reflect the said access road.

In her **Plaint**, the Plaintiff had alleged that he is the registered owner of **LR.No.13537/141**, whereas the Defendant is the registered owner of parcel **LR.No.13537/104**, near **Juja Township**. He further alleged that after the subdivision of the large **Juja Ithuri Farm**, where the Plaintiff and Defendant's titles originated from, an access road was made adjacent to plot **LR.No.13537/104**, which belongs to the Defendant. However, when the **Survey Plan Map** was made, the said access road was not shown that the access road was included inside the Defendant's plot. Further that by a letter dated **17<sup>th</sup> October 2005**, the **District Physical Planner** allowed for the provision of the said access road but through a subsequent letter made by the new **District Physical Planner** on **30<sup>th</sup> April 2008**, it ousted the contents of the earlier letter. Subsequently, the Plaintiff and others challenged the said letter vide **Judicial Review application No.51 of 2008** and an order of stay of the said letter was issued on **14<sup>th</sup> October 2009**. Since then, the Plaintiff has been pursuing the inclusion of the said **access road** in the survey plan but has not yet been successful.

The Plaintiff further alleged that recently the Defendant has without lawful authority or consultation with the Plaintiff and other residents closed off the **access road** and has dug trenches intending to construct a high rise permanent structure across the said easement. Due to the alleged act of the Defendant, the Plaintiff filed a **Notice of Motion** together with the **Plaint** and sought for these orders:-

- a) That a temporary injunction be issued by this Honourable Court restraining the Defendant, his agents, servants and/or people working under him from closing, acquiring, taking possession or in any other way interfering with the access road already existing at the Northern end of LR.13537/104 towards the Nairobi-Thika Superhighway, pending the hearing and determination of this suit.**
- b) That the costs of this application be borne by the Defendant/Respondent.**

The above application was allegedly prompted by the action of the

Defendant of interfering with the access road by closing it off and he has now dug trenches intending to construct a permanent structure. The Plaintiff had alleged that together with other neighbours, they have used the said access road since **1987**.

In response to the said Notice of Motion application, the Respondent filed a **Notice of Preliminary Objection** on **8<sup>th</sup> December 2017**, and urged the Court to dismiss the whole suit on the following grounds:

- a) That the Plaintiff's suit is hopelessly misconceived as this court lacks jurisdiction over the subject matter herein as per Section**

**18 & 19 of the Land Registration Act 2012, and therefore the cause of action does not lie and this Honourable Court is incapable of being seized of this matter.**

**b) That the matter is Res Judicata, the Plaintiff having unsuccessfully pursued this dispute through the High Court in *Nairobi Judicial Review application No.51 of 2008, George Mbugua Kirori & 7 Others ...Vs...District Physical Planning Officer, Thika.***

The Court directed the parties to canvass the **Preliminary Objection** first by way of written submissions. In compliance thereof, the **Law Firm of Muraguri, Mungai, Waweru & Co. Advocates** filed their written submissions on **4<sup>th</sup> January 2018** and urged the Court to dismiss the entire suit with costs to the Defendant.

The Defendant submitted that the issue herein involves boundary disputes and **Section 18(2)** of the **Land Registration Act** bars the court from entertaining such matters. **Section 18(2)** of the **Land Registration Act** was referred to which 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”.**

It was further submitted that boundary disputes falls squarely within the provision of the Land Registrar as stated in **Section 18(3)** of the **Land Registration Act**. This Section states:-

**“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:**

**Provided that where all the boundaries are defined under section 19(3), the determination of the position of any uncertain boundary shall be done as stipulated in the Survey Act, (Cap. 299).”**

Further the Defendant relied on various decided cases among them the case of **Samuel Njoroge Gituku & 6 Others...Vs...Kenya Rural Road Authority & 5 Others (2017) eKLR**, where the Court held among other findings that:-

**“.....Section 18(2) of the Land Registration Act 2012 bars this court from entertaining any proceedings relating to a dispute over a boundary which has not been fixed..... I must say that this court has jurisdiction to determine the dispute brought before it by the Plaintiff (See the case of *Wamutu...Vs...Kiarie 1982 KLR 480*). I am of the view that the dispute should have been taken before the Land Registrar in the first instance under Section 19 of the Land Registration Act 2012”.**

On the issue of *Resjudicata*, the Defendant submitted that the Plaintiff has conveniently failed to disclose that the **Judicial Review** filed by himself was **dismissed for Want of Prosecution** on **23<sup>rd</sup> March 2012** and therefore the Plaintiff is seeking to introduce the same cause of action through a back door.

On this issue the Defendant relied on various decided cases among them the case of **William Koros (Legal Representative of Elijah C.A Koross...Vs...Hezekiah Kiptoo Komen & 4 Others (2015) eKLR**, where the Court held that:-

**“As res judicata constitutes a mandatory bar that injuncts and precludes any fresh trial or reconsideration of a concluded issue.....”**

On his part, the Plaintiff filed his written submissions on **1<sup>st</sup> February 2018** and disputed the Defendant’s allegations. It was submitted that the parties parcels of land are known with known boundaries and therefore the issue herein is not a boundary dispute as the boundaries of the parcels of land are known and have been determined and therefore **Sections 18 & 19** of the **Land Registration Act 2012** are not applicable.

However, the dispute herein is whether there is an access road easement that exists within land parcel **No.LR.13537/104** and that can only be determined by tendering of the evidence. It was further submitted that the suit herein is part of the process of having the access road excised from the Defendant’s parcel of land and the same be included in the **Survey Plan Map** of the area. The Plaintiff relied on **Section 100** of the **Land Registration Act** which provides:-

**(1)The benefit of an easement, or an analogous right granted under this Part shall be enjoyed, during the term of its existence, by the owner of the dominant land, any successors in title and by—**

**(a) any lessee of the dominant land, or so far as the nature of the easement, or analogous right or part of it permits; and**

**(b) any lender on the security of a charge for the time being in possession of the dominant land, or so far as the nature of the easement or analogous right any part of it permit.**

**(2) Any person referred to in subsection (1)(a) or (b) who is by this section entitled to the benefit of an easement**

**or analogous right may take out, in their own name, any proceedings necessary for the enforcement of the easement or the analogous rights.**

It was therefore submitted that the Plaintiff is within his right in law to pursue the recognition and non-interference of the access road by the Defendant and hence this suit.

On whether the suit is *Res judicata*, the Plaintiff alleged that the **Judicial Review No.51 of 2008**, was filed to challenge a letter that had been issued by the then **District Physical Planner**, which purported to claim that there was no access road on **LR.No.13537/104**. Further **Stay Orders** were issued and although the said suit was later dismissed on **23<sup>rd</sup> March 2012**, it was later re-instated on **24<sup>th</sup> January 2018** and transferred to **Thika Environment and Land Court** as **Judicial Review No.2 of 2018**. Therefore the suit is not *Res judicata* as the current suit is for ensuring that the **access road** is not interfered with or closed off whereas the **Judicial Review** was to challenge a certain letter and it has not been heard fully and determined on merit.

The above being the background of this case, the Court will now interrogate the available evidence and available evidence and submissions in determination of the instant **Preliminary Objection**.

The ingredients of **Preliminary Objection** were well set out in the case of **Mukisa Biscuits & Co. Ltd....Vs...West End Distributors Ltd (1969) EA 696** to mean:-

**“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 of the suit”.**

A **Preliminary Objection** has the capability of bringing a matter to finality at a **Preliminary stage**. See the case of **Quick Enterprises Ltd..Vs.. Kenya Railways Corporation, Kisumu HCCC No.22 of 1999**, where the Court held that:-

**“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”**

The Defendant has alleged that the Plaintiff’s suit herein is brought without jurisdiction and it is *Resjudicata*. Jurisdiction is everything and without jurisdiction, the court has no option but to down its tool. See the case of **The Owners of the Motor Vessel ‘Lillian S’...Vs...Caltex Oil (Kenya) Ltd 1989 KLR 1**, where the Court held that:-

**“...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”.**

Therefore, a **Preliminary Objection** brought about challenging jurisdiction and *Resjudicata* is a point of law and for that reason, the Defendant’s **Notice of Preliminary Objection** suits the criteria of what amounts to a **Preliminary Objection** as stated in the **Mukisa Biscuits Case**.

The Defendant has alleged that as provided by **Sections 18 & 19** of the **Land Registration Act**, this Court has no jurisdiction to determine the issues raised herein as they deal with boundary disputes.

However, the Court has considered the Plaintiff’s claim as stated in the **Plaint**, and has noted that the Plaintiff is alleging existence of an access road which has now been interfered by the Defendant herein. It is also evident that the Plaintiff and the Defendant have their defined land parcels with known boundaries. The only contention is whether an access road exists on the Defendant’s parcel of land and that may be a matter of evidence to be brought out by he who has alleged. Therefore the Court finds that the existing dispute herein is not a boundary dispute which falls under the purview of **Sections 18 & 19** of the **Land Registration Act** and this Court is not barred at all from dealing with the dispute herein.

Further, on whether the suit herein is *Resjudicata*, the Court finds that indeed **Judicial Review No.51 of 2008** had been **dismissed** by the court on **23<sup>rd</sup> March 2012** for **Want of Prosecution**. However the same **Judicial Review** was **re-instated** by the court on **24<sup>th</sup> January 2018** and therefore the **Judicial Review** is not a determined matter. Further the said **Judicial Review** was filed to challenge the existence of the letter issued on **30<sup>th</sup> April 2008**, but not interference of the access road as pleaded by the Plaintiff herein.

Therefore even if the **Judicial Review** has not been determined, the issues raised in the two suits are not similar and **Section 7** of the **Civil Procedure Act** is not applicable. The said Section provides:-

**“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”.**

Therefore the Court finds that this suit is not *Res judicata*.

Having now carefully considered the available evidence and the rival written submissions, the Court finds the **Preliminary Objection** as raised by the Defendant not merited and the same is dismissed entirely with costs

to the Plaintiff herein. Let the matter herein be heard and be determined on merit.

It is so ordered.

**Dated, Signed and Delivered at Thika this 19<sup>th</sup> day of October 2018.**

**L. GACHERU**

**JUDGE**

**19/10/2018**

In the presence of

Mr. Maina holding brief for Jesse Kariuki for Plaintiff/Applicant

Mr. Waweru for Defendant/Respondent

Lucy - Court clerk

**L. GACHERU**

**JUDGE**

**Court:** Ruling read in open court.

**L. GACHERU**

**JUDGE**

**19/10/2018**