



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 175 OF 2017

HEZEKIAH NJUGUNA MWANGI.....PLAINTIFF

VS

JAMLECK CHEGE KANYI.....DEFENDANT

RULING

1. The case for the Plaintiff is that he is the owner of MAKUYU/KIMORORI BLOCK 1/1545 measuring 0.35 Ha. That in 2007 he subdivided the land into 16 plots MAKUYU/KIMORORI BLOCK 1/2157-2172. He was issued title deeds for the said subdivisions including MAKUYU/KIMORORI BLOCK 1/2162,2163,2164,2171 and 2172(5 plots). That in 2009 the Defendant encroached onto the 5 plots and carried out activities inconsistent with his right of ownership of the plot & claiming that the 5 plots were a portion of his own land MAKUYU/KIMORORI BLOCK 1/1677. That MAKUYU/KIMORORI BLOCK 1/1677 does not exist on the RIM. The Defendant on the other hand insists that the Plaintiff has encroached on his land MAKUYU/KIMORORI BLOCK 1/1677 which was a subdivision of MAKUYU/KIMORORI BLOCK 1/1630. He has a survey report to back up his entitlement. The Plaintiff avers that MAKUYU/KIMORORI BLOCK 1/1630 does not exist on the Rim and that the mutation which produced MAKUYU/KIMORORI BLOCK 1/1677 cannot be traced in the surveyor's office. He states that the Land Registrar Murang'a ruled in a boundary dispute involving MAKUYU/KIMORORI BLOCK 1/1545, 1546 and 1630 that MAKUYU/KIMORORI BLOCK 1/1677 overlapped with LR Nos MAKUYU/KIMORORI BLOCK 1/1545 and 1546.

2. The Defendant has informed the Court that he is a purchaser of MAKUYU/KIMORORI BLOCK 1/1677 from John Njuguna Gachau who was one of the Defendants in LDT 45 of 2009. He stated that parcel MAKUYU/KIMORORI BLOCK 1/1677 borders MAKUYU/KIMORORI BLOCK 1/1545 and 1546. That MAKUYU/KIMORORI BLOCK 1/1677 was a subdivision of MAKUYU/KIMORORI BLOCK 1/1630. That the Plaintiffs purported 5 plots do not exist on the ground. That they are not part of MAKUYU/KIMORORI BLOCK 1/1677.

3. Both parties have supported their positions with summary reports which seem to be contradicting. It is for the trial Court to determine the dispute/boundary dispute on the availability of evidence to be adduced on trial. I need not go into the merits of the same.

4. That being the case the definition of a Preliminary Objection is acknowledged in the **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**.

a. "..... 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".

b. In **Oraro vs. Mbaja [2005] 1 KLR 141 Ojwang, J** (as he then was) expressed himself as follows; -

i. ".....a "Preliminary Objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence..."

5. Going by the above definition the Court would have to call for evidence of fact to determine which of the plots have overlapped or encroached on the other. This would oust the principle of Preliminary Objection which states that a Preliminary Objection must be a pure point of law and should on facts to prove the point. Further the Court would also require to call for facts on the exact position of the plots on the ground *vis a vis* the survey maps and the titles issued to the parties.

6. Resjudicata relates to a matter in which the issue raised had previously been raised and has been heard and finally decided by Court. The rationale of the doctrine of Resjudicata is twofold; Firstly that no hardship to the individual that he should litigate twice for the same cause. Secondly that it is public policy that litigation must come to an end.

7. In my considered view the Land Dispute Tribunal 45 of 2009 dealt with MAKUYU/KIMORORI BLOCK 1/1545, 1456 and 1677. The current controversy is on 5 subplots arising from MAKUYU/KIMORORI BLOCK 1/1545 which are said to be sitting on MAKUYU/KIMORORI BLOCK 1/1677. The subject matter is therefore different. The Land Dispute Tribunal dealt with boundary dispute however the cause of action of the Plaintiff in the Plaintiff is based on fraud. The case is therefore not Resjudicata.

8. In the end the Principles of Preliminary Objection have been ousted and the application is devoid of merit. It is dismissed with costs.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 1st DAY OF NOVEMBER, 2018

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Juma for the Plaintiff

Mwangi Muthoni for the Defendant

Irene and Njeri, Court Assistants