



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CASE NO 307 OF 2015

**HENRY ONYANGO OKETCH.....PLAINTIFF**

**VERSUS**

**JENIFER OWUOR.....DEFENDANT**

**RULING**

1. Coming up before me for determination is the Preliminary Objection dated the 24<sup>th</sup> May 2017, raised by the firm of Behan and Okero Advocates and argued by M/s Akinyi Odhiambo, Advocate on behalf of the defendant. In the said application counsel for the Defendant has raised the following grounds of objection.

i. That the honourable court has no Jurisdiction in this matter in view of Section 18(2) of the Land Registration Act No. 3 of 2012 that require boundary disputes to be first settled by the Land Registrar.

ii. That the suit is misconceived, scandalous, frivolous, and vexatious and a blatant abuse of the due process of the court and ought to be dismissed with costs to the Defendant.

2. **The defendant while relying on the grounds raised in her Preliminary Objection reiterated that by virtue of the provision of Section 18 (2) of the Land Registration Act 2012, the same precludes this court from entertaining any proceeding relating to a dispute on a boundary of registered land before such a dispute has been determined by the land Registrar.**

3. That the suit was misconceived, scandalous, frivolous, and vexatious and a blatant abuse of the due process of the court and should be dismissed. Counsel drew the courts attention to paragraph 4 of the Plaintiff's plaint where the plaintiff had averred that the defendant had encroached and interfered with the boundary lines of the suit property No. North Gem/Marenyo/1544 to the detriment of the plaintiff.

4. Further attention was also drawn to Paragraph 'd' of the particulars of loss and damage wherein the plaintiff yet again referred to the alteration of a substantial part of the plaintiff's land parcel as a result of moving the boundary.

5. Paragraph 'b' of the plaintiff's plaint were prayers to the effect that the court issues an order for the determination of the boundary lines for land parcel No. North Gem/Marenyo/1544.

6. Counsel, while submitting that the present suit was premature before court, relied on the following authorities.

**Wills Ocholla v Mary Ndege [2016] eKLR where the Land and Environment Judge held that:**

*That in terms of Section 18 (2) of the Land Registration Act, proprietors of registered land with a boundary dispute are obligated to first seek redress or solution from the Land Registrar before moving or escalating the dispute to this court. That where such a party fails to do so, and comes to court without first seeking redress from the Land Registrar, the court being a court of law, has to remind such a party that he/she has moved the court prematurely. That the provisions of Section 18 (2) of the Land Registration Act shows clearly that the court is without jurisdiction on boundary disputes of registered land until after the land Registrar's determination on the same has been rendered.*

7. **In the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696. Sir Charles Newbold, P. stated:-**

*“...a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be*

*ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.*

**8. In Amos Mpeshe & 3 others v Salau Ole Sokon Modo [2015] eKLR the Land and Environment Judge held that:**

*Under section 18 of the Land Registration Act, 2012 the court is precluded from entertaining any action or any proceedings any action relating to a boundary dispute unless the boundaries have been ascertained/determined in accordance with the Act.*

9. Mr. Odhiambo, learned counsel for the Plaintiff was of the view that the Preliminary Objection lacked merit because the Defendant had actually moved into the suit land and that there was no boundary dispute between the parties.

10. Counsel also submitted that there were no two parcels of land refers to in their plaint but just one in which the Defendant had moved in and which actually belonged to the Plaintiff.

11. That the authorities herein relied upon by the defendant were distinguishable as they referred to situations where there were two pieces of land bordering each other.

12. That the Preliminary Objection was misconceived and looked to waste the court’s time. Counsel then sought for it to be dismissed with costs.

13. I have considered the rival arguments presented by learned advocates from both sides. In order for me to determine whether or not the dispute is a boundary dispute, I must peruse the pleadings which I have carefully done.

14. That the suit herein was fled on the 5<sup>th</sup> November 2015 wherein the plaintiff not only averred that the defendant had encroached and trespassed on his land but had also interfered with the boundary lines of the said parcel of land wherein she had erected buildings upon the said land to the detriment of the plaintiff.

15. In her defence filed on the 23<sup>rd</sup> March 2017, the defendant is categorical that the piece of land she is alleged to have trespassed upon actually is a road reserve, the property of Kenya Highways Authority, and of which she has been making temporal use of.

16. Section 18 (2) of the *Land Registration Act, 2012* Act provides:-

***The court shall not entertain any action or proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been fixed in accordance with this section.***

17. Being alive to the above provision of the law, I find that in the present case, a mere glance at the pleadings is not satisfactory enough to say with certainty that the present suit is either a suit for trespass or one **relating to a boundary dispute**. Boundary /fence line trespass disputes can be highly technical and frequently turn on historical treatment of the involved properties. **This ambiguity can only** be resolved upon the receipt of viva voce **evidence through a full trial and not** on a Preliminary Objection.

18. The present Preliminary Objection **in my view has failed to satisfy the principles laid down in the Mukisa Biscuit Manufacturing case. In the premises thereof I find that the said Preliminary** Objection has no merit and proceed to dismiss it with costs to the Plaintiff.

**Dated and delivered at Kisumu this 1<sup>st</sup> day of August 2017.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**