



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC.602 OF 2017

FREDRICK NGANGA THUO.....PLAINTIFF/RESPONDENT

-VERSUS-

PROF. PETER MUNGAI NJUHO.....DEFENDANT/APPLICANT

RULING

The Plaintiff herein filed this suit on **15th June 2017**, and sought for various reliefs. Among the orders sought was an order of permanent injunction to restrain the Defendant by himself, his servants, agents and/or watchmen from doing various activities on the suit property, **Kikuyu/Kikuyu/Block 1/820**, which could curtail the Plaintiff's peaceful occupation and ownership of the above stated parcel of land. Contemporaneously, the Plaintiff filed a **Notice of Motion** even dated and sought for temporary injunctive order against the Defendant and based his application on various grounds.

The Defendant herein **Prof. Peter Mungai Njuho**, opposed the said **Notice of Motion** dated **15th June 2017**, and filed his **Replying Affidavit** dated **23rd June 2017**. He averred that he is the registered owner of land parcel **No.Kikuyu/Kikuyu/Block 1/819**, and that the Plaintiff's parcel of land is **Kikuyu/Kikuyu/Block 1/820**. He also averred that the issues raised by the Plaintiff are boundary issues which should be determined by the County Surveyor and Land Registrar, Kiambu whose jurisdiction the matter squarely lies.

Further, the Defendant filed a **Notice of Preliminary Objection** on the following grounds:-

- 1) That this Honourable Court has no jurisdiction to hear and determine this matter.**
- 2) That the matter in question has already been determined in accordance with the applicable law.**
- 3) That this suit is an abuse of the court process.**

He urged the Court to dismiss the Plaintiff's suit with costs.

On **29th June 2017**, the Court directed that the **Preliminary Objection** be determined first by way of written submissions as it dealt with the issue of jurisdiction.

In compliance, the **Law Firm of Tripple A Law LLP** for the Defendant filed their two sets of written submissions and urged the Court to allow the Preliminary Objection. It was submitted that the Court did

not have jurisdiction to deal with this matter of boundaries as provided by Section 18(2) & 3 of the Land Registration Act, 2012 which 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.”

Further Section 18(3) provides that:-

“Except where it is noted in the Register that the boundaries of a parcel of land have been fixed, the Register may in any proceedings concerning the parcel receive such evidence as to its boundaries and situation as may be necessary.”

The Defendant relied on various decided cases among them the case of Samuel Njoroge Gitukui & 6 Others...Vs...Kenya Rural Roads Authority & 5 Others (2017) eKLR, where the Court held that:-

“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.”

He also relied on the case of Benard Otieno Alosi & Another..Vs...Kepha Omulo Opap & 3 Others (2017) eKLR, where the Court held that:-

“It is evident that the law recognizes that the Court lacks the technical ability to determine disputes relating to boundaries and that explains why the land registrar and the surveyor are given that mandate expressly under the law since they are the ones who possess the technical ability to do so.”

The Defendant urged the Court to allow the *Notice of Preliminary Objection* and dismiss the Plaintiff's suit entirely with costs.

The Plaintiff strongly opposed the *Preliminary Objection* on the grounds that what has been raised by the Defendant is not a pure point of law as envisaged by Mukisa Biscuits Manufacturing Co.Ltd...Vs...West End Distributors Ltd (1969)EA 696, where the Court defined a Preliminary Objection in the following manner:-

“So far as I am aware, a Preliminary Objection consists of a point of law which have been pleaded or which arises by clear

implication out of pleadings and which if argued as a preliminary point may dispose of the suit; examples are an objection to the jurisdiction of the court.....”

The Plaintiff argued that in this matter, the court will need to investigate facts and therefore that is not a Preliminary Objection

It was the Plaintiff's submissions that in the instant case, the respective parcels of land have been clearly demarcated and boundaries fixed and the Plaintiff has annexed a map which shows the boundaries and the acreages. Therefore the Registrar does not have jurisdiction over disputes where the boundaries have been fixed like in the instant case, where the parcels of land have been surveyed, demarcated and title documents issued. Further that the Registrar under Section 18 could only be seized of the dispute if the boundary were uncertain. It was submitted that the map was very clear as to where the boundary between *Kikuyu/Kikuyu Block 1/820* and *819* lies.

The Plaintiff urged the Court to dismiss the Defendant's Notice of Preliminary Objection and then *set* the *Notice of Motion* dated *15th June 2017* for *hearing*.

This Court has carefully considered the Notice of Preliminary Objection herein. The first issue for determination is whether what has been filed herein is a Preliminary Objection as described in the **Mukisa Biscuits Case (Supra)**. In the above stated case, **Sir Charles Newbold, President** stated

that:-

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises 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”.

Further in the case of **Samuel Waweru...Vs...Geoffrey Muhoho Mwangi (2014) eKLR**, the Court held that:-

“The definition of preliminary objection was well set out in the case of Mukisa Biscuit Case 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”.

So does the objection raised herein by the Defendant, fit the above description? The Defendant has alleged that the Court has no jurisdiction to hear and determine this matter. The issue of jurisdiction is key in every matter. Jurisdiction is everything and where a Court has no jurisdiction, it must down its tools. See the case of **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”.

The Court finds that the Defendant has raised the issue of jurisdiction. If

this Court is to arrive at a finding that it has no jurisdiction, then it will have to down its tools. Jurisdiction is an issue of law and it can dispose of the suit. The objection as raised by the Defendant meets the criteria of what constitutes a Preliminary Objection as described in the **Mukisa Biscuits case (supra)**.

Is the Preliminary Objection raised herein merited?

The Defendant has alleged and submitted that this Court has no jurisdiction to determine this matter as it involves boundaries dispute. That the proper forum is before the Land Registrar as provided by Section 18(2) of the Land Registration Act, which 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”.

It is not in doubt that the two parcels of land are registered and each piece has its own distinct title deed with measurements.

There is also a surveyor’s report dated ***12th April 2017***, which shows that ***L. K. Ngetich, the County Surveyor, Kiambu*** went to the ground to re-state the boundary between ***Kikuyu/Kikuyu Block 1/819 and 820***. From the above letter, it shows that the boundary for the two parcels of land had been fixed.

Section 18(2) of the Land Registration Act applies where the boundaries have not been fixed. However, in this instant case, the respective parcels of land have their boundaries clearly demarcated and fixed as per the letter of ***L. K. Ngetich, the County Surveyor***. The Registrar would have jurisdiction where the

boundaries have not been fixed. In the instant case, the boundaries have been fixed and therefore the Court has jurisdiction.

The Plaintiff has also sought for an order of permanent injunction and damages for trespass. The above prayer falls under the jurisdiction of Environment and Land Court as provided by Section 13(2) of the Environment and Land Court Act 2011 which provides that:-

“In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes:-

a) Relating to environmental Planning and Protection, climate issues, land use planning, title, tenure boundaries, rates, rent, valuations, mining minerals and other natural resources.....;

any other dispute relating to environment and land.

The Plaintiff has brought a case of trespass, which relates to land use and boundaries. These are disputes mentioned in Section 13(2) of the Environment and Land Court Act 2011, and the Court has power to hear and determine them. Therefore this Court finds and holds that it has jurisdiction to hear and determine the issues raised by the Plaintiff and not the Land Registrar. Further the Plaintiff's suit raises triable issues and it is not an abuse of the court process.

For the above reasons, the ***Court finds and holds that the Defendants Notice of Preliminary Objection dated 28th June 2017 is not merited.*** The said Notice of Preliminary Objection of ***dismissed entirely with costs being in the cause.***

The ***Notice of Motion*** dated 15th June 2017, will accordingly ***be set down for hearing and be decided on merit.***

It is so ordered.

Dated, Signed and Delivered at Thika this 19th day of ***October 2017.***

L. GACHERU

JUDGE

In the presence of

M/S Kinuthia holding brief for Mr. Wachira for Plaintiff/Respondent

No appearance for Defendant/Applicant

Lucy - Court clerk.

L. GACHERU

JUDGE

Court – Ruling read in open court in the presence of the above stated advocate and absence of the Defendant.

L. GACHERU

JUDGE

19/10/2017