



**REPUBLIC OF KENYA**

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

**ELC CAUSE NO. 375 OF 2017**

**NEPATAO OLE NJOE.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**RURETO OLE SAAYA .....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**MUNTERERU OLE SAAYA.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**TOBIKO KOISIKIRR.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**SARUNI KOISIKIRR.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

The Plaintiff has by a Notice of Motion dated 13<sup>th</sup> April, 2017 brought under order 40 Rule 1, 2 and 4 of the Civil Procedure Rules sought for an order of injunction restraining the Respondent by themselves, or agents from encroaching, entering upon, ploughing or dealing with parcel of land registered as **NRK/CIS-MARA/EWUASO NYIRO/270** and a further order that the District Surveyor Narok North/South be allowed to visit the suit land to establish the correct position of the suit land.

The Application is further based on the grounds that the Applicant is the registered owner of the parcel of land known as **NRK/CIS-MARA/EWUASO-NYIRO/270** and that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are the sons of the proprietor of the parcel of land **NRK/CIS MARA/EWUASO NYIRO/566** and that since the two parcels share a common boundary the Respondents encroached on the Applicant's parcel.

The Application was further supported by the Affidavit of the Applicant who expounded on the grounds aforesaid and stating that efforts by the District Land Registrar have been futile due to the frustrations of the Respondents.

The Application was opposed by the Respondents by way of raising a Preliminary Objection on the grounds that the Application is premature, that the boundaries have not been established, that there is no evidence to sustain the Application and the suit and lastly that the Applicant has not established a prima facie case with probability of success.

When the Application came for hearing counsels representing the parties agreed that they shall dispose of the Application by way of written submissions which they filed on 24<sup>th</sup> July, 2017 and 25<sup>th</sup> July, 2017 respectively.

I have read the submission made by counsel on the Preliminary Objection which is before me for determination.

What constitutes a Preliminary Objection on points has already been settled by our courts and we have not diverted from the position in the case of **MUKISA BISCUITS MANUFACTURING CO. LTD – versus- WEST END DISTRIBUTORS LTD (1969) E.A. at 696.**

The Respondents have listed four grounds as stated earlier and applying the test and the threshold established in the Mukisa case grounds 1, 3 and 4 of the Notice of Preliminary Objection filed on 5<sup>th</sup> May, 2017 does not meet the threshold as none of the said grounds are strictly on part of law. That leaves the court to determine whether ground 2 of the Notice of Preliminary Objection which relate to whether boundaries have been fixed constitute a point of law.

Even though the Respondents have not on the face of the Notice stated which law the said ground is based on in the submission the Respondents stated that they rely on section 18 (2) of the Land Registration Act 2012 which provides that:-

**“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.”**

The above section in essence entails parties to exhaust the provisions of the Act before they resort to the court for redress.

In the instant case there is no dispute that both the Applicant and the Respondents land are registered and that the Applicant has attempted to resolve the dispute through the Registrar but the Respondents have frustrated the same which averment has not been rebutted. From the Plaintiff the Applicant prays for an order of injunction to restrain the Respondents from encroaching, entering, laying claim, cutting down trees, burning bushes, ploughing, leasing at which in my view is not a dispute relating to boundaries. The Plaintiff second prayer is seeking the court to intervene to have the surveyor to visit the land and establish the boundaries which in my view is different from determining a boundary. The former engages a boundary already fixed and the later a boundary not fixed and not known.

The upshot is that the Preliminary Objection raised by the Respondents is not valid and I dismiss the same.

On the prayers sought the Applicant has established a prima facie case with a probability of success and I will therefore allow the Application dated 13<sup>th</sup> April, 2017 in terms of prayers 2 and 3. I will not allow prayer 4 as it will lead to the determination of the suit at the interlocutory stage.

Orders accordingly.

**DATED, SIGNED and DELIVERED** in open court at **NAROK** on this **3<sup>RD</sup>** day of **NOVEMBER, 2017.**

**Mohamed N. Kullow**

**Judge**

In the presence of:

Ms Nchoe for the Plaintiff/Applicant

Ms Cheptoo for Defendant/Respondent

