



**REPUBLIC OF KENYA**

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

**LAND CASE NO.137 OF 2015**

**WILLS OCHOLLA.....PLAINTIFF**

**VERSUS**

**MARY NDEGE .....DEFENDANT**

**RULING**

1. The Plaintiff, **Wills Ochola**, commenced this suit against the Defendant, **Mary Ndege**, seeking to have the Defendant evicted and permanently enjoined from his parcel of land **Kisumu/Karateng/298**. The Defendant filed a notice of preliminary objection dated 1st March 2016 setting out four grounds summarized as follows;

a) The court has no jurisdiction in this matter in view of **Section 18 (2) of the Land Registration Act 2012** that require boundary dispute be first settled the Land Registrar.

b) That the suit is misconceived, scandalous, frivolous, vexatious and a blatant abuse of the due process of the court.

2. That when the matter came up for hearing on 6th April 2016, the court gave directions on filing of written submissions in respect of the preliminary objection raised by the Defendant. The submissions filed are as summarized herein below;

a) **DEFENDANT'S COUNSEL'S SUBMISSION;**

i) That the pleadings shows that the dispute is about the position of the boundary between the Plaintiff's parcel **Kisumu/Karateng/298** and **Kisumu/ Karateng/296** belonging to the Defendant.

ii) That in view of the provision of **Section 18 (2) of the Land Registration Act 2012** which precludes this court from entertaining any proceeding relating to a dispute on a boundary of registered land before such a dispute is determined by the land Registrar, then this court lacks jurisdiction.

iii) The Defendant's counsel referred the court to the cases of **Samuel Kamau Macharia & Another -V- Kenya commercial Bank Limited & 2 others** [2012] eKLR and **Owners and Masters of the Motor Vessel Joey " -V- Owners and Masters of the Motor Tugs "Barbara" and "Steve B" [2008]. EA 367** and submitted that the suit should be dismissed with costs.

b) **PLAINTIFF COUNSEL'S SUBMISSIONS;**

i) That the issue raised by the Defendant as a point of law is not pure point of law as it cannot be determined without evidence being adduced on whether or not the boundary dispute has been determined by the Land Registrar.

ii) That the Plaintiffs list of documents includes, the County Surveyor's report dated 27th April 2015 whose findings and recommendation should be taken to be a compliance of **Section 18(2)** of the Land Registration Act 2012.

iii) The counsel for the Plaintiff referred the court to this court's ruling in **Peter Nyagara Awiti -V- Julius Ocholla Ojunga & Another** [2016] eKLR and submitted that unlike in that case, the Plaintiff herein has demonstrated that the Defendant has encroached onto his land.

iv) That the preliminary objection should be dismissed with costs.

3. The following are the issues for determination by this court;

a) Whether the main issue in the suit is about boundary dispute and if so whether the same has been first determined in accordance with **Section 18 (2)** of the Land Registration Act, by the Land Registrar.

b) Who pays the costs of the preliminary objection.

4. The court has carefully considered the notice of preliminary objection, the pleadings, the rival written submission and come to the following determinations;

a) 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.

b) That the parties submission and pleadings shows clearly that the dispute before this court is one of the correct position of the boundary between, land parcels **Kisumu/Karateng/298** and **296** owned by the Plaintiff and Defendant respectively. That this clearly mean that the first forum with authority to settle the boundary dispute is the Land Registrar in accordance with **Section 18 of the Land Registration Act**.

c) That contrary to the submissions by the Plaintiff's counsel, the list of documents filed by the Plaintiff do not include any document with the Land Registrar's determination of the boundary dispute between the parties herein as proprietors of land parcels **Kisumu/Karateng/298** and **296**. That the Kisumu County Surveyor's report dated 27th April 2015 cannot be a substitute of a land Registrar's determination under **Section 18(2) of the Land Registration Act** for reasons that the two offices are not synonymous or the same. That the surveyor's report did not settle or attempt to settle the dispute on the boundary but instead made a recommendation that the "**Land Registrar to visit the site and solve the boundary dispute**". That it appears the Plaintiff, ignored the surveyor's advise and instead came to this court which, was a premature move, as this court is without jurisdiction to determine the said boundary dispute until after the Land Registrar pronouncement on the issue.

5. That having found as above, the Defendant's preliminary objection is upheld and the plaintiff suit commenced through the plaint dated and filed on 5th June 2015 is hereby struck out with costs.

It is so ordered.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**DATED AND DELIVERED THIS 22ND DAY OF JUNE 2016**

In presence of;

Plaintiff Present

Defendant Absent

Counsel Mr Anyumba for Defendant

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**22/6/2016**

22/6/2016

S.M. Kibunja J.

Oyugi court assistant

Mr Anyumba for Defendant

Mr Obuso for Plaintiff absent.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**22/6/2016**

Court: Ruling delivered in open court in presence of the Plaintiff and Mr Anyumba for the Defendant.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**22/6/2016**