



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 760 OF 2014

AMOS MPESHE 1ST PLAINTIFF
TUMPEINE MPESHE..... 2ND PLAINTIFF
KUPERE MPESHE..... 3RD PLAINTIFF
NAISIANOI OLONGE JEK AND LEGITIE MPESHE MODO4TH PLAINTIFF
(As administrators to the estate of the late MPESHE MOYAE MODO)

VERSUS

SALAU OLE SOKON MODODEFENDANT

RULING

The plaintiffs by a plaint dated 13th June 2014 filed in court on the same day instituted the instant suit against the Defendant where they claim the Defendant has encroached onto land parcel **Kajiado/Kitengela/1862** subsequently subdivided into parcel numbers **3204 and 3205** and the Defendant persists in trespass. The plaintiffs seek a permanent order of injunction and damages for unlawful trespass.

Simultaneously with the plaint the plaintiff filed a notice of motion application seeking orders of temporary injunction against the Defendant pending the hearing and determination of the suit and an order for appointment of an independent and/or joint surveyors to determine the parties respective boundaries. The grounds in support of the application and the affidavit sworn in support disclose there has been a long running boundary dispute between the plaintiff and the Defendant which has been the subject and/or the reason for intervention by the District Land Registrar, Kajiado and court proceedings between the parties.

Upon being served with the suit and the plaintiff's Notice of Motion application the Defendant gave notice of preliminary objection dated 14th August 2014 to the plaintiff's suit and application dated 13th June 2014 to have the same struck out and/or dismissed with costs on the grounds:-

1. That this Honourable court has no jurisdiction under section 7 of the Civil Procedure Act to preside over and or determine issues of boundary raised in this suit as the same is re judicata to the

decision made on 26th July 2012 by the District Land Registrar, Kajiado as upheld by decision in the Judicial Review Judgment delivered on the 7th day of April, 2014 in the Judicial Review Miscellaneous Application NO. 441 of 2012 between the parties herein over the same subject matter.

2. That this honourable court has no jurisdiction under section 5 and 6 of the Civil Procedure Act to preside over and or determine issues of boundary raised in this suit as the same is sub-judice to the proceedings in miscellaneous Application NO. 22 of 2014 Kajiado.
3. That the entire suit is incurably defective made of non disclosure of material facts and an abuse of the due process of the court.

The court on 18th September 2014 directed that the preliminary objection be disposed off first and the parties were required to file written submissions in regard to the preliminary objection. The Defendant filed his submissions in support of the preliminary objection on 1st October 2014 and supplementary submissions on 14th January 2015 being in reply to the plaintiffs submissions filed on 29th October 2014.

The gist of the Defendant's submissions in support of the preliminary objection is that the dispute with the plaintiff is a boundary dispute which the Land Registrar, Kajiado has adjudicated upon and has rendered a decision and thus the court lacks the jurisdiction to deal with the matter. The Defendant further argues that the plaintiff challenged the decision of the Land Registrar vide a Judicial Review application in **HC.MISC Application NO. 441 of 2012** and the court upheld the decision of the District Land Registrar. Hence the Defendant contends that at any rate the present suit is res judicata the parties having litigated on the same subject matter in the previous Judicial Review suit.

The Defendant further submits the plaintiff's instant suit is subjudice by reason of a pending suit being Kajiado Senior Resident Magistrate's **Misc. Application NO. 22 of 2014** where the Defendant seeks the adoption of the decision made by the Kajiado District Land Registrar on the 26th July 2012. Finally the Defendant submits that the plaintiff's suit is incurably defective and amounts to abuse of the due process of the court. The Defendant argues that the plaintiff was the initiator of the proceedings relating to the boundary dispute that the Land Registrar ultimately rendered a decision on and thus the plaintiff was not sincere when he filed the instant suit.

The plaintiff in their filed submissions dated 29th October 2014 and filed in court on the same date acknowledge the decision by the Land Registrar the Judicial Review matter filed in court and the pending miscellaneous application in the **Kajido Senior Magistrate's Court**. The plaintiff however contends that in the Judicial Review proceedings the plaintiff was not challenging the merits of the Land Registrar's decision but rather the process vide which the decision was arrived. The Plaintiff argues that the instant suit raises different issues from those raised in the Judicial Review proceedings and hence submits the Principle of Resjudicata cannot be invoked. The plaintiff referred the court to the case of **Biren Amritlal Shah & Another –vs- Republic & 3 others (2013) eKLR** where the court of Appeal reiterated the position that Judicial Review is not concerned with the merits of the decision but rather the fairness of the process in reaching the decision. The Court of Judges in the case stated:-

“Judicial review is not concerned with reviewing the merit or otherwise of a decision by a public entity, in respect of which the application for review is made, but the decision, making process itself. It is important to note in every case, that the purpose of judicial review is to determine whether the application was accorded fair treatment by the concerned public body, and that it is not within the remit of the court to substitute its own opinion with that of the public entity charged by law to decide the matter in question----“.

In the Judicial review proceedings referred to herein it is my understanding that the plaintiffs had sought to quash the decision of the Land Registrar, Kajiado made on 26th July 2012 and to prohibit the Land Registrar, Kajiado from delineating or altering boundaries of all the affected parcels of land. The court declined to quash the decision made by the Land Registrar holding that the Registrar had the powers under the repealed Registered Land Act Cap 300 Laws of Kenya and the Land Registration Act of 2012 to determine and fix boundaries.

On the issue of the present matter being subjudice the plaintiff submitted that the suit pending before the Kajiado Senior Resident Magistrate's court sought to have the decision of the Land Registrar dated 26th July 2012 adopted by the court whereas the instant suit seeks to have the actual and correct boundary established and a permanent injunction. Thus the plaintiff contends the two matters are not on similar issues and thus subjudice cannot arise.

The plaintiff further submits the preliminary objection taken does not qualify to be a preliminary objection under the test established in the case of **Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors (1969) EA 696** where their Lordships observed thus:-

“----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. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case **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”.

The summation of the Defendant's preliminary objection is that this matter involves the issue of a disputed boundary or boundaries which has been the subject of a decision by the Land Registrar, Kajiado which decision the plaintiffs challenged by way of judicial review but the court upheld the determination by the Land Registrar and that the Defendant has subsequently sought to have the decision by the Land Registrar adopted by the court at Kajiado, Thus it is the Defendant's contention that the court lacks the jurisdiction to deal with the matter.

Having considered and reviewed the pleadings and submissions by the parties it is clear that the fact that is not in dispute is that there exists a boundary dispute between the plaintiffs and the Defendant which was the subject of the determination by the Land Registrar, Kajiado as per the decision dated 26th July 2012. The issue for determination by the court in the preliminary objection is whether the court has the jurisdiction to entertain the instant suit having regard to the provisions of the Land Registration Act NO.3 of 2012 that deal with issues relating to boundaries and further having regard to the determination and/or decision alleged to have been made by the Land Registrar on 26th July 2012.

The Land Registration Act 2012 like the repealed Registered Land Act, Cap 300 Laws of Kenya makes provisions for alteration and fixing of boundaries and it is the Land Registrar who is granted the power to deal with matters relating to alterations and fixing of boundaries. Section 16 of the Act provides for alteration of boundaries and provides as follows:-

16.(1) The office or authority responsible for the survey of land may rectify the line or position of any boundary shown on the cadastral map based on an approved subdivision plan, and such correction shall not be effected except on the instructions of the Registrar, in writing, in the prescribed form, in accordance with any law relating to subdivision, of land that is for the time being in force.

(2) Notwithstanding subsection (1), any alteration made shall be made public and whenever the boundary of a parcel is altered on the cadastral map, the parcel number shall be cancelled and the parcel shall be given a new number.

(3) The office or authority responsible for the survey of land may prepare new editions of

the cadastral map or any part thereof, and may omit from the new map any matter that it considers obsolete.

Section 19 of the Act provided for the fixing of boundaries and the Land Registrar is under the section given power to establish and have the boundaries fixed after giving all the parties of adjoining parcels an opportunity to be heard.

Section 19 provides:-

19.(1) If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land or otherwise the survey of land or otherwise to define in the register, the precise position of the boundaries of a parcel or any part thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.

(2) The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed and the plan shall be deemed to accurately define the boundaries of the parcel.

(3) -----

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. Section 18 (2) of the Act provides:-

18.(2) 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.

As noted by **Odunga, J** when he delivered his ruling in the Judicial Review application between the parties, section 18 of the Act not deal with determination and fixing of boundaries as the section intimates as clearly it is section 19 which deals with determination and fixing of boundaries and therefore the earlier the Attorney General deals with this anomaly the better. The point however is that the Land Registration Act 2012 clearly provides the procedure for dealing with land boundary disputes and parties are obliged to ensure that procedure is exhausted before they can resort to court for any redress. The provision of the Act is explicit that no court should entertain any action of proceedings relating to a boundary dispute unless the procedure under the Act has been complied with.

Under section 86 of the Land Registration Act any party aggrieved by or with the decision or by the exercise of any power by the Registrar can apply for review of the Registrar's decision by way of a case stated for the court's opinion.

Section 86 provides:-

86.(1) If any question arises with regard to the exercise of any power or the performance of any duty conferred or imposed on the Registrar by this Act, the Registrar or any aggrieved person shall state a case for the opinion of the court and thereupon the court shall give its opinion, which shall be binding upon the parties.

Essentially the judicial review application by the plaintiffs was in my view in the nature of an application as contemplated by section 86 of the Land Registration Act to the extent that it was challenging the decision of the Kajiado District Land Registrar made on 26th July 2012. The court considered the application and declined to quash the decision of the Land Registrar, Kajiado made on 26th July 2012

holding that the Land Registrar had power under the Land Registration Act to fix boundaries. The decision made by the Land Registrar Kajiado on 26th July 2012 therefore in my view stands.

While I accept that this suit cannot be said to be res judicata by reason of the ruling in the Judicial review application owing to the fact that different issues are involved my view is that the suit nonetheless involves the determination establishment and fixing of the disputed boundaries between the parties which falls squarely under provisions of the Land Registration Act 2012 that deal with boundaries. A look at the plaintiff's plaint paragraphs 5, 6,7, 8 and 10 clearly shows that indeed the Land Registrar, **Kajiado** did infact hold an inquiry respecting the disputed boundaries as per the decision made on 26th July 2012. This is the decision that **Hon. Odunga, J** upheld and declined to quash the same. I would see no reason to differ with the learned judge and/or indeed to sustain the suit when it is within the preserve of another organ of the state to deal with. The court would be usurping the powers of that organ if it were to deal with the matter.

I therefore uphold the preliminary objection on the basis that pursuant to sections 16, 18 and 20 of the Land Registration Act 2012 the court lacks the jurisdiction to deal with a matter relating to a boundary dispute as in the instant suit. The boundary dispute having been determined and fixed by the Land Registrar as per the decision made on 26th July 2012 which decision was upheld by the High Court in the Judicial Review application **NO. 441 of 2012** the plaintiff's suit in my view is misconceived and incompetent and is an abuse of the process of the court.

In the premises I order the plaintiff's suit filed on 13th June 2014 vide the plaint of even date struck out with costs to the Defendant.

Ruling dated, signed and delivered this...**12th**...day of...**March**.....2015.

J. M. MUTUNGI

JUDGE

In the presence of:

MASIBO..... For the Plaintiffs

MS Kinyua for Muganda..... For the Defendant