



Rinda v China Civil Engineering Construction Cooperation Limited (Land Case E031 of 2022) [2024] KEELC 3814 (KLR) (30 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3814 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
LAND CASE E031 OF 2022**

**AE DENA, J
APRIL 30, 2024**

BETWEEN

SAID JUMA RINDA PLAINTIFF

AND

**CHINA CIVIL ENGINEERING CONSTRUCTION COOPERATION
LIMITED DEFENDANT**

RULING

1. The Defendant herein filed the Notice of Motion dated 8/11/23 subject of this ruling pursuant to the provisions of Sections 1A,1B and 3A of the Civil Procedure Act and Order 2 Rule 15[1] [a] and [d] of the Civil Procedure Rules, Rule 40[1][2][3][4][5] and [6] of the Land Registration [General]Regulations 2017 sections 18[1][2][3] of the Land Registration Act No 3 Of 2012 and Article 40 of the constitution of Kenya 2010. The application is for orders; -
 1. That this suit be struck out and/or dismissed for want of jurisdiction.
 2. That costs of this suit and the application be provided for borne by the Plaintiff.
2. The application is premised upon the following grounds;
 1. That this court lacks original jurisdiction to hear and determine this suit by virtue of the express provisions of section 18[2] of the land registration act.
 2. That the cause of action is based on an encroachment and hence it is a boundaries dispute in respect of parcels of land that fall within the general boundaries system.
 3. That such this matter ought to be determined by the Land Registrar at first instance.
 4. That the entire suit is therefore premature and misconceived and it is unsustainable in the obtaining circumstances.



3. The application is further supported by the affidavit of Lui Teddy Mutinda an employee of the Defendant working as a liaison officer. It is averred that the Plaintiff filed the instant suit against the Defendant on the basis that the Defendant had encroached and/or trespassed into the suit parcel Kwale/Ng'ombeni/757. The trespass was denied by the Defendants and who stated that they had restricted their activities within the boundaries of their leased property Kwale/Ng'ombeni/760 and Kwale/Ng'ombeni/2018 which share a boundary with the suit property. That from a survey report pursuant to a survey exercise carried out by Geopima Company Limited dated 11/10/2022, the dispute is a boundary one.
4. The deponent states that he is aware vide an order of court dated 13/2/2023 the District Surveyor carried out another survey exercise and subsequently two reports were filed dated 24/4/2023 and 30/5/2023. It is averred at paragraph 7 of the affidavit that the survey report indicates the suit property and the adjoining parcels fall within the general boundary system and not fixed boundary. That it is the Land Registrar's office that can resolve the issues of boundary before the same are escalated to this court. The court is urged to strike out/dismiss the suit for lack of jurisdiction.
5. The application is opposed vide a replying affidavit sworn by Onesmus Safari Mangaro Advocate acting on behalf of the Respondents. It is averred that from the pleadings, there is no claim for a boundary dispute before court. That before commencement of the suit, the issues of boundary identification had been done and beacons placed by the Ministry of Lands as per the letter dated 1/12/2021. Further that the court on 6/12/2022 ordered the land surveyor Kwale to conduct a survey within 60 days to ascertain the extent of encroachment on the Plaintiffs land. The order is attached. A report was filed indicating that the defendant had encroached on the Plaintiff's land but the nature and extend of the same was not indicated.
6. The deponent avers that a valuation of the property was carried out and the value assessed at Kshs. 4 6,650,000/- as per the valuation report filled before court on 20/7/2023. The Respondents maintain that the dispute before court is not a boundary issue and the instant application is miscalculated and a waste of courts time. The court is invited to dismiss the application with costs.
7. The court record indicates that the Defendants submissions were filed before court on 14/2/2024 while the Plaintiffs submissions were placed on record on 26/2/2024. The court has considered these submissions in its determination herein.
8. It is trite that jurisdiction of a court is key for determination of any matter placed before it. See Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR where the court held that jurisdiction is everything, without it a court should down its tools.
9. The plaint dated 3/7/2022 instituting this suit states the brief facts of the case according to the Plaintiff. At paragraph 4 of the same it is averred that the Defendant has trespassed on the Plaintiffs land parcel and is excavating material for the construction of the Dongo Kundu bypass without the authority of the Plaintiff. That the Plaintiff has thus been deprived of the use of his land. At paragraph 7 the Plaintiff further states that his land has been turned into a quarry and the Defendants were harvesting quarry dust, murram and sand from the same. The Plaintiff sought for a permanent injunction against the Defendants, compensation for the said murram and quarry dust, general damages for trespass and a restoration order to return the suit property to its initial original form. The Plaintiff further sought for costs of the suit and interest.
10. In their defence, the Defendants deny the alleged trespass and put the Plaintiff to strict proof of the same. They reiterate the averments earlier stated that they have confined themselves to the use of their properties and which are adjacent to the suit property.



11. I further note that from the record, it was intimated to court by counsel for the Plaintiff vide an application dated 3/7/2022 that the Defendants were trespassing on the suit property and the need for an injunction pending the hearing and determination of the suit. The court on 1/11/2022 ordered that a survey exercise be carried out to determine whether there was any encroachment and the nature and extend of the same as alleged by the Plaintiff. On 15/5/2023 the court further issued orders to the District Surveyor to submit a further report on the extend of the encroachment.
12. From the survey report, what can be deduced is that the Defendants have not fully taken occupation and use/encroached on the suit property belonging to the Plaintiff but part of the same and which has been indicated in the survey report dated 30/5/2023 as 0.27Ha. The question therefore is whether this encroachment can be deduced as being a boundary dispute between the parties. From the pleadings the Defendants maintain that they have kept on their side of the property they have leased and have not encroached on the suit property. I am of the view that the issue as to the nature and extend of the encroachment can be determined by the Land Registrar who is empowered to do so under Section 18 of the [Land Registration Act](#) No. 3 of 2012.
13. The issue of a boundary is evident, and it is thus clear that the parties ought to have given the Land Registrar the chance to address the encroachment issue herein in line with Section 18 of the aforementioned [Land Registration Act](#). The Court in Hon. Henry Kosgey v Brian Cuthbert & Another [2019] eKLR stated that the jurisdiction of the Court in determining boundary disputes should be considered in view of Section 18 of the [Land Registration Act](#) which provides as follows: -
 18.
 - (1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.
 - (2) 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.
 - (3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary;

Provided that where all the boundaries are defined under section 19(3), the determination of the position of any uncertain boundary shall be done as stipulated in the [Survey Act](#).
14. The provisions of Section 19 of the [Land Registration Act](#) outline the powers of the Land Registrar to deal with a boundary dispute as follows;
 - 19.(1) if the Registrar considers it desirable to indicate on a field plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts 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) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section.
15. I note that the parties have not tendered any evidence indicating that the issue of encroachment was first lodged with the Land Registrar before being escalated to this court. It is my view that parties should first appear before the Land Registrar for determination of the boundaries to their respective properties in relation to the alleged encroachment.
16. In view of the above finding it is my view that the suit cannot be struck out as invited by the Defendant. I say so because should the registrar find encroachment then the court will proceed to determine the issues touching on compensation if any and or as shall be moved by the parties.
17. The following orders hereby issue to dispose of the preliminary objection;
1. The Parties shall submit themselves to the jurisdiction of the Land Registrar for the determination on boundary issues.
 2. Depending with the outcome of 1) above parties shall apply for appropriate orders/directions
 3. Costs shall be in the cause.

It is so ordered.

RULING DATED, AND DELIVERED THIS 30TH DAY OF APRIL 2024.

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A.E DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of: -

Mr. Mumin holding brief for Mr. Magaro for the Plaintiff/Respondent

Ms. Ngigi for the Applicant/ Defendant

Ms. Asmaa Maftah - Court Assistant

