



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO.113 OF 2018

BETWEEN

MENKAR LIMITED.....APPELLANT

AND

RATILAL GHELA SAMAT SHAH.....1ST RESPONDENT

DI NUMATI GHELA.....2ND RESPONDENT

BHIKHU RATILAL GHELA SHAH.....3RD RESPONDENT

(Being an appeal from the ruling and order of the Environmental and Land Court of Kenya at Mombasa (L. Komingoi, J) dated 22nd May, 2018 and delivered on 28th June, 2018 by (A. Omollo, J)

in

ELC NO. 179 of 2017)

JUDGEMENT OF THE COURT

[1] This is an appeal against the ruling and order of the Environment and Land Court (ELC), (L. Komingoi, J.) dated 22nd May, 2018 where the learned Judge dismissed a notice of motion dated 6th July, 2017 filed by *Menkar Limited*, (appellant) against *Ratilal Ghela Samat Shah*, *Di Numati Ghela Shah* and *Bhikhu Ratilal Ghela Shah* the 1st, 2nd and 3rd respondents respectively. The said motion sought orders to strike out the respondents' plaint dated 22nd May, 2017 for want of jurisdiction in accordance with the provisions of **Section 18(2)** of the **Land Registration Act**. The said **Section 18 (2)** of the said **Act** 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”.

[2] The fundamental question that arose for determination before the trial court was whether the provisions of **section 18(2)** of the **Land Registration Act** precludes the ELC from determining a matter involving a boundary dispute; this was to be considered alongside the provisions of **Section 13 (2) (a)** of the **Environmental and Land Court Act**. It is necessary to restate the said provisions before capturing the summary of the salient facts as its interpretation is germane in this appeal. It provides;

(2) 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, rents, valuations, mining, minerals and other natural resources;

[3] A brief background of the matter prior to this appeal as can be gleaned from the record is that the respondents being the joint registered owners of the leasehold interest in the property known as **Mombasa/ Block I/408** (suit plot) realized on or about 2009, that part of a

construction on the adjoining plot **Mombasa/Block1/ 409** belonging to one **Roshanali Sherali Esmail** (original owner) was encroaching onto their property. As a result, they sought an order of injunction, eviction, demolition and damages against the owner of the **Mombasa/Block I/ 409**. By their plaint dated 22nd May, 2017 the respondents claimed that the said owner of the adjoining property did not comply with demolition notices and as a result, he was charged in **criminal case No.650 of 2012** wherein he was found guilty and convicted of the offence of failing to identify a plot boundary and encroaching on the suit property contrary to by-law **42 (1)** of the **Building Code of the Local Government (Adoptive) By laws 1968**.

[4] Prior to the suit the matter had been handled by the subordinate court that issued orders to the County Government of Mombasa to ensure compliance with the demolition notice by demolishing to ground level all parts encroaching on the suit property. Despite being ordered to demolish the encroachments the owner did not comply but instead sold the aforesaid plot to the appellant. In a brief/ report written by the legal services county director of the Mombasa County, addressed to the County Secretary, the director noted that the transfer of ownership was intended to defeat the course of justice and pre-empt possible demolition orders on the ground of ownership shift despite the owner being ultimately discharged under **Section 35 (1)** of the Penal Code. Thereafter the appellant as the new owner was issued with fresh notice to comply with and was also charged in **Criminal Case No. 1968 of 2015**.

[5] Thus the respondents' claim against the appellant as the new owner of the **Mombasa/Bock/1/409** was that it refused/neglected to demolish the encroaching portion of its building despite notice at the respondents' detriment as they continued to suffer loss and damage. The appellant denied those allegations and in particular it denied ever having been served with any notice by the County Government of Mombasa. The appellant further denied the court's jurisdiction to determine a dispute over boundaries of registered land. In the alternative the appellant pleaded that the respondents' claim was not sustainable in equity as the respondents were guilty of laches and indolence. The appellant went on to state that it was never a party to the proceedings involving the respondents or the County Government of Mombasa.

[6] In addition to the defence, the appellant filed the aforementioned notice of motion dated 6th July, 2017 seeking orders to strike out the respondent's plaint for want of jurisdiction on the basis that boundary disputes do not fall within the jurisdiction of the trial court pursuant to **Section 18** of the **Land Registration Act**. The motion was opposed by the respondents who contended that there existed a **cadastral map**, and **surveyor's report** confirming the boundaries; *that* there was even a record of the criminal court proceedings wherein the previous owner of the suit plot was convicted *of* encroachment. The respondents further argued that there was no appeal pending regarding that conviction and since there was no compliance on the appellant's part, the current application was an abuse of court process meant to scuttle the respondent's genuine claim to protect their property from encroachment. According to the respondents' the suit fell well within the jurisdiction of the Environment and Land Court (ELC) since the suit property lies on an already determined boundaries.

[7] Having considered the motion Komingoi, J., was persuaded the ELC had jurisdiction to hear the suit, her decision was also informed by the holding of Kibunja, J., in **Willis Ocholla v. Mary Ndege Kisumu ELC Land Case No. 137 of 2015 (2016) eKLR** when making the following observations in a pertinent portion of the impugned ruling;

“Section 18(2) of the Land Registration Act is set in mandatory terms. It means any issue relating to a dispute as to boundaries are within the Land Registries' mandate. I agree that the Plaintiffs' ought to have taken the dispute to the Land Registrar in accordance with Section 18 of the Land Registration Act, 2012.”

The Judge however found no merit in the appellant's application and declined to strike out the respondents' plaint citing also the case of **D.T Dobie Company (K) Limited v. Muchina (1982) KLR** where the court relied on **Wenlock v. Moloney (1965)** where it was stated that;

“This summary jurisdiction of the court was never intended to be exercised by a minute and a protracted examination of documents and the facts for the case in order to see whether the Plaintiff really has a cause of action. To do this is to usurp the position of the trial judge and to produce a trial of the case in chambers on affidavits only without discovery and without oral evidence tested by cross examination in the ordinary way. This seems to be an abuse of the court and not a proper exercise of that power.”

Madan J.A further added;

“No suit ought to be summarily dismissed unless it appears so hopeless that it is plainly and obviously so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action provided it can be injected with real life by amendment it ought to be allowed to go forward for a court of justice ought not to act in darkness without full facts of the case before it.”

[8] Although the trial court appeared to agree that **Section 18 (2)** of the RLA vested the jurisdiction of determining boundary disputes on the Land Registrar, the court went further and directed that the Land Registrar, Mombasa do conduct the required process of determining the boundaries of the subject parcels of land as envisaged under **Section 18, 19 and 20** of the **Land Registration Act** and moreover a report to be filed in court within sixty (60) days from the date of the ruling. That is the order that provoked the instant appeal which is predicated on four (4) grounds in essence, faulting the learned Judge for errors in law and facts; in making substantive orders instead of downing the tools upon finding that **Section 18(2)** of the **Land Registration Act, 2012** is mandatory that the court shall not entertain any suit or proceeding; in failing to appreciate that a suit filed in contravention of a mandatory provision of the law is a nullity; by proceeding to confer jurisdiction where none existed; by contradicting herself, taking extraneous and irrelevant matters and/or otherwise failing to take into account matters which she ought to have taken into account and as a result misdirected herself, exercised her discretion wrongly and arrived at a manifestly erroneous decision.

[9] During the plenary hearing of the appeal, both parties were represented by counsel who had filed written submissions and list of authorities. Mr. Karega learned counsel represented the appellant while Mr. K'Bahati learned counsel represented the respondents. On the

part of the appellant, Mr. Karega expounded on the grounds of appeal and made oral highlights of the written submissions. He assailed the learned Judge's decision stating that there was an improper exercise of discretion in that the Judge failed to strike out the suit despite having concluded that the court is restricted *by Section 18(2)* of the Land Registration Act.

[10] On this point counsel made reference to the dicta in the cases of Samuel Kamau Macharia & another v. Kenya Commercial Bank Limited & 2 others (2012) eKLR and The Owners of Motor vessel Lilian "S" v. Caltex Oil Kenya Ltd. (1989) KLR 1. Emphasizing the long standing principle that "*without jurisdiction, a court cannot act.*"

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. The issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction the court cannot entertain any proceedings".

Lastly, counsel submitted that the Judge wrongfully applied the provisions of *Article 159(2)* of the Constitution whose boundaries were extended to override a mandatory provision of the statute and purported to give ELC jurisdiction over boundary disputes against the letter and spirit of a statute. In light of these arguments, counsel urged us to allow the appeal.

[11] Mr. K'Bahati learned counsel for the respondent opposed the appeal; he cited the provisions of *Section 13 (2) of the Environment and Land Court Act* which confers jurisdiction to the Environment and Land Court to deal with boundary disputes over registered titles where survey has been done. It therefore does not follow that another law should eliminate the court's power to determine disputes that are intertwined with other claims. According to counsel the trial Judge had jurisdiction although she stated otherwise in the impugned ruling which statement was *per in curium*; *Section 18(2)* of the *Land Registration Act* must be read along with *Sections 18(1)* and other evidence that shows that what formed the boundaries were duly established but the appellant's predecessor in title interfered with the beacons.

[12] Moreover the boundary was not the only issue in dispute. The respondents' case as per their pleadings involves trespass, illegal acquisition/grabbing of private property and unlawful occupation. The prayers sought were for trespass, eviction, demolition, *mesne* profits and general damages for unlawful occupation and use of property. Counsel went on to point out that in all cases touching on the interpretation of *Section 18 (2)* of the *RLA* and the preponderance of judicial opinions is not for striking out a suit, but to direct the land registrars to file a report for consideration by the court. Counsel cited the cases of Kepha Omulo Opap & 3 Others [2017] e KLR, Eddah Wanjiru Mbiyu vs. Simon Kimani Ndungu [2016] e KLR where the principle was explained that in a boundary dispute, if no party will suffer prejudice, the exercise can be handled by the court for expeditious disposal of matters. The appellant is not saying that the order directing the Land Registrar to resolve the boundary issue will prejudice it in anyway. Counsel argued that striking out the suit would not have advanced the cause of justice as it was not only about the boundary but there were other issues; he was emphatic that the appellant had committed an offence under *Section 21* of the *Land Registration Act* by destroying beacons and having constructed the building in contravention of by law *42(1)* of the *Building Code of the Local Government (Adoptive) By Laws 1968*.

[13] Counsel for the respondents urged this Court to note that the survey plan was available and was found in folio named F/R253/87 since the re-surveys conducted were not to determine the boundaries but were to identify beacons marking them on the ground. To buttress this view he cited the case of Fredrick Ngaya Thuo v. Peter Mungai Njuho [2017] eKLR, where the trial court was faced with a similar issue and stated thus;

"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." Emphasis added.

In conclusion counsel for the respondent implored us not to strike out the suit which is a draconian step only resorted to as a last resort and thus urged this Court to dismiss the appeal with costs.

[14] We have considered and deliberated on the rival submissions by learned counsel, examined the record of appeal, and the cited authorities. As this is a first appeal, it is this Court's duty to analyze and re-assess the evidence on record and reach its own conclusions in the matter. It was put more appropriately in Selle -vs- Associated Motor Boat Co., [1968] EA 123, thus:

"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally." (See Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270) and Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR.)"

[15] From the material and submissions tendered, it is common ground that the dispute that gave rise to this appeal is regarding a wall that was constructed along two adjoining parcels of land being Mombasa/Block 408 and Mombasa/Block 409. Pursuant thereto, the respondents complained of encroachment on their plot, trespass, tampering with beacons among other complaints. The matter was first handled before the Municipal court and the appellant was issued with a notice to demolish a wall it had purportedly constructed, remove the debris and restore the plot to its original state. The said order does not seem to have been complied with and the dispute therefore escalated to a suit filed by the respondents before the ELC. Before the suit was determined, the appellant applied to strike it out. The outcome of the said application was an order made on 22nd May, 2018 directing the Land Registrar to conduct a survey process to determine the boundaries of the two adjoining parcels of land and file a report within 60 days from the date of the impugned ruling.

[16] The question we have to answer at the outset is whether the learned Judge had jurisdiction to determine the aforesaid dispute? A perusal of the plaint that was sought to be struck out reveals that the respondents had prayed for a retinue of orders *inter alia*, an order of permanent injunction to restrain the appellants from trespassing, constructing or interfering with the suit plot no Mombasa/Block 1/ 408; an order of eviction; demolition and removal of the building encroaching the said plot *mesne* profits and damages among others. The way the prayers are couched there is no specific prayer for determination of a boundary dispute even if it would perhaps become necessary to involve a land registrar to produce documents regarding those parcels of land that would point out the beacons so as to establish those claims. We are alive to the provisions of **Section 13** of the ELC and **18 (2)** of the **Registered Land Act**, both provisions must be interpreted objectively to promote the Rule of Law and not to undermine it. We take note of a persuasive English case of *Amalgamated Society of Engineers vs. Adelaide Steamship (1920) 28 CLR 129 at 161-2* where **Higgins J.** stated as follows:

“The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we consider the result to be inconvenient or impolitic or improbable.”

[17] Having looked at the two enactments within the context of the case before us, we do not think that the jurisdiction of the ELC is divested especially where the issues in dispute are intertwined with others. As the Judge unravels the intricate web of disputes, we find nothing wrong in the order requesting the Land Registrar who is the custodian of the official records of land ownership to avail them to assist the court make a determination on the germane issue of whether the wall constructed on the disputed plot is within its boundary and whether there was trespass. As correctly pointed out by the Judge, the court is enjoined under **Article 159 (2) (d)** of the Constitution to ensure the ends of justice are met by overlooking technicalities and addressing substantive issues. Striking the entire suit would not serve the ends of justice.

[18] The material before us does not demonstrate this as a pure boundary dispute. This is because these are titled plots and indeed at page 25 of the record contains a letter from **Kimoland Surveying Services** dated 26th November, 2009 addressed to the 1st respondent which states that;

“Following your verbal instruction to relocate the boundary beacons for your above property, I visited the site, carried out the survey and here below is my ground report;

1. Five of the six beacons marking the boundaries of this plot are there are intact as approved by the Director of Surveys on F/R 253/87.

2. Beacon No. K36 could not be accessed because of the wall on plot no. 409.

3. The development on plot no. MI/I/409 encroaches on your plot as will be seen on the attached survey print.

4. I have explained to the owner of this development and about the encroachment but I advise that you take up the matter as the registered owner of plot no. MI/I/408.

The above is the situation on the ground and we will be able to relocate beacon no. K36 as soon as you settle out the encroachment issue.” Emphasis added.

Attached to that letter was a surveyor’s map of the property with a depiction of where the wall is erected and what would be supposedly the beacon K.36. It is therefore not in contention that the Title Nos. Mombasa Block I/409 and Mombasa Block I/408 have a defined boundary, they have titles and the issues pleaded in the plaint are matters that fall within the jurisdiction of the Environment and Land Court to determine whether the allegations of encroachment hold water and whether damages can be awarded.

[19] In the end we find this appeal lacks merit and we see no prejudice that may be suffered by the order made directing the Land Registrar to avail a report. Accordingly the appeal is hereby dismissed with costs to the respondents.

Dated and delivered at Mombasa this 28th day of May, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

M. K. KOOME

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR