



Muiruri (Suing as administrator of the Estate of the Late Patrix Paul Muiruri) v Khamis & 2 others (Land Case E002 of 2024) [2024] KEELC 4525 (KLR) (30 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4525 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
LAND CASE E002 OF 2024**

AE DENA, J

MAY 30, 2024

BETWEEN

JANE WAMUCI MUIRURI (SUING AS ADMINISTRATOR OF THE ESTATE OF THE LATE PATRIX PAUL MUIRURI) PLAINTIFF

AND

SULEIMAN ATHMAN KHAMIS 1ST DEFENDANT

DISTRICT LAND REGISTRAR KWALE COUNTY 2ND DEFENDANT

THE HON ATTORNEY GENERAL 3RD DEFENDANT

RULING

1. This ruling is subject of the Notice of Motion dated 29/12/23 and preliminary objection to the same dated 23/01/24. The Applicant sought for the following prayers;
 1. Spent
 2. That this honourable court hereby issues temporary injunction restraining the 1st Defendant, his servants, workmen and/or agents from interfering with, constructing any wall or structures or in any manner whatsoever dealing with the disputed land forming the boundary between Galu/Kinondo/568 on one side and Galu/Kinondo/1855 pending the hearing and determination of this application.
 3. That this honourable court hereby issues temporary injunction restraining the 1st Defendant, his servants, workmen and/or agents from interfering with, constructing any wall or structures or in any manner whatsoever dealing with the disputed land forming the boundary between Galu/Kinondo/568 on one side and Galu/Kinondo/1855 pending the hearing and determination of this suit.
 4. That the costs of this application be borne by the Defendants.



2. The application is premised upon grounds on its face and the supporting affidavit of Jane Wamucii Muiruri. The deponent states that she is the legal owner of plot no Galu/Kinondo/568 while the 1st Defendant is the owner of Galu/Kinondo/1854 and 1855. It is alleged that the 1st Defendant has encroached on the Applicants parcel and the matter has been reported to the District Land Registrar the 2nd Defendant for resolution. That the land was visited by the District Surveyor Kwale and who concluded there was a boundary dispute that ought to be determined by the 2nd Defendant. Consequently, the 2nd Defendant summoned the Applicant and the 1st Defendant for hearing of the dispute on 20/4/2023 but has to date failed to file a report of his findings to date. The Applicant states that several reminders have been sent to the 2nd Defendant in vain.
3. The Applicant further states that on or about 20/12/2023 the 1st Defendant commenced construction of permanent structures on the disputed boundary area in clear disregard of the pending issues. That it will be in the interest of justice that the application be allowed to prevent further encroachment on the land.
4. In response to the application the 1st Defendant Suleiman Athman Khamis filed a replying affidavit sworn on 30/1/2024. The 1st Respondent avers that the entire suit is incompetent, defective, bad in law and an abuse of the court process. That the instant suit offends the provisions of section 18[2] of the Land Registration Act 2012 and the same should be dismissed with costs. That the suit is an affront of the doctrine of exhaustion as the boundary dispute remains unresolved.
5. The 1st Defendant further filed a Notice of Preliminary Objection. The preliminary objection is premised on the following grounds;
 1. Pursuant to the provisions of Article 162[2][b] of the constitution of Kenya 2010, the jurisdiction of this honourable court is limited to disputes relating to environment and use and occupation and title to land.
 2. That the suit herein is an affront to the provisions of section 18[2] of the land registration act 2012 which provides as hereunder
 - a. “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. That the suit herein is therefore bad in law, incompetent, an abuse of the court process and the same should be struck out with costs to the 1st defendant/respondent.
6. The application together with the Preliminary objection were canvassed by way of written submissions which both parties filed and exchanged and which I have considered in my determination.
7. According to the 1st Respondent, the issue between the parties herein is over a boundary and the same ought to be determined by the land registrar before escalating to the court. That the Applicant has failed to exhaust this avenue and can therefore not instruct the court on making a finding before exhausting the available legal remedy first.
8. The Applicant on the other hand states that initially, the matter was referred to the Land Registrar Kwale by the County Surveyor after it was established that indeed the dispute revolved around the boundary shared by the 1st Respondent and the Applicant. That however, after the matter was heard by the Land Registrar, no report on his finding has been availed and efforts to secure the same have proved futile. That it is these actions by the Land Registrar which have enabled the 1st Respondent to trespass



on the disputed part and is in fact putting up a permanent structure thereon hence necessitating this suit.

9. Having perused the pleadings herein, the court has come across the Surveyor's report dated 27/1/2023. The analysis and observations indicate an encroachment into the Applicant's parcel. It is recommended that the issue be dealt with by the Land Registrar for resolution. I have further come across the letter dated 6/4/2023 by the Land Registrar N S Mwanguni who informs the parties concerned of her visit to the disputed boundary on 20/4/2023 for a possible resolution. It is confirmed by the Applicant that the meeting took place, however to date the Land Registrar has never furnished the parties with the minutes of the meeting and the outcome in form of a report. The letter dated 19/7/2023 is a request for the said documents and from the record, no response has been forthcoming.
10. I am in agreement with the 1st Respondent on one front, that this is a matter which ought to have been presented to the Land Registrar in the first instance, I am guided by the dictum in the Court of Appeal Case of *Azzuri Limited Versus Pink Properties Limited* [2018] eKLR, the court stated as follows in relation to the application of Section 18 of the *Land Registration Act*;

"This means that under the aforesaid provisions, boundary disputes pertaining to lands falling within general boundary areas must be referred to the Land Registrar for resolution. From this analysis of the law, it should be clear from the above that, we are in agreement with the learned Judge's conclusion that the dispute ought to have been heard by the Land Registrar as stated in the statute. Jurisdiction is everything. It has been said many times before, that, without it a court has no powers to make one more step, irrespective of the strength and nature of evidence in the parties' possession".
11. In *Speaker of National Assembly –Versus- Karume* (1992) KLR 21 the court held: -

"Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures".
12. 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.
13. The court confirms from the pleadings, that the hearing before the Land Registrar was indeed conducted. However, no evidence of what transpired has been presented for the court to confirm the



outcome of the alleged boundary resolution. This evidence should be as per section 19 (2) (3). In the event that a finding was made and the same was in favour of the 1st Respondent, then it was imperative of the 2nd Respondent to inform the Applicant of the same. Is this not what the tenets of natural justice would require. The Applicant states that she had nowhere to go but move the court since the 1st Defendant was erecting structures on the very disputed portion. It is malafides for the 1st Respondent to proceed with the alleged construction bearing in mind that the boundaries to the suit property were subject of an unresolved dispute.

14. Furthermore, the Applicant cannot be faulted for not exhausting the laid down dispute resolution mechanism over boundaries when it is the Land Registrar who has failed to play its part to ensure the matter is resolved or otherwise. This court is emboldened by Article 48 of *the Constitution* of Kenya which commands access to justice for all persons and which I will uphold. Court of Appeal has held that courts still retain residual jurisdiction to intervene in exceptional circumstances despite existence of alternative remedies See Chief Justice and President of Supreme Court of Kenya & Another V. Bryan Mandila Khaemba (2021) eKLR.

15. The jurisdiction of this Court flows from Article 162(2) (b) of *the Constitution* which is read together with the provisions of Section 13(2) of the ELC Act. The latter provides as follows;

"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;
- b) relating to compulsory acquisition of land;
- c) relating to land administration and management;
- d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
- e) any other dispute relating to environment and land".

16. The court is tasked with determination of disputes relating to land and which is similarly before court. Despite the boundary issue being a pending one, the invasion and use of the land by the 1st Respondent calls for the action of this court. In the event that after the survey exercise is carried out and the Land Registrar finds the 1st Respondent at fault, then the construction will definitely be an infringement of the Applicants rights to ownership of property. On the other hand, the Land Registrar might find that there is no encroachment. With this uncertainty in mind, the court opines that status quo orders will suffice in this instance. The Black's Law Dictionary, Butter Worths 9th Edition, defines Status Quo as a Latin word which means "the situation as it exists".

17. The Court of Appeal in the case of Mugah Vs Kunga [1988] KLR 748, upheld the practice of issuing status quo orders in land matters status.

Status quo orders should always be issued for purposes of preserving the subject matter. This court's practice direction vide Gazette Notice No. 5178/2014 have followed suit. Practice direction No. 28(k) is relatively clear. It gives the court the leeway and discretion to make an order for status quo to be maintained until determination of the case."

18. The purpose of an order of status quo has been reiterated in a number of decisions as here below;



19. 19 In Republic Vs National Environment Tribunal, Ex-parte Palm Homes Limited & Another [2013] e KLR, Odunga J. stated,

"When a court of law orders or a statute ordains that the status quo be maintained, it is expected that the circumstances as at the time when the order is made or the statute takes effect must be maintained. An order maintaining status quo is meant to preserve existing state of affairs...Status quo must therefore be interpreted with respect to existing factual scenario..."

20. In TSS Spinning & Weaving; Company Ltd Vs Nic Bank Limited & another [2020] e KLR, the court elucidated the purpose of a status quo order as follows:

"In essence therefore, a status quo order is meant to preserve the subject matter as it is/ existed, as at the day of making the order. Status quo is about a court of law maintaining the situation or the subject matter of the dispute or the state of affairs as they existed before the mischief crept in, pending the determination of the issue in contention".

21. Accordingly, the following orders shall issue to dispose of the Notice of Motion and the preliminary objection in response thereto; -

- i. The District Land Registrar Kwale proceed as provided under provisions of section 18 and 19 of the *Land Registration Act* and file a report in court within the next 45 days of this ruling.
- ii. The pending further orders of this court, the status quo on the portion of the suit properties subject of this dispute shall be maintained. For the avoidance of doubt there shall be no further constructions or development thereof. Any ongoing construction shall forthwith cease.
- iii. Costs shall be in the cause.

Orders accordingly.

DELIVERED AND DATED AT KWALE THIS 30TH DAY OF MAY, 2024.

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A.E DENA

JUDGE

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

Mr. Jumbale for the Plaintiff

Mr. Otieno for the 1st Defendant

Mrs. Njau for the 2nd and 3rd Defendants

Mr. Daniel Disii - Court Assistant

