



Cephei Trading Limited v Mastermind Tobacco (K) Limited (Environment & Land Case E019 of 2021) [2023] KEELC 15729 (KLR) (15 February 2023) (Ruling)

Neutral citation: [2023] KEELC 15729 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E019 OF 2021
A NYUKURI, J
FEBRUARY 15, 2023**

BETWEEN

CEPHEI TRADING LIMITED PLAINTIFF

AND

MASTERMIND TOBACCO (K) LIMITED DEFENDANT

RULING

1. Before court is a preliminary objection dated May 4, 2022 based on the following grounds;
 1. This honourable court lacks jurisdiction to hear and determine this suit at the first instance as it offends the mandatory provisions of sections 18 and 19 of the Land Registrations Act No 3 of 2012 for reasons that;
 - a. The subject matter of this suit is a boundary issue of LR No 12715/601 (now LR No 12715/14862 and LR No 12715/14863) and LR No 12715/602 which falls within the jurisdiction of the Land Registrar; and
 - b. It is an established principle of law that where there is an alternative remedy and especially where parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order would be granted by courts and this suit does not establish exceptional circumstances for the court's acquiescence of jurisdiction that vests with the Land Registrar at the first instance.
 2. Court redress of a boundary dispute of LR No 12715/601 (now LR No 12715/14862 and LR No 12715/14863) and LR No 12715/602 can only be invoked in an application for judicial review or an appeal, thus this suit filed in this court at the first instance is premature and untenable in law.



3. This suit is fatally defective, misconceived and mischievous or otherwise an abuse of the court process and therefore is unsustainable in the obtaining circumstances.
2. The preliminary objection was canvassed by way of written submissions. On record are the defendant's submissions dated June 14, 2022 and the Plaintiff's submissions dated August 2, 2022.

Defendant's Submissions

3. Counsel for the defendant submitted that the dispute between the parties herein is a boundary dispute as the plaintiff alleges encroachment into his property by the defendant whose property borders the plaintiff's property. Counsel relied on section 18(2) of the Land Registration Act No 3 of 2012 to argue that this court lacks jurisdiction as that provision vests the jurisdiction in the Land Registrar.
4. Reliance was placed on the case of Azzuri Limited vs Pink Properties Limited [2018] eKLR, where the court held that boundary disputes in regard to general boundaries are within the jurisdiction of the Land Registrar. Further, reliance was placed on the cases of Estate Sonrisa Ltd & Another vs Samuel Kamau Macharia & 2 Others [2020] eKLR and Willis Ocholla vs Mary Ndege [2016] eKLR. Counsel argued that to determine if there is encroachment, the court must know the boundaries.
5. It was further submitted that the claim of trespass is not ripe as the actual ground of trespass is not properly defined on the ground. In that regard, counsel referred to the cases of Telkom Kenya Ltd vs County Government of Murang'a [2019] eKLR, Reuben Kioko Mutyaene vs Hellen Kiunga Miriti & 4 Others and Ntalala Eric Mutura & Another (Interested Parties) [2021] eKLR, for the proposition that where the law has granted a government department an obligation, courts ought to allow such departments to do their legal obligations.

Plaintiff's Submissions

6. Counsel for the plaintiff submitted that this court has jurisdiction to determine this suit by dint of article 162 (2) of the Constitution and section 13 of the Environment and Land Court Act. Counsel argued that the preliminary objection did not meet the threshold for a preliminary objection as set out in the case of Mukisa Biscuits Manufacturing Co Ltd vs West End Distributors [1969] EA 696. Further, reliance was placed on the cases of Hassan Ali Jobo & Another vs Suleiman Said Shabal & 2 Others [2014] eKLR and Oraro vs Mbaja [2005], for the argument that a preliminary objection must consist only a pure point of law, where facts are not disputed.
7. Counsel contended that jurisdiction of a court emanates from the law and relied on the cases of Owners of the Motor Vessels Lilian "S" vs Caltex Kenya Limited [1989] KLR and Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others [2012] eKLR.
8. It was contended for the plaintiff that the suit before court was not a boundary dispute but blatant encroachment and trespass on the plaintiff's property by the defendant. Counsel argued that the defence showed that the defendant alleged having purchased the suit property from Embakasi Industrial Projects Limited and that therefore, this was a claim of ownership. Counsel argued that the orders sought by the plaintiff showed that the court has jurisdiction. Counsel referred to the case of Independent Electoral and Boundaries Commission vs Jane Cheperenger & 2 Others [2015] eKLR.

Analysis and Determination

9. I have carefully considered the preliminary objection raised together with submissions filed by both parties. The issues that arise for determination are as follows;
 - a. Whether the preliminary objection is a proper preliminary objection.



- b. Whether the preliminary objection is merited.
10. A preliminary objection is an objection raised in respect of the pleadings filed on pure points of law in regard to a matter whose facts are not in dispute. where legal and factual matters are blurred, then that cannot be a proper preliminary objection.
11. In the case of *Mukisa Biscuits Manufacturing Co Ltd vs West End Distributors* [1969] EA 696, the court held as follows;

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 off the suit. Example are an objection to the jurisdiction of the court or a plead for 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 as follows;

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 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.

12. In the instant matter, the defendant's objection is based on section 18 (2) of the [Land Registration Act](#). The defendant's argument is that the plaintiff's claim is a boundary dispute and therefore the same ought to be heard by the Land Registrar.
13. Paragraphs 3, 4 and 5 of the plaint show that the plaintiff's parcel LR No 12715/601 borders the defendant's parcel LR No 12715/602 and that the plaintiff's claim is that the defendant's parcel 12715/602 has encroached on the plaintiff's parcel No 12715/601 by 0.154 Ha. The allegations that the two properties neighbour each other and that the plaintiff's claim is on where the boundary between LR No 12715/601 and LR No 12715/602 lies is not in contention. I therefore do not agree with the plaintiff's contention that this is not a boundary dispute. It is a boundary dispute. As the defendant has raised an objection based on section 18(2) of the [Land Registration Act](#) in respect of the undisputed facts stated above, it is the finding of this court that the objection raised is a pure point of law and therefore a proper preliminary objection.
14. On whether the objection is merited, I note that the objection is based on section 18 and 19 of the [Land Registration Act](#). Section 18 provides as follows;
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 the 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 situations 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, cap 299.

15. Essentially therefore, the jurisdiction of the Land Registrar in determining boundary disputes is limited to disputes concerning general boundaries, where there are no fixed boundaries. I therefore agree with the reasoning of the case of Azzuri Limited vs Pink Properties Limited [2018] eKLR, where the court held as follows;

22. 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; while disputes pertaining to lands with fixed boundaries may be investigated and possibly resolved simply through a surveyor.

16. In the said case of Azzuri Limited vs Pink Properties Limited (Supra) the neighbouring land in issue were parcels Chembe/Kababamshe/356 and Chembe/Kibabamshe/272. These were parcels registered under the Registered Land Act (repealed) which parcels only had general and not fixed boundaries.
17. In the present suit, the suit properties being LR No 12715/601 and LR No 12715/602 were registered under Registration of Titles Act (repealed). From the evidence of survey plans produced by the plaintiff, the boundaries of the suit properties are fixed with specific measurements endorsed by the director of surveys. It is therefore clear that both parcels herein have fixed boundaries.
18. As provided for in section 18(2) of the Land Registration Act, the jurisdiction of the Land Registrar does not extend to fixed boundaries. Having concluded that the boundaries of the two suit properties herein have fixed boundaries, it is my finding that this dispute is not within the jurisdiction of the Land Registrar.
19. In the premises, the preliminary objection lacks merit and the same is dismissed with costs.
20. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 15TH DAY OF FEBRUARY 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Ms Okumu holding brief for Mr. Okoth for the Defendant/Applicant

Ms Anyango for the Plaintiff/Respondent

Josephine – Court Assistant

