



**IN THE COURT OF APPEAL**

**AT MALINDI**

**(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A.)**

**CIVIL APPEAL NO. 54 OF 2018**

**BETWEEN**

**PATRICK OKEEFF.....APPELLANT**

**AND**

**JONATHAN SAVAGE.....RESPONDENT**

*(An appeal from the Ruling of the Environment and Land Court of Kenya*

*at Malindi (Olola, J.) delivered on 21st March, 2018*

*in*

*E.L.C. No. 134 of 2017.)*

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**JUDGMENT OF THE COURT**

1. The genesis of this appeal is a boundary dispute between the appellant and the respondent. The respondent, who is the Managing Director of Digital Communication Systems Ltd, filed a suit in the High Court at Malindi, stating that the said company is the registered proprietor of two parcels of land known as **L.R. No. Kilifi/Jimba 1138** and **1139** originally sub-divided from **Plot No. Kilifi/Jimba 380**.

2. The appellant, **Patrick Okeeff**, is the registered proprietor of two parcels of land namely, **LR No. Kilifi/Jimba 1189/1190** originally sub-divided from **Plot No. Kilifi/Jimba/397**.

3. The respondent stated that there was a boundary dispute between himself and the appellant over their respective parcels of land. The dispute had lasted more than eleven years. He alleged that the appellant had encroached into his property (actually registered in the name of Digital Communications Systems Ltd) by about 62 metres.

4. The respondent sought a permanent injunction to restrain the appellant, his servants and/or agents from trespassing or encroaching into land parcels Nos. Kilifi/Jimba 1138 and 1139.

5. Pending hearing and determination of the aforesaid suit, the respondent sought an interlocutory injunction against the appellant as aforesaid.

6. In his defence, the appellant contended that the court had no jurisdiction to entertain the suit, arguing that the suit had been filed in violation of *section 18(2)* of the *Land Registration Act No.3 of 2012*.

7. The appellant further stated that the respondent had no capacity to institute the suit since the two parcels of land, Kilifi/Jimba 1138 and 1139 are registered in the name of Digital Communications Systems Ltd.

8. Without prejudice to the foregoing, the appellant denied the alleged acts of trespass and urged the court to dismiss the suit with costs to him.

9. When the respondent's application for interlocutory application was filed, the appellant raised a preliminary objection on grounds that:-

*“i. The Court has no jurisdiction to entertain this suit as the same is brought in direct violation of Section 18(2) of the Land Registration Act No. 3 of 2012.*

*ii. The Plaintiff has no locus standi to bring about this action as the Plaintiff is not the owner of the suit premises.*

*iii. The Supporting Affidavit of Jonathan Savage is defective and all the exhibits annexed thereto are not sealed with the seal of a Commissioner of Oaths in violation of Rule 9 of the Oaths and Statutory Declaration Rules.*

*iv. There is no evidence placed before the Court to suggest the Defendant has violated the Order made by the Registrar on 5th March 2017.*

*v. The Plaintiff has failed to satisfy the conditions necessary for the grant of the Orders of injunction.”*

10. In response, the respondent submitted that the issues raised in the preliminary objection did not meet the threshold set in *Mukisa Biscuit Manufacturing Company Ltd v West End Distributors Ltd [1969] E.A. 696*.

11. In a nutshell, the respondent argued that the Land Registration Act 2012 cannot oust the jurisdiction of the Court; that the court can order an amendment to the plaint to reflect the correct owner of parcels of land Kilifi/Jimba 1138 and 1139; and that the alleged defects in the respondent's affidavit are excusable in terms of *order 19* of the *Civil Procedure Rules*.

12. The learned judge (*Olola, J.*) considered the submissions made by the parties' respective advocates and overruled the preliminary objection. The learned judge held that there was evidence that the Land Registrar had determined the boundaries between the two blocks of land, though not conclusively, and therefore the provisions of *section 18(2)* of the *Land Registration Act* could not oust the Court's jurisdiction; that the plaintiff (respondent herein) was not the owner of land parcels numbers Kilifi/Jimba/1138 and 1139, which were owned by Digital Communications Systems Ltd, as stated in the plaint. Consequently, the learned judge ordered that an application for amendment of the plaint be filed within 30 days from the date of the ruling.

13. As regards the alleged defects in the respondent's affidavit, where it was conceded that the annexure thereon was not sealed with the seal of a Commissioner for oaths, the learned judge construed the violation as a matter of form and not substance and therefore held that the affidavit was competent.

14. Being dissatisfied with the said ruling, the appellant preferred an appeal to this Court on two grounds as follows:-

***“1. That the learned judge erred on the law and facts in finding that the boundaries of the suit property were determined and as such the jurisdiction of the court was not ousted as stipulated under Section 18(2) of the Land registration Act, 2012.***

***2. That the learned judge misdirected himself on the law and facts in ruling that even though the Plaintiff had no locus standi to institute the suit, the same could be cured by striking out the Plaintiff and enjoining the proper party.”***

15. When the appeal came up for hearing, both **Mr. Amadi**, holding brief for **Mr. Kina** for the appellant and **Mr. Ogeto**, holding brief for **Mr. Agina** for the respondent, relied entirely on their written submissions.

16. On their first ground of appeal, the appellant’s counsel referred the Court to **section 18** of the **Land Registration Act, 2012**, which states as follows:-

#### **18. Boundaries**

***“(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, (Cap. 299).”***

17. Counsel submitted that the word “*fixed*” should be read with reference to **section 19(3)** of the **Land Registration Act** which provides that for a parcel of land to be deemed to have fixed boundaries, there should be a note made in the register with reference to a plan verified by the office or authority responsible for survey of land.

18. The appellant’s counsel added that the Land Registrar held a meeting with both parties and received evidence regarding the dispute but he did not fix the boundary as required. Consequently, the trial court lacked jurisdiction and ought to have downed its tools, as was held in ***The Owners of Motor Vessel “Lillian S” v Caltex Oil Kenya Ltd [1989] KLR 1.***

19. Regarding the second ground of appeal, the appellant’s counsel submitted that the suit had been instituted in the name of the wrong person; that the provisions of **order 1 rule 10** of the **Civil Procedure Rules** could only be invoked to order substitution or addition of a party where a suit had been instituted through a bona fide mistake, which was not the case with respect to the respondent’s suit. Counsel relied on ***Dawson (Bradford) Ltd & Others vs Dove & Another [1971] Q.B.330.***

20. With that, the appellant urged this Court to allow the appeal, set aside the impugned ruling; uphold the preliminary objection and award him the costs of the appeal.

21. Responding to the first ground of appeal, the respondent's counsel submitted that the trial court had jurisdiction to determine the matter, in terms of *Articles 162(1)(b) and 165* of the *Constitution of Kenya, 2010* as read together with *section 13(2)* of the *Environment and Land Court Act*.

22. Counsel added that the boundary dispute had been settled by the Land Registrar on paper but on the ground it had not been resolved for over six years. The court therefore had jurisdiction to intervene. Furthermore, the Land Registrar had directed that the *status quo* on the disputed area be maintained until the Ministry of Lands, Housing and Urban Development seeks and obtains an order from the court to correct the erroneously erected boundaries affecting the parcels of land in issue. For over three years the Land Registrar and the Ministry did nothing, while the appellant enjoyed the status, leaving the respondent to suffer.

23. Regarding the second ground of appeal, the respondent's counsel submitted that the learned judge was right in his interpretation of *order 1 rule 10 (2)* of the *Civil Procedure Rules, 2010*. He further cited the holding of this Court in *D.T. Dobie (K) Limited v Joseph Mbaria Muchina & Another [1982] KLR* where *Madan, JA.* stated:-

***“No suit ought to be dismissed unless it appears so hopeless that it 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 the full facts of a case before it.”***

24. The respondent's counsel urged the Court to dismiss the appeal in its entirety.

25. We have carefully considered the record of appeal as well as the submissions on record.

26. Regarding the boundary dispute and the action taken by the Land Registrar, the trial court traced the history of the dispute very well. It observed that the appellant lodged a complaint with the Permanent Secretary several years ago; that the Permanent Secretary sent a team of the Public Complaints and Resolutions Committee to visit the site with a view to resolving the dispute, but the said officials were not able to resolve the dispute; eventually the Land Registrar directed that the *status quo* be maintained until the Ministry obtains a court order to correct erroneously erected boundaries affecting listed parcels of land.

27. It cannot therefore be said that boundaries between the parcels of land had been fully determined. The *status quo* was maintained pending determination of the dispute by court.

28. As rightly pointed out by the trial judge, to hold that the trial court lacked jurisdiction would have been improper in the circumstances. We find no basis of interfering with the learned judge's decision.

29. We now turn to the second ground of appeal. It is not disputed that parcels of land numbers 1138 and 1139 are owned by Digitel Communications System Ltd and not the respondent as pleaded. The learned judge was of the view that the defect could be corrected by way of an amendment to the plaint, instead of striking out the entire suit. He therefore ordered that an amendment to the plaint be effected. In so holding, the learned judge exercised his discretion. Did that amount to injudicious exercise of discretion" We do not think so. Ndichu Associates & Company Advocates drew the plaint on behalf of the respondent. It would have been unjust to punish the respondent for a basic error of law made by the respondent's advocates that could be corrected without occasioning prejudice to the appellant.

30. We find that the trial court was perfectly entitled to invoke the provisions of *order 1 rule 10(2)* of the *Civil Procedure Rules* to

order amendment to the plaint to reflect the real owner of the property. The provisions of *Article 159(2)(d)* of the *Constitution of Kenya, 2010* require that justice be administered without undue regard to procedural technicalities.

31. All in all, we find this appeal lacking in merit and dismiss it with costs to the respondent.

**Dated and delivered at Nairobi this 24<sup>th</sup> day of April, 2020.**

**D.K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original*

*Signed*

**DEPUTY REGISTRAR**



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