



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 246 OF 2018**

**KARISA NGARI KOMBE.....PLAINTIFF**

**-VS-**

**1. ESTHER NZINGO KALUME**

**2. BERNARD OCHIENG OLUOCH.....DEFENDANTS**

**RULING**

1. This ruling is in respect of the 1<sup>st</sup> and 2<sup>nd</sup> defendants preliminary objection dated 22<sup>nd</sup> February 2019 seeking to have the suit struck out with costs on a point of law that by virtue of section 18(2) Land Registration Act, 2012 the Honourable Court lacks jurisdiction as it is expressly barred from entertaining this action for reason that from the plaint dated 15<sup>th</sup> October 2018, it is not shown the boundaries of the alleged Plot Number MN/II/3858 have been fixed or noted in the register.

2. The preliminary objection was canvassed by way of written submissions. In their submissions dated 1<sup>st</sup> October 2020 and filed on 5<sup>th</sup> October, 2020 the 1<sup>st</sup> and 2<sup>nd</sup> defendant submitted that the objection meets the threshold expressed in the case of **Mukhisa Biscuit Manufacturers Ltd –v- West End Distributors Ltd (1969) EA 696** which principle were restated in **Independent Electoral & Boundaries Commission –v- Jane Cheperenger & 2 Others (2015)eKLR**. The defendants submitted that in their view the plaintiff's case is principally a boundary issue and that from the plaint the court has not been shown any fixed boundaries of PLOT MN/III/3858 and the cadastral map or any plan of the said plot other than the averment that the beacons was erected by the 1<sup>st</sup> defendant's deceased brother. The defendants contend that in the circumstances, the court must down its tools by virtue of Section 18 (2) of the Land Registration Act 2012. The defendants submitted that boundary demarcation can only be made by the Land Registrar and no one else, including the 1<sup>st</sup> defendant's deceased brother. That the court has not been told how it can possibly locate the plaintiffs' alleged plot from the 3<sup>rd</sup> defendant's share. The 1<sup>st</sup> and 2<sup>nd</sup> defendants submitted that the court cannot assume jurisdiction on a portion at large. That if an order were to attach to such a portion it would be futile and difficult to implement. The 1<sup>st</sup> and 2<sup>nd</sup> defendants urged the court to uphold the preliminary objection and decline jurisdiction as the dispute if at all, belongs elsewhere before it can escalate to this court. The 1<sup>st</sup> and 2<sup>nd</sup> defendants relied on the case of **George Kamau Macharia –v- Dexka Limited (2019)eKLR**.

3. In his submissions dated 26<sup>th</sup> October 2020 and filed on 27<sup>th</sup> October 2020, the plaintiff submitted that the issues raised in the plaint are issues of demolition, eviction and adverse possession and not a boundary dispute. It is the plaintiff's submission that the defendants are taking a short cut to deny the plaintiff's claim and that the matter before court cannot be dealt with by way of a preliminary objection.

4. I have considered the pleadings the preliminary objection raised and the rival submissions made. The main ground of the objection is that the plaintiff's suit against the defendants is over a boundary dispute and that Section 18 (2) of the Land Registration Act ousts the jurisdiction of this court from entertaining boundary disputes where boundary disputes have not been determined.

5. By the plaint dated 15<sup>th</sup> October 2018 and amended on 17<sup>th</sup> July, 2019, the plaintiff has brought the suit against the defendants seeking the following reliefs:

**a. A permanent injunction restraining the defendants by themselves, servants and/or agents from demolishing the house and evicting the plaintiff from PLOT NO. MN/III/3858 SITUATED WITHIN MTWAPA.**

**b. A declaration that the portion of land occupied by the plaintiff and registered under the 1<sup>st</sup> defendant being LR. NO. 10215(original Number 3860/2) belong to the plaintiff by virtue of adverse possession.**

**c. Costs of the suit with interest thereon at court rates.**

**d. Such other or further reliefs as this honourable court may deem fit and proper.**

6. In their amended statement of defence dated and filed on 13<sup>th</sup> February, 2019, the 1<sup>st</sup> and 2<sup>nd</sup> defendants contend that to the extent that the plaintiff has not demonstrated that the boundaries of the alleged PLOT NUMBER MN/III/3858 are noted in the register this court is expressly barred from entertaining this action by virtue of Section 18 (2) of the Land Registration Act, 2012. The 1<sup>st</sup> and 2<sup>nd</sup> defendants admit paragraph 4 of the plaint only to the extent that the plaintiff occupies a portion of land that abuts the 1<sup>st</sup> defendant's parcel known as PLOT NUMBER 10215/III/MN (ORIGINAL NUMBER 3860/2 SECTION III MAINLAND NORTH. In paragraph 8 of the amended statement of defence, the 1<sup>st</sup> defendant avers that the plaintiff without any colour of right has erected temporary/semi-permanent structures that overlap the boundary beacons and encroach into the 1<sup>st</sup> defendant's PLOT NUMBER 10215/III/MN (ORIGINAL NUMBER 3860/2/SECTION III MAINLAND NORTH).

7. In the case of Mukhisa Biscuits Manufacturing Co. Ltd (supra), Law JA stated as follows:

*“So far as I am aware, 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 objection may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to this suit to refer the dispute to arbitration.”*

8. In the same case, Sir Charles Newbold, President stated as follows:

*“A preliminary objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on the assumption that all the 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.”*

9. In this case, the plaintiff's claim is for a permanent injunction and a declaration that he is entitled to the portion he is occupying by virtue of adverse possession. From the pleadings, it cannot be said that the case is purely one of a boundary dispute as submitted by the 1<sup>st</sup> and 2<sup>nd</sup> defendants. From the pleadings the issues are highly contested. I find and hold that the notice of preliminary objection dated 22<sup>nd</sup> February 2019 does not raise a pure point of law as it requires some investigations of some facts. Furthermore, the plaintiff's claim also includes a claim for adverse possession. In my view, these are matters that are fit and proper arguments in the substantive suit. For the foregoing I am inclined to dismiss the notice of preliminary objection dated 22<sup>nd</sup> February, 2019 with costs.

**DATED, SIGNED and DELIVERED at MOMBASA virtually due to COVID-19 Pandemic this 15<sup>th</sup> day of December 2020**

\_\_\_\_\_  
C.K. YANO

JUDGE

**IN THE PRESENCE OF:**

Yumna Court Assistant

**C.K. YANO**

**JUDGE**



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