



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MILIMANI COURT NAIROBI**

**ELC CASE NO. 1429 OF 2014**

**ADEN ABDULLAHI MOHAMED.....PLAINTIFF**

**=VERSUS=**

**GEORGE DOMINIC OTIENO.....1<sup>ST</sup> DEFENDANT**

**MAXWELL OKOTH MUCHURA.....2<sup>ND</sup> DEFENDANT/ADMINISTRATOR**

**LAW RINE ODERA.....3<sup>RD</sup> DEFENDANT/ ADMINISTRATOR**

**RULING**

**(Notice of Motion dated 20th July, 2021)**

**INTRODUCTION**

1. The Notice of Motion by the 2nd and 3rd Defendants/Applicants prays for striking out of the Plaintiff's suit on the ground that the suit is premature. The Applicants' contention is that the Plaintiff has not exhausted the laid down procedure as set forth in Section 18 of the Land Registration Act, No. 3 of 2012. The Applicants pray that the costs of the Application be borne by the Plaintiff.

2. On the face of it, the Notice of Motion enumerates the grounds upon which it is premised as follows:-

*(a) The dispute herein relates to the boundaries of the parcels of Land Reference Nos. 19952/188 and 19952/185.*

*(b) In a situation as this, the dispute should have been handled in the manner provided for in Section 18 of the Land Registration Act No. 3 of 2012.*

*(c) The Section forbids any Court from entertaining any action or other proceedings with a boundary dispute until the matter has been fully exhausted at that level.*

*(d) In the circumstances it is only fair that the suit herein be struck-out.*

3. The Application is further supported by the Affidavit of the 2nd Defendant/Applicant which reiterates the grounds on the face of the Application. The deponent terms the suit defective, since it relates to a boundary dispute and ought therefore to have been

handled by the Land Registrar first. He prays that it be struck out.

4. The 1st Defendant supports the Application by his co-defendants.

5. The Plaintiff's response was by way of grounds of opposition dated 9th September, 2021. The Plaintiff raises Five (5) grounds in opposition, namely;

*a) The Application is misconceived, incompetent, defective, frivolous and an abuse of the court process.*

*b) The Plaintiff has demonstrated a reasonable cause of action and a triable claim against the Defendants.*

*c) The Applicants have not demonstrated sufficient grounds to warrant striking out of this suit under Order 2 Rule 15 of the Civil Procedure Rules, 2010.*

*d) The Applicants have not properly moved to court for orders to strike out this suit on grounds of lack of jurisdiction.*

*e) The Applicants have misinterpreted the provisions of Section 18 of the Land Registration Act by failing to read the section in its entirety together with other enabling provisions.*

#### **DIRECTIONS ON THE HEARING OF THE APPLICATION**

6. The Court gave directions that the Application be canvassed by way of written Submissions. All the parties filed their written submissions.

#### **THE 2<sup>ND</sup> AND 3<sup>RD</sup> DEFENDANTS/APPLICANT'S SUBMISSIONS**

7. In their written submissions dated 20th September, 2021, the Applicants merely restated the averments in their application that the dispute is in relation to boundaries between two parcels of land known as LR 19952/188 & 19952/185 which are adjacent to one another. Therefore, the dispute ought to have been handled as provided for under Section 18 of the Land Registration Act hence the prayer to strike out the suit. In regard to the grounds of opposition, by the Plaintiff, the Applicants termed them as misplaced.

#### **SUBMISSIONS BY THE 1<sup>ST</sup> DEFENDANT**

8. On his part, the 1st Defendant through his submissions dated the 27th September, 2021 supported the Application by the 2nd and 3rd Defendants and urged the court to strike out the suit with costs.

9. On the question whether the Plaintiff's suit is in contravention of the provisions of Section 18(2) of the Land Registration Act, the 1st Defendant answered in the affirmative. He cited an observation in the case of **Willis Ocholla vs Mary Ndege (2016) eKLR** where the court stated that proprietors of registered land with a boundary dispute are obligated to first seek redress or solution from the Land Registrar before moving or escalating the dispute to the court. Where a party moves to court without first seeking redress from the Land Registrar, the Court has to remind him that he/she moved to court prematurely. The Court has no jurisdiction until after the Land Registrar's determination.

10. The 1st Defendant submitted that the proceedings herein were commenced prematurely. The Court therefore does not have the jurisdiction to determine this matter.

11. He further cited the case of **747 Freighter Conversion LLC –vs.- One Jet One Airways Kenya Limited & 3 others (2014) eKLR** where Havelock J (as he then Was,) stated that No party may just waive the Rules of Procedure to itself on the mistaken belief that justice must be done without due regard to technicalities.

12. The 1st Defendant's submission was that the Court lacks jurisdiction to hear the suit in light of the mandatory requirements of Section 18(2) of the Land Registration Act.

### **THE PLAINTIFF'S SUBMISSIONS**

13. The Plaintiff's submissions are dated 1st October, 2021. The Plaintiff opposes the Application by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

14. The Plaintiff submits that the titles to the parcels of land the subject matter of this suit are titles issued under the now repealed, Registration of Titles Act - RTA (Cap 281 Laws of Kenya). The copies of the titles form part of the record of the court as they are in the Plaintiff's as well as the defendants' bundle of documents. Accordingly, that their boundaries are fixed and defined as opposed to titles issued under the repealed Registered Land Act – RLA, Cap 300, Laws of Kenya. Therefore, even if there was any boundary dispute arising it would be exempt from the provisions of Section 18 of the Land Registration Act.

15. In support of his submissions, the Plaintiff cited the Court of Appeal case of **Azzuri Limited vs Pink Properties Limited (2018) eKLR**, where the court stated that boundary disputes pertaining to general boundaries are the ones to be referred to the Land Registrars while those with fixed boundaries are or may be investigated and possibly resolved through a Surveyor.

16. The Plaintiff also cited the case of **George Kamau Macharia vs Dexta Limited (2019) eKLR** where ELC Judge Kemei stated that Section 18 of the Land Registration Act gives the Land Registrar the mandate to resolve boundary disputes of Land with general boundaries (only), before the dispute is escalated to the Court.

17. The Plaintiff too cited the case of **Abdalla Mohammed Salim & Another vs Omar Mohamud Shallo & Another (2014) eKLR** where the court clearly distinguished between general and fixed boundaries.

18. The Plaintiff further submitted that his case as stated in the Plaint filed in court was not merely on the issue of boundaries. He also pointed out that the 1<sup>st</sup> Defendant too had even filed a Counter-claim dated 7th September, 2015 seeking permanent injunctive orders against him.

19. The Plaintiff therefore prays for the dismissal of the 2nd and 3rd Defendants' Application with costs.

### **ISSUES FOR DETERMINATION**

20. The Court is of the opinion that the issues for determination in regard to the Notice of Motion Application dated 6th July, 2021 are as follows:-

*a) Whether the Plaintiff's cause of action is a boundaries disputes.*

*b) Whether a boundaries dispute (if any) involving L.R. 19952/ 188 & 19952/185 falls within the ambit of Section 18(2) of the Land Registration Act.*

*c) Whether the Court has jurisdiction to entertain the Plaintiff's suit.*

*d) Who should bear the costs of the Application.*

### **ANALYSIS AND DETERMINATION**

21. The Court will proceed to consider the issues in the order listed above;

#### **A. WHETHER THE PLAINTIFF'S CAUSE OF ACTION IS A BOUNDARIES DISPUTES**

22. The Plaintiff's case is stated in his Complaint dated 10th November, 2014 filed in Court on the 11<sup>th</sup> November, 2014. His claim, in my opinion is expressed in paragraphs 6, 7 & 8 thereof. He pleads that sometimes in 2013, the 1st and 2nd Defendants wrongfully entered into his land, took possession and have remained in possession thereof; thereby trespassing on his land. That they have continued to trespass and have since erected a permanent structure on the land.

23. The Plaintiff in Paragraph 7 further avers that he has been denied use and enjoyment of the suit property by the Defendants' trespass and wrongful occupation. He also accuses the Defendants of damaging, wasting, destroying and degrading the property amongst other allegations.

24. The Plaintiff therefore seeks for various reliefs including vacant possession, a permanent injunction and general damages for trespass.

25. The 1st Defendant on the other hand filed a Statement of Defence and Counter-claim. He denies the Plaintiff's allegations of trespass and avers that he is in occupation of his own plot and not the Plaintiff's.

26. The 1st Defendant in his Counter-claim accuses the Plaintiff of trying to evict him from his own land. The 1st Defendant states that he has already constructed a home on the land. He prays for a declaration that he is the rightful owner of the parcel of land and a permanent injunction restraining the Plaintiff from evicting him from his land LR. NO. 19952/188 Nairobi.

27. A cause of action as defined in the case of **DT Dobie & Co. (K) Ltd. vs Muchira (1982) KLR** is "*an act on the part of the Defendant which gave the Plaintiff a cause of complaint.*"

28. In trying to establish the cause of action of the Plaintiff in this case, I have no alternative but to look into his pleadings; off course without going into the merits or otherwise of any allegations therein at this stage. My perusal of the Complaint indicates that the Plaintiff's complaints against the Defendants include wrongful entry into his land, continued unlawful possession and trespass, which actions were aggravated by the Defendant's building of a permanent house on the said land. The Plaintiff also complains against the Defendants for alleged damage, wastage, destruction and degradation of his property occasioned by the actions of the Defendant.

29. From the foregoing, the court's determination on the issue whether the Plaintiff's cause of action is a boundaries dispute is that, it is not.

**B. WHETHER A BOUNDARIES DISPUTE (IF ANY) INVOLVING PARCELS OF LAND L.R. 19952/188 & L.R. 19952/185 FALLS WITHIN THE AMBIT OF SECTION 18(2) OF THE LAND REGISTRATION ACT**

30. The Applicants and the 1st Defendant in their submissions aver that the dispute in this Suit is a boundaries dispute in relation to the boundaries between LR 19952/188 and LR 19952/185. The Court has already expressed itself on the cause of action in this matter as stated in the Plaintiff's Complaint.

31. The Plaintiff attached a copy of his certificate of title to his Complaint i.e. Title LR 19952/185. The 1st Defendant too attached a copy of the Certificate of Title for the parcel L.R. No. 19952/188 to his statement of defence. It is clear that both titles (referred above) are registered under the now repealed RTA, Chapter 281 of the Laws of Kenya. The Applicants' basis for their application to strike out the Plaintiff's suit is that since the cause of action is a boundaries dispute it should have been referred to the Land Registrar for determination first. The Plaintiff's response is that **EVEN** if there was a boundaries dispute it would not fall within the mandate of the Land Registrar because boundaries for parcels of land registered under the repealed RTA are "fixed boundaries" and not, "general boundaries."

32. The Plaintiff cited the case of **George Kamau Macharia vs. Dexta Ltd (2019) eKLR** where ELC Judge Kemei went ahead to distinguish between "*Fixed boundaries*" and "*General boundaries.*" She held that the Registrar's mandate is only over general boundaries. For parcels of land registered under the repealed RTA, their boundaries are fixed and defined. The Registrar has no mandate over such fixed boundaries.

33. ELC Justice Angote in **Azzuri Limited vs. Pink Properties Limited (2017) e KLR** was of a similar view in respect to the Land Registrar's mandate under Section 18 of the Land Registration Act. The mandate is only over general boundaries not the fixed boundaries.

34. The Court of Appeal upheld the decision of Justice Angote in **Azzuri Limited vs. Pink Properties Limited (2018) eKLR**.

35. I am persuaded by the decisions of Justices Angote and Kemei. I am also guided by the Court of Appeal decision in the Azzuri case. The boundaries of the two plots the subject matter of this suit are indeed fixed boundaries since both titles are registered under the repealed RTA. In a nutshell, even if the Plaintiff's cause of action was a boundaries dispute, the boundaries of the parcels of land mentioned in the pleadings are fixed boundaries. The Land Registrar would have no mandate over such a dispute.

#### **A. WHETHER THE COURT HAS JURISDICTION TO ENTERTAIN THE PLAINTIFF'S SUIT**

36. From the Court's findings in respect to the above two issues, it goes without saying that the Court is duly seized of this matter and has the jurisdiction to consider and determine this suit.

37. I would at this juncture go ahead to state that from my reading of Section 18 of the Land Registration Act, 2012, and the authorities referred above, *even if the Court were persuaded to the contrary, that the Land Registrar had the mandate to consider a boundary dispute, the suit before a Court would be stayed awaiting the outcome of the Registrar's determination; not struck out.*

#### **B. WHO SHOULD BEAR THE COSTS OF THE APPLICATION**

38. Costs follow the cause.

#### **CONCLUSION**

39. In conclusion, the Court notes that this suit was filed way back in 2014. The defendants came on record in 2015. Why did they wait for six years to raise their objection to the jurisdiction of the Court? A question of jurisdiction, as stated in the well known case of **Owners of Motor Vessel Lilian S –vs- Caltex Kenya Ltd, (1989) KLR**, ought to be raised at the earliest opportunity so that where the Court lacks jurisdiction, it downs its tools at that early stage and allow the matter to be determined at the appropriate forum. That would definitely save Court's and litigants' time.

40. Advocates, who are officers of the Court have an obligation to assist the Courts of this country in realizing the overriding objective of facilitating just, expeditious, proportionate and affordable resolution of civil disputes.

41. The Court's finding is that the Notice of Motion Application dated the 20th July, 2021 lacks merit and is hereby dismissed with costs to the Plaintiff.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF OCTOBER, 2021.**

**M.D. MWANGI**

**JUDGE**

In the Virtual Presence of :-

Ms.Karumba for the Plaintiff

Ms. Atsieno for the 1<sup>st</sup> Defendant

None appearance for the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants/Applicants

Court Assistant: Hilda

**M.D. MWANGI**

**JUDGE**



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