



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT KISUMU**

**PETITION NO. E 016 OF 2021**

**IN THE MATTER OF ALLEGED INFRINGEMENT AND VIOLATION OF  
ARTICLES 1,2,3,10,19,20,21,22,23,24,26,27,28,29,31,40,43,45,47,60,61,62,63,64,162  
AND 259 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE LAND ACT NO. 6 OF 2012**

**AND**

**IN THE MATTER OF THE ENVIRONMENT AND LAND COURT ACT, 2011**

**BETWEEN**

**ADAH ANYANGO OMBERE..... PETITIONER/APPLICANT**

**(Suing as the Executor of the Estate of the Late Fredah Achola Omolo)**

**VERSUS**

**KENYA RAILWAYS CORPORATION ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF KISUMU..... 2<sup>ND</sup> RESPONDENT**

**THE CABINET SECRETARY FOR**

**MINISTRY OF INTERIOR AND COORDINATION**

**OF NATIONAL GOVERNMENT..... 3<sup>RD</sup> RESPONDENT**

**THE CABINET SECRETARY LAND, HOUSING**

**AND URBAN DEVELOPMENT..... 4<sup>TH</sup> RESPONDENT**

THE HONOURABLE ATTORNEY GENERAL..... 5<sup>TH</sup> RESPONDENT

THE CHIEF LAND REGISTRAR.....6<sup>TH</sup> RESPONDENT

## RULING

### BRIEF FACTS

The 1<sup>st</sup> Respondent herein filed a Notice of Preliminary Objection dated 5<sup>th</sup> July 2021 seeking to have the Application and Petition of the Petitioner/Applicant be struck out for lack of jurisdiction on grounds that the Application offends the provisions of section 7 of the Civil Procedure Act as a similar Application and suit was dismissed in Tamu Land Case Number E008 of 2021. That Tamu Land Case Number E008 of 2021 was dismissed in Ruling dated 27<sup>th</sup> April 2021 on account of lack of jurisdiction. That these Honourable lacks the jurisdiction to hear and determine the Petition and Application as filed as they offend the provisions of section 18(2) of the Land Registration Act which gives the Land Registrar the primary Jurisdiction to determine boundary disputes. That the Application and Petition as filed amount to forum shopping and an abuse of the court process. The Preliminary Objection was canvassed by way of written submissions.

### **Petitioner's Submissions**

The Petitioner herein filed written submissions on 14<sup>th</sup> January 2022 where she stated that the Preliminary Objection is frivolous, vexatious and an abuse of the court process. That there was a similar case at Tamu Law Courts and the 1<sup>st</sup> Respondent has not proved the existence of such a case or the parties and the subject matter. The Petitioner relied in the case of **Wensley Barasa v Immaculate Awino Abongo & Another (2020) eKLR**.

In the present case which the 1<sup>st</sup> Respondent relied on the principle of res judicata and has not placed any evidence of the other case they referred to in the Preliminary Objection. That since the 1<sup>st</sup> Respondent's Preliminary Objection required proof or evidence to substantiate it, it falls short of the test required for Preliminary Objection as it delves into factual matters and deviates from the legal form of a Preliminary Objection which should be purely based on a point of law. The Petitioner relied in the case of **Engineer E.M. Kithimba T/A Kithimba Associates Consulting Engineers v Attorney General & Another (2014) eKLR**.

It was the Petitioner's submission that even if there existed a case in Tamu Land Case number E008 of 2021, this present Petition does not in any way violate the provisions of section 7 of the Civil Procedure Act. It was stated that according to paragraph 2 of the Preliminary Objection, the 1<sup>st</sup> Respondent has stated that the court in Tamu Land Case No. E008 of 2021 dismissed the case in a ruling on account of lack of jurisdiction and therefore the court did not qualify as a competent court as per the provisions of section 7 of the Civil Procedure Act as it lacked the jurisdiction to hear that matter.

The Petitioner submitted that the case in Tamu Court was dismissed on a technicality and was not determined on merit and relied in the case of **MWK vs AMW (2016) eKLR**. On paragraph 3 of the Preliminary Objection, it was the Petitioner's submission that the Petition and the Application does not violate the provisions of section 18(2) of the Land Registration Act, 2012. That in compliance with the provisions of section 18(2) of the said Act, the Petitioner engaged the Land Registrar to conduct a survey on the property to ascertain the actual boundaries which would solve the dispute but the Land Registrar ignored and/or refused to act on her request.

That the Petitioner has enjoined the Land Registrar as a Respondent in this matter and in the preservation of the Land Registrar's jurisdiction as she seeks for an order in the Petition that the Land Registrar to conduct an official survey over land parcel number Koru Settlement Scheme/555 to ascertain the property's actual boundaries and file a report in court within 30 days from the date of the order. That the report of the Land Registrar will be crucial in this Honourable Court's determination of the constitutional questions raised by the Petitioner and also the extent of the violations of the Petitioner's constitutional rights. It was the Petitioner's submissions that there was no violation of the provisions of section 18(2) of the Land Registration Act, 2012 by the Petitioner.

The Petitioner further stated in her submissions that the Petition raises serious constitutional issues that go beyond the boundary dispute which cannot be overlooked. The Petitioner relied in the case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited Civil Appeal No. 50 of 1989 eKLR** and submitted that this court has jurisdiction to hear and determine this case.

The Petitioner therefore prayed that the Preliminary Objection be dismissed with costs as it lacks merit.

### **1<sup>st</sup> Respondent's Submissions**

The 1<sup>st</sup> Respondent filed its submissions on 25<sup>th</sup> January 2022 where the following issues were raised for determination:

#### **a) Whether the court should uphold the Preliminary Objection.**

**It was the 1<sup>st</sup> Respondent's submission that Tamu CMELC No. 8 of 2021 Adah Anyango Ombere vs Kenya Railways Corporation and the National Land Commission having been dismissed, it is not open to the Petitioner to file a similar suit seeking the same remedies. That the learned Magistrate in Tamu case found that *"the Preliminary Objection raised by the 1<sup>st</sup> Defendant has merit. The court does not have jurisdiction to entertain this claim by virtue of section 18(2) of the Land Registration Act and the suit is accordingly struck with costs."***

**It was the 1<sup>st</sup> Respondent's submissions that the remedies sought in Tamu CMELC No. 8 of 2021 Adah Anyango Ombere vs Kenya Railways Corporation and the National Land Commission are similar to the remedies being sought by the Petitioner in the present Petition and therefore this amounts to res judicata. That if the Petitioner felt that the Registrar has taken long to conduct the survey, she ought to have sought orders of mandamus compelling the Registrar to conclude the process.**

**It was further stated that the Petitioner has not shown any attempt to obtain a date from the Registrar as such matters are lodged with the Registrar and a date taken for the site visit. That the doctrine of res judicata is set out in section 7 of the Civil Procedure Act ousts the jurisdiction of a court to try any suit or issue which had been finally determined by a court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title. The 1<sup>st</sup> Respondent submitted that when it comes to general boundaries, section 18(2) of the Land Registration Act provides that the dispute should be submitted to the Land Registrar and relied in the case of *George Kamau Macharia v Dexka Limited (2019) eKLR*.**

**It was the 1<sup>st</sup> Respondents prayer that the instant suit be struck out for want of jurisdiction.**

### **Analysis and Determination**

The Petitioner herein filed a Petition together with an Application on 2<sup>nd</sup> June 2021 where she alleged that at all material times, land parcel number KORU SETTLEMENT SCHEME/555 belonged to Freda Achola Omolo (deceased) whose estate is being represented by the Petitioner. That the suit property was transferred to the late Freda Achola Omolo in the late 1960s and a title was issued to her where she took possession of the property. It is the Petitioner's case that on 7<sup>th</sup> February 2021, security officers acting on instructions of the 3<sup>rd</sup> Respondent, officials of the 2<sup>nd</sup> Respondent and other state officials of the Respondent wrongly descended on the suit property and wrongfully proceeded to illegally, unlawfully, forcefully and violently demolished the Petitioner's family's fences and buildings claiming that the Petitioner had encroached on the 1<sup>st</sup> Respondent's land.

The 1<sup>st</sup> Respondent herein filed a Preliminary Objection based on grounds that the Petitioner's Application offends section 7 of the Civil Procedure Act as a similar Application and suit was dismissed in Tamu Land Case Number E008 of 2021 on account of lack of jurisdiction, that this court lacks jurisdiction to hear and determine the Petition and Application as filed as they offend the provisions of section 18 (2) of the Land Registration Act which gives the Land Registrar the primary jurisdiction to determine boundary disputes and that the Application and the Petition amount to forum shopping and an abuse of the court process.

In the case of *Quick Enterprises Ltd.. Vs.. Kenya Railways Corporation, Kisumu HCCC No.22 of 1999* the Court held that: -

***"When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings."***

In the case of *Oraro vs. Mbaja [2005] 1 KLR 141 Ojwang, J* (as he then was) expressed himself as follows; -

*“.....a “Preliminary Objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”*

Section 7 of the Civil Procedure Act Cap 21 which provides that:

**“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”**

In determining whether a matter is *res judicata* it was summarized in **Bernard Mugo Ndegwa -vs- James Nderitu Githae and 2 Others (2010) eKLR**, as follows that:

- i. The matter in issue is identical in both suits;**
- ii. The parties in the suit are the same;**
- iii. Sameness of the title/claim;**
- iv. Concurrence of jurisdiction; and**
- v. Finality of the previous decision.**

In the case of *E.T vs Attorney General & Another (2012) eKLR* it was held that:

*“The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi Vs National Bank of Kenya Limited and Others (2001) EA 177 the court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J., in the case of Njangu vs Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic fact lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....”*

I have looked at the Ruling in Tamu **CMELC No. 8 of 2021 Adah Anyango Ombere vs Kenya Railways Corporation and the National Land Commission** and I do confirm that the matter is *res judicata* as the parties are the same with the present suit save for the fact that the Petitioner herein has added other parties, the matter in issue is the same as it involves a boundary dispute and the subject matter being land parcel number KORU SETTLEMENT SCHEME/555 is the same as the present suit. It is stated in the Ruling that the Plaintiff in Tamu **CMELC No. 8 of 2021 Adah Anyango Ombere vs Kenya Railways Corporation and the National Land Commission** pleaded that there is a shared boundary between land parcel number KORU SETTLEMENT SCHEME/555 and the land belonging to the 1<sup>st</sup> Defendant and also pleaded that there are survey maps which show the boundaries over the parcels of land and the 1<sup>st</sup> Defendant had trespassed the boundary and encroached over the Plaintiff’s land.

In the present case, the Petitioner in her Petition has alleged that the 1<sup>st</sup> Respondent has encroached in her parcel of land by illegally, unlawfully, forcefully and violently demolished the Petitioner’s family’s fences and buildings. I am of the view that the Petitioner

herein is trying to bring to court in another suit and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. This court is of the view that the matter in **Tamu CMELC No. 8 of 2021 Adah Anyango Ombere vs Kenya Railways Corporation and the National Land Commission** and the present suit are the same being a boundary dispute that ought to be determined by the Land Registrar.

Section 18 of the Land Registrar Act No. 3 of 2012 provides as follows: -

**18. (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.**

Section 19 of the Land Registrar Act No. 3 of 2012 provides as follows: -

**“19. (1) If the Registrar considers it desirable to indicate on a filed 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.**

In the case of **George Kamau Macharia v Dexka Limited [2019] eKLR** the court held as follows:

**“From the above provisions of the law, it is manifestly clear that the above section gives the mandate to the Land Registrar to resolve boundary disputes of land with general boundaries. Registry Index Map (RIM) only indicates approximate boundaries and the approximate situation on the ground. Even if this Court was to hear and determine this matter it will still require the input of the Land Registrar. The framers of section 18(2) of the Land Registration Act placed this matter before the Land Registrar who has the technical advice and resources of the District Surveyor to determine and ascertain the boundaries. It is trite law that where the law has given a legal obligation to a department of Government, it is important for the Court to let that department proceed to meet its legal obligations. In this case the office of the Land Registrar is mandated to deal with the general boundary dispute first before the same is escalated to the Court. It is the view of this Court that the dispute is prematurely before the Court.”**

I have looked at the Pleadings herein and I have established that the Petition and the Application is a boundary dispute which ought to be determined by the Land Registrar. This court therefore lacks jurisdiction to hear and determine the same. In the upshot, this court upholds the Preliminary Objection and this suit is hereby struck out with costs to the 1<sup>st</sup> Respondent.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 31<sup>ST</sup> DAY OF MARCH 2022**

**ANTONY OMBWAYO**

**JUDGE**

**This ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2019.**



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