



Birgen (Suing as the legal administrator ad litem of the Estate of the Late David Kipketer Birgen) v Elgeyo Border Investment Limited & another (Environment & Land Case E036 of 2022) [2023] KEELC 17209 (KLR) (16 March 2023) (Ruling)

Neutral citation: [2023] KEELC 17209 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE E036 OF 2022
EO OBAGA, J
MARCH 16, 2023

BETWEEN

ISAACK KIPLAGAT BIRGEN (SUING AS THE LEGAL ADMINISTRATOR AD LITEM OF THE ESTATE OF THE LATE DAVID KIPKETER BIRGEN) PLAINTIFF

AND

ELGEYO BORDER INVESTMENT LIMITED 1ST DEFENDANT
KIPLAGAT KIMARU BONGOI 2ND DEFENDANT

RULING

1. This is a ruling in respect of two separate preliminary objections filed by the Defendants. The first preliminary objection is undated but was filed on July 8, 2022. The same raises the following grounds: -
 - 1) The suit offends the provision of section 38(1) of the [Land Act 2012](#).
 - 2) The suit offends the provision of section 3(3) of the [Law of Contract Act](#).
 - 3) The Plaintiff lacks the Locus standi to commence and pursue the suit and the entire Plaintiff's proceedings are totally defective.
 - 4) The suit is bad in law and is an abuse of the court process and ought to be struck out in the first instance with costs.
2. The second preliminary objection is dated September 22, 2022 and raises the following grounds: -
 - 1) That the said application offends section 6 of the [civil Procedure Act](#) as the matter is still pending and awaiting determination by a court of competent jurisdiction in Eldoret CMELC No E064 of 2022.



3. Besides the two preliminary objections, there is a notice of motion filed by the Plaintiff which seeks injunctive orders against the Defendants. Though the court had directed that the parties file written submissions on both the preliminary objections as well as the notice of motion, I will only deal with the preliminary objections in this ruling for if the same are upheld, that will dispose of the suit as well as the notice of motion.

Background

4. The Plaintiff herein is son of David Kipketer Birgen (Deceased). The Plaintiff holds a Limited grant of letters of administration ad litem in respect of the Estate of the Deceased. The Deceased was in the process of purchasing 3.452 hectares out of Elgeyo Border Wheat Farm LR No 6802 and 75557/2 (provisional No E146). The Deceased had paid a total of Kshs 10,750,000/= towards the purchase price.
5. For reasons known to the plaintiff, there was no sale agreement entered into between the Deceased and the 2nd Defendant. It was later agreed that the 2nd Defendants refunds the Estate of the Deceased a sum of Kshs 6,250,000/= as the suit property was said to be valued at Kshs 4,500,000/= The second Defendant has since refunded the Estate Kshs 3,000,000/= leaving a balance of Kshs 3,250,000/=
6. The plaintiff contends that the 1st Defendant has since sold the suit property to the 2nd Defendant who knew well that the Deceased had purchased the same.
7. It turned out that the 1st Defendant had sued the Plaintiff's brother in the Chief Magistrate's court at Eldoret in E&L Case No E064 of 2022. It is this failure to enter into a sale agreement on the part of the Deceased and the filing of E&L suit No E064 of 2022 which triggered the two preliminary objections.

Analysis and Determination

8. I have considered the two preliminary objections vis-a-vis the submissions by the parties. In *Mukisa Biscuits Manufactures Ltd v West End Distributors Limited* [1969] EA 696, it was held as follows: -

“so far 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 preliminary object, point may dispose off the suit....

A preliminary objection is in 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 had to be ascertained or if what is sought is the exercise of judicial discretion.”

9. It is in light of the Mukisa Biscuit Manufacturers case (Supra) that I will decide the first preliminary objection. Section 38(1) of the [Land Act, 2012](#) provides as follows: -

“No suit shall be brought upon a contract for the disposition of an interest in land unless...

- a) the contract upon which the suit is founded—
 - i. is in writing; 2012 Land No 6
 - ii. is signed by all the parties thereto; and
- b) the signature of each party signing has been attested to by a witness who was present when the contract was signed by such party.”



10. Section 3(3) of the [Law of Contract Act](#) which is a replica of section 38(1) of the [Land Act, 2012](#) provides as follows: -

- “ a) the contract upon which the suit is founded—
 - i. is in writing;
 - ii. is signed by all the parties thereto; and Cap 23 Law of Contract [Rev 2012] L11 – 6
- b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party: Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the [Auctioneers Act](#) (Cap 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”

11. The [Land Act, 2012](#) and the [Law of Contract Act](#) prohibit the filing of any suit brought upon a contract for the disposition of an interest in land unless the contract is in writing, is signed by all parties thereto and the signatures of each party signing has been attested by a witness who was present when the contract was signed by such party.

12. This is a requirement of law which can be raised as a pure point of law. The plaintiff has tried to argue in his submissions that this is not a pure point of law and that a contract can be implied from the payments which the deceased had made to the 1st Defendant. This cannot be a substitute for the clear requirements of the law. It is clear that the Deceased did not have any contract with the 1st Respondent. If the Deceased had any contract with the 1st Defendant the Plaintiff would have easily annexed the same to the notice of motion which he filed after the preliminary objection filed on July 8, 2022. It is therefore clear that the Plaintiff's suit is a non-starter on this account alone.

13. The principle of subjudice is predicated on section 6 of the [Civil Procedure Act](#) which provides as follows: -

- “No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”.

14. The Plaintiff is litigating over a property known as Elgeyo Border Wheat Farm LR No 6802 and 75557/2. This is the same property which is the subject in Chief Magistrates E&L suit No E064 of 2022. The Plaintiff in that suit is the 2nd Defendant in this case. The Defendant in that suit is a brother to the Plaintiff in this case. The mere fact that the Plaintiff in this case is not a party in E&L suit No E064 of 2022 as is the 1st Defendant does not save the present case being subjudice.

15. The Plaintiff in the present case is litigating on behalf of his brother. They are both sons of the Deceased. The party who allegedly sold to them the land is the 1st Defendant who ought to have been made a party in that suit. The subject matter of the suit is valued at Kshs 4,500,000/= This is within the monetary jurisdiction of the Chief Magistrate's court. The chief magistrate's court is therefore capable of granting the relief claimed in the present suit.



16. In *London Distillers (K) Limited v NEMA & Another* [2021] eKLR and *Edward R Ouko vs Speaker of National Assembly & 4 others* [2017] eKLR the conditions which render a suit subjudice were set out as follows:-

“...for the principle to apply certain condition precedent must be shown to exist; first, the matter in issue in the subsequent suit must also be directly and substantially in issue in the previous instituted suit; proceedings must be between the same parties, or between parties under whom they or any of them claim, litigating under the same title; and such suit or proceedings must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

Disposition;

17. It is clear from the above analysis that the Plaintiff's suit is contrary to the express provisions of section 38(1) of the *Land Act* of 2012 and section 3(3) of the *Law of Contract Act*. The suit is also subjudice and amounts to abuse of the process of court. I therefore uphold the preliminary objection on the aforeanalysed ground and proceed to strike out the entire suit with costs to the Defendants.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 16TH DAY OF MARCH, 2023.

E. O. OBAGA

JUDGE

In the virtual presence of;

Ms. Moronge for Mr. Kamau for Defendants.

Court Assistant –Laban

E. O. OBAGA

JUDGE

