



**Baras v Koech (Environment and Land Appeal E056 of 2021)
[2023] KEELC 17225 (KLR) (16 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 17225 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND APPEAL E056 OF 2021
EO OBAGA, J
MARCH 16, 2023**

BETWEEN

KIPKURGAT LELEI BARAS APPELLANT

AND

SAMMY KOECH RESPONDENT

*(Being an appeal from the Ruling of Honorable R. Odenyo Senior Principal
Magistrate delivered on 11th November, 2020 in E&L case No. E050 of 2021)*

JUDGMENT

1. The Appellant herein filed a suit against the Respondent in the Chief Magistrate's Court at Eldoret in which he sought the following reliefs: -
 - a. A declaration that the agreement for exchange of land dated March 16, 2019 or any other between the parties herein and/or with their agents or people claiming through the defendants has been rescinded by conduct.
 - b. An order of eviction against the Defendant, his agents, and/or persons claiming through him that land parcel known as Uasin Gishu/Mile Thirteen/167.
 - c. Permanent injunction restraining the Defendant, his servants, agents and/or any other person claiming under him from entering, dealing in or doing any act on that parcel of land known as Uasin Gishu/Mile Thirteen/167.
 - d. Costs of the suit.
 - e. Any other relief that this honorable court may deem fit and just to grant.



2. The Respondent raised a preliminary objection on the ground that the suit and the application offends the provisions of section 18(2) of the Land Registration Act No 3 of 2012 which vests boundary disputes of registered land in the Land Registrar.
3. The trial magistrate directed parties to file written submissions on the preliminary objection. In a brief ruling, the trial magistrate upheld the preliminary objection stating that what was in contention in the suit was basically a boundary dispute which ought to have been referred to the Land Registrar before filing a suit. The trial magistrate then proceeded to strike out the Appellant's suit with costs to the Respondent
4. This is what triggered the present appeal in which the Appellant has raised the following grounds of appeal:-
 1. The learned Senior Principal Magistrate erred in law and in fact in failing to find that the preliminary objection dated March 24, 2021 was unmerited.
 2. The learned Senior Principal Magistrate erred in law and in fact by failing to comprehend the purport and import of the Plaintiff's/Appellant's claim vis –a- vis the contents of the preliminary objection.
 3. The learned Senior Principal Magistrate erred in law and in fact in failing to note that the suit in its entirety was founded on rescission of an agreement for exchange of land dated March 16, 2019 and case for eviction.
 4. The learned Senior Principal Magistrate erred in law and in fact in finding that the Honourable court lacked jurisdiction to entertain issues of boundaries of land when the issues on this suit was not one for boundary but raised issues of breach of agreement for exchange of land and raised a case for eviction.
 5. The learned Senior Principal Magistrate erred in law and in fact in failing to take into consideration the fact due to causing inconvenience to the Appellant's use of the road ceded from the Respondent's land parcel by the Respondent's actions, the Appellant has rescinded the initial agreement and wants back his land which the Respondent has refused to give necessitating a case for eviction.
 6. The learned Senior Principal Magistrate erred in law and in fact in failing to scrutinize the prayers sought in the plaint and the appellant's pleading in its entirety.
 7. The learned Senior Principal Magistrate erred in law and in fact in finding that the preliminary objection dated March 24, 2021 is merited when the pleadings as presented by the Appellant herein is blurred with factual details liable to be contested and be proved through the process of evidence.
The learned Senior Principal Magistrate erred in law and in fact by not finding that the Appellant's case as presented require the court to investigate facts.
 8. The learned Senior Principal Magistrate erred in law and in fact in failing to have regard to the submissions tendered by the Appellant on the preliminary objection dated March 24, 2021.
5. I have gone through the proceedings before the trial court vis-à-vis the grounds of appeal. The duty of this court as a first appellate court is to evaluate the evidence before the trial court, analyse the same and reach its own conclusion. See *Selle and another v Associated Motor Boat Limited & others* (1968) EA 123.



6. From the grounds of appeal, there is only one issue for determination and this is whether the trial magistrate was correct in making a finding that what was in contention between the Appellant and the Respondent was a boundary dispute which should have first been referred to the Land Registrar.
7. Section 18 (2) of the [Land Registration Act](#) provides as follows:-

“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.”
8. A look at the prayer in the plaint shows that the bone of contention was failure by the Respondent to honour the exchange agreement dated March 16, 2019. The Appellant had entered into an exchange agreement with the previous owner of LR No Uasin Gishu/Mile Thirteen/604. The agreement was that the previous owner of this land was to cede a stretch of access road six metres wide which was to be used by the Appellant to access his land parcel No Uasin Gishu/Mile Thirteen/167 in exchange of a similar portion on his land.
9. The Appellant honoured his part and the previous owner of Uasin Gishu/Mile Thirteen/604 too honoured his part. However, when the Respondent became owner of LR No Uasin Gishu/Mile Thirteen/604, he reduced the six meter wide road to an extent that it became not viable for the purpose for which the exchange happened.
10. The appellant therefore filed a suit seeking to rescind the agreement and have the Respondent evicted from the six meter wide portion he had ceded from his land. There was therefore nothing like a boundary dispute. This was a case of breach of contract. The trial magistrate was therefore wrong in finding that the contention between the Appellant and the Respondent was a boundary dispute. I therefore allow the appeal and proceed to set aside the ruling of November 11, 2020 and in place thereof make an order dismissing the preliminary objection with costs. The Appellant shall also have costs of this appeal. The lower court file is remitted back for hearing before a magistrate other than Hon. R. Odenyo.

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

E. O. OBAGA

JUDGE

In the virtual presence of;

Mr. Simiyu for Mr. Ngigi Mbugua for Respondent.

Mr. Korir for Mr. Songok for Applicant.

Court Assistant –Laban

