



REPUBLIC OF KENYA



**Musa (Suing as the personal representative of the Estate of Amina
Chepkemboi Mwalimu) v Rotich & 7 others (Environment & Land Case
89 of 2021) [2023] KEELC 16422 (KLR) (20 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16422 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE 89 OF 2021
MN MWANYALE, J
MARCH 20, 2023**

BETWEEN

**MARIAM SAID MUSA (SUING AS THE PERSONAL REPRESENTATIVE OF
THE ESTATE OF AMINA CHEPKEMBOI MWALIMU) PLAINTIFF**

AND

**JOEL ROTICH 1ST DEFENDANT
ISAAC KIPKERING KUTO 2ND DEFENDANT
PROF JOSPHAT KIPKOECH YEGO 3RD DEFENDANT
HELLEN AUMA OMONDI 4TH DEFENDANT
ELPHAS OMBUYA ANGORO 5TH DEFENDANT
MARTIN DOUGLAS 6TH DEFENDANT
FLORENCE MBOGA ISAAC 7TH DEFENDANT
EDWIN KIRWA BIRGEN 8TH DEFENDANT**

RULING

1. The 1st, 3rd, 4th 5th and 8th Defendants *vide* their joint statement of defence dated September 28, 2022 raised at several preliminary objections *vide* paragraph 5, 18, 19 and 20 of their stated defence.
2. At paragraph 5 of their defence, the objection related to the case being a boundary dispute which ought to be decided by the Land Registrar as per Sections 18 and 19 of the [Land Registration Act](#).



3. The point of Law raised by the preliminary objection pleaded at paragraph 18 of the Defence is that the suit and prayers sought are statute barred by Limitation of Actions Act, as the suit was instituted post 12 years from the date of alleged cause of action.
4. The objection raised at paragraph 19 of the Defence, is that the Plaintiff is no longer a beneficiary and/or has any proprietary interests as her caretaker rights were revoked upon the actual beneficiaries having grown of age and taking over their property, pursuant to a succession cause before the Kadhi's Court.
5. The objection at paragraph 20 relates to jurisdiction of the Court as the dispute is said to be a boundary dispute which ought to be resolved by the Land Registrar vide Section 18 and 19 of the Land Registration Act.
6. In view of the preliminary objection in the defences, the Court directed the parties to file submissions so that the issues may be determined in limine.
7. Parties filed submissions, the 2nd, 6th and 7th Defendants filed their submissions on January 18, 2023 through Messrs Melly and Company Advocates. The 1st, 3rd, 4th and 8th Defendants filed their submissions on January 18, 2023 through Messrs Rotich, Langat and Company Advocates.
8. The Plaintiff filed two sets of submissions initially by the firm of Wambua Kigamwa filed on February 3, 2023, and later by the Plaintiff acting in person, on the same day February 3, 2023 pursuant to a Notice of Intentions to act in person also filed on the same day.
9. The Court shall now consider whether the objections as filed met the threshold of preliminary objections as was observed in the decision in the case of *Omondi vs National Bank of Kenya Limited and 2 others*; as quoted in the decision of *JN and 5 others vs Board of Management St G School Nairobi and Another* where it was held that; "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 point may dispose of the suit.....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."
10. In *Mukisa Biscuit Manufacturer Limited vs Westend Distributors Limited*; the Court held in respect of a preliminary objection, that "so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implications out of pleadings, and which if argued as a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the acts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion...."
11. The above excerpts from the decision shall guide this Court on whether the objections pleaded at paragraphs 5, 18,19 and 20 of the defence filed by the 1st, 3rd, 4th and 5th Defendants meets the criteria preliminary objections.
12. All the four objection arisen from the defence thus from the pleadings and thus have passed the first test as indicated in the case of Mukhisa Biscuits.
13. The second test is whether all the four objections can be determined in Limine a point of laws, without ascertaining of facts or calling for the test of facts by way of normal rules of evidence.
14. With regard to the 1st and 4th objection based on Section 18 and 19 of the Land Registration Act. It is the Defendant's submissions that the issue herein is a boundary dispute that ought to be dealt with by the Land Registrar, the Plaintiff's however indicate that the dispute herein is not a boundary dispute



- but a claim of encroachment and that the said encroachment of about 3 metres has infringed on her right to enjoy use and occupation of her property.
15. The Defendant thus submits that the dispute is a dispute that ought to be heard and determined by this Honourable Court.
 16. The Plaintiff submits that under Section 18 (2) of the *Land Registration Act*, the boundary disputes envisaged therein related to land that has not been registered, but in the present case, the land is registered and title hence the provisions of Section 18 do not apply to it. In this regard the Plaintiff place reliance on the decision in the case of *Fredrick Nganga Thuo vs Peter Mungai Njubo* (2017) eKLR, where the Court observed that, “the Registrar would have jurisdiction where the boundaries have not been fixed” the above decision was quoted in the decision in the case of *Nelly Atieno Oluoch vs Damaris A. Nyawalo and 2 others* (2021 eKLR).
 17. Consequently in view of that above holding the 1st and 4th objections with regard to the suit being a boundary disputed and the Court lacking jurisdiction does not hold water and the 1st and 4th objections are overruled.
 18. Turning on the 2nd and 3rd objections, so as to subject them to the second test of a preliminary objection as espoused in the Mukhisa Biscuit case, which requires that for a preliminary objection, to be termed as such there should be no ascertainties of facts or calling for the test of facts by way of normal use of rules of evidence ought to be necessary.
 19. At paragraph 16 of the 1st, 3rd, 4th, 5th and 8th Defendant’s submissions, they submit that the 2nd objection relates to the 3rd Defendant i.e. that the suit against the 3rd Defendant is statute barred, the submissions indicate that from the documentation, the 3rd Defendant acquired the suit property on July 26, 2004 and was joined in the suit in 2021 more than 17 years.
 20. At paragraph 19 of the said submission the 1st, 3rd, 4th and 5th and 8th Defendants have referred the Court to the list of documents, i.e. the green card, Nandi/Kamobo/2622 mutation of Nand/Kamobo/1946 and transfer of Nandi/Kamobo/2622.

Essentially in the submission of the 1st, 3rd, 4th, 5th and 8th Defendants, the Court is asked to ascertain certain facts from the list of documents. This in the Courts view is thus to ascertain facts, that ought to be proved by way of normal use of rules of evidence.
 21. The Court thus finds that as pleaded objection 2 needs to be supported by evidence contained in the list of documents, hence the submissions at paragraph 19 of the Defendants submissions.
 22. As the Court has been invited to look land ascertain certain facts, this objections fails the 2nd test of what a Preliminary Objection is, and is equally overruled.
 23. This leaves the Court to determine the 3rd objection to wit, where the Plaintiff has locus standi, to institute the proceedings.
 24. The submissions in relation to this limb of objection as filed by the 1st, 3rd, 4th, 5th and 8th Defendants are found on paragraph 7 of the submission at paragraph 7 (i) and 7(ii) the Court is referred to a judgment of Vihiga Kadhi’s Court No. 1 of 2019 and 7 (ii) refers to the title deed of Nandi/Kamobo/275 as well as the Green card of Nandi/Kamobo/5275.
 25. This limb of submission invites to Court to look at evidence, which evidence should be adduced by way of the normal rules of evidence and it may not be a pure point of law capable of determining the matter in limine as required in the case of Mukhisa Biscuit.



26. The Court thus finds that objection 3 needs ascertaining of facts and is not a pure point of law and the same is equally overruled.
27. The upshot is that the preliminary objections are hereby overruled and shall be heard as defences by way of evidence during the trial as they required ascertainment of facts by the Court in the normal use of the rules of evidence. The objections are thus overruled.
28. Costs in the cause.

DELIVERED AND DATED AT KAPSABET THIS 20TH MARCH 2023

HON. M. N. MWANYALE,

JUDGE.

In the presence of;

Mrs. Koech Lelei for 9th Defendants.

No appearance for the 1st, 3rd, 4th, 5th and 8th Defendant duly notified.

No appearance for 2nd, 6th and 7th Defendants duly notified.

Mariam Said Musa the Plaintiff in Plaintiff in person.

