



Sakaja & 2 others v Mariga & 2 others (Environment & Land Case 13 of 2023) [2023] KEELC 18226 (KLR) (20 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18226 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 13 OF 2023**

FO NYAGAKA, J

JUNE 20, 2023

BETWEEN

JOHN SAKAJA 1ST PLAINTIFF

PASTOR GEORGE ODERA 2ND PLAINTIFF

GODFREY OJILO 3RD PLAINTIFF

AND

NYOKABI MARIGA 1ST DEFENDANT

SCHOLASTICA MUDHAI 2ND DEFENDANT

PETER WILSON 3RD DEFENDANT

RULING

1. The Plaintiffs brought the present suit jointly on March 10, 2023 by way of a Plaint dated March 7, 2023. It was filed by the firm of Ms. Nasike Wafula & Associates. They prayed for:
 - a. An order of mandatory injunction requiring the Defendants whether jointly or severally to forthwith stop interfering in any way with the reserved area meant for the access road and for a permanent injunction restraining the Defendants whether jointly or severally, their servants and/or any other persons acting through them from interfering in any way with the reserved area.
 - b. Costs and interest.
 - c. Any other relief that this Honorable Court may deem fit.
2. The claim was, as pleaded in the Plaint, that the Plaintiffs were the registered owners of land parcel Nos LR 2073/16 & 17, LR No 2073/15/10 and LR 2073/15/1 respectively while the Defendants were the registered owners of land parcels Nos LR 2073/14/1, LR No 2073/135/1 and LR No 2073/13/2



- respectively. They pleaded further that when the parcels of land were surveyed in 1952 the surveyor created an access road from the main Kitale-Webuye Road and reserved 3 acres for the expansion of the road to be 40 ft wide. The 3 acres fell on a number of parcels of land, including the Defendants'. They pleaded that the Defendants had encroached the reserved area and been cultivating on the reserve area thereby destroying the beacons and making accessibility to respective homes difficult, hence the claim.
3. The 3rd Defendant filed a Notice of Appointment of Advocates and a Notice of Preliminary Objection dated March 15, 2023 on March 27, 2023. In the Preliminary objection which had four grounds he pleaded that the Application (for injunction) and suit offend Section 18(2) of the [Land Registration Act](#), No 3 of 2012 as, in their view, this Honourable Court lacked jurisdiction to determine boundary disputes in the first instance. Secondly, the Registrar of Lands was clothed with jurisdiction to entertain boundary disputes. Third, the Application and suit are therefore bad in law and offend the doctrine of exhaustion. Fourthly, the Application and suit be struck out with costs to the 3rd Defendant.
 4. The preliminary objection was determined by way of written submissions of which only the 3rd Defendant filed his on March 27, 2023. In them he stated that the Preliminary Objection was based on Section 18(2) of the [Land Registration Act](#) and the doctrine of exhaustion. He summed up the Plaintiffs' pleadings as above and indicated that from the Plaintiffs' admissions that the parties were the registered owners of the respective parcels of land averred in the Plaintiff. He submitted that from the pleadings it was clear that both the Plaintiffs and the defendants were uncertain of the correct position of the boundary between them. He argued that the question was whether the road reserve was on the plaintiffs' parcels of land or that the Defendants were farming on the road reserve. For that reason, he submitted that the claim herein was a boundary dispute which ought to have been handled by the Land Registrar.
 5. The 3rd Defendant quoted Section 18(2) of the [Land Registration Act](#). He relied on the cases of [Willis Ochola v. Mary Ndege](#), Kisumu ELC Land Case No 137 of 2015 (2016) eKLR After reproducing an exposition by the Court of Section 18(2) of the Act he posed a question as to what the position would be if the Plaintiffs relied on Section 13(2) of the [Environment and Land Court Act](#). He answered this issue by relying on the case of [Amalgamated Society of Engineers v. Adelaide Steamship](#) (1920) 28 CLR 129 as cited in [Menkar Limited v. Ratilal Ghela Samat Shah & 2 others](#) [2019] eKLR and the case of [Nicholus v. Attorney General & 14 others; National Environment Complaints Committee \(NCEC\) & 5 Others \(Interested Parties\)](#) (Civil Appeal 42 of 2021) [2023] KECA 34 (KLR) cited in [Night Rose Cosmetics \[1972\] Limited vs Nairobi County Government & 2 Others](#) [2018] eKLR
 6. After that he relied on Article 159(2)(c) of the [Constitution](#) which provides for the use of alternative forms of dispute resolution. He submitted that the Plaintiffs had not provided any evidence of having tried to settle the issue through the mechanism set out under Section 18(2) of the [Land Registration Act](#). He relied on the Court of Appeal case of [Estate Sonrisa Ltd & Another v. Samuel Kamau Macharia & 2 others](#) (2020) eKLR
 7. He submitted that by filing this suit before a decision was made by the Registrar pursuant to Section 18 of the [Land Registration Act](#), the Plaintiffs jumped the gun. He relied also on the case of [Adah Anyango Ombere v Kenya Railways Corporation & 5 others](#) [2022] eKLR He stated that though he was acutely aware that striking out is a draconian remedy and is to be resorted to in the clearest of cases, the instant suit was one that fitted the remedy. He urged the Court to merit in the preliminary objection and uphold it.



Issue, Analysis and Determination

8. I have carefully and deeply considered the Preliminary Objection herein, the law and the pleadings. I am of the view that all the grounds of the Objection relate to only one issue for determination whether or not the dispute herein is a boundary dispute between the parties. If the Court finds that it is a boundary dispute then it has no option than to find that the Court has no jurisdiction and strike out the suit.

9. A Preliminary Objection is and must always be an issue on a point of law, which if successful goes to the root of a suit, claim or Defence or pleading and entitles a Court to strike such a pleading out. It is never based or does not depend on any fact whatsoever because a determination on the basis of facts would call for the court examining the merits of the matter. The definition of a Preliminary Objection was given in the case of *Mukhisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd* (1969) EA 696 wherein Sir Charles Newbold stated as follows:

“ 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. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... 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 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.”

10. In *Bashir Haji Abdullahi v Adan Mohammed Noor & 3 others* [2004] e KLR, the same Court held that:

“ We are of the considered view that if a party wishes to raise a Preliminary Objection and files in Court a Notice to that effect and is subsequently served on other parties to the suit, the Preliminary points should be sufficiently particularized and detailed to enable the other side and indeed the court to know exactly the nature of the preliminary points of law to be raised. To state that „the application is bad in law? without saying more does not assist the other parties to neither the suit nor the Court to sufficiently prepare to meet the challenge. If it is only at the hearing that the Preliminary Objection is amplified and elaborated, it gets the other side unprepared and is reminiscent of trial by ambush.”

11. Also, in *Susan Wairimu Ndiangui v Pauline W. Thuo & another* [2005] eKLR, Musinga J, as he then was, held as follows:-

“ a Preliminary Objection should not be drawn in a manner that is vague and non-disclosing of the point of law or issue that is intended to be raised. It should clearly inform both the court and the other party or parties in sufficient details what to expect.”

12. Given the meaning of a Preliminary Objection as given above, I am now left to determine whether the one in the instant case fits it. The 3rd Defendant relies on Section 18(2) of the *Land Registration*



Act to ask this Court to find that it has no jurisdiction over the issue herein. Section 18(2) of the Act provides that,

“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.”

13. It leaves no doubt in my mind that the point that the 3rd Defendant raises for determination is a point of law and qualifies as such within the meaning of the Mukisa Biscuits case (*supra*) and the subsequent decisions that discuss the meaning. But what remains of me to determine then is when the pleadings herein disclose a legal weakness that fits into the preliminary objection.
14. The 3rd Defendant contests that the issue between the Plaintiffs and the Defendants is as a result of the inability to distinguish the exact boundary between the parties or whether or not the Defendants encroached the reserve area and that this can only be determined by the Land Registrar hence the Plaintiffs should have presented this issue to the said office first before moving the Court. On their part the Plaintiffs pleaded that the dispute between the parties herein was one of the Defendants' unwarranted activities of cultivating on land that is reserve area for expansion of the road of access.
15. A perusal of the Plaint shows that the Plaintiffs do not in any way aver that there is a common boundary between them and the Defendants. At paragraph 6 and 7 they plead that there is a road of access created off the Kitale-Webuye Road to serve the parcels of land known as LR No 2072/11-22. It is a road in use. But the issue is that the Defendants have resorted to cultivating the land reserved for the access road thereby causing accessibility of the Plaintiffs' land parcels difficult. Without a doubt, that cannot be a boundary dispute.
16. Bryan A. Garner. (2019). Black's Law Dictionary, 11th Edition, Thompson Reuters, St. Paul MN, p. 229 defines a boundary as a “natural or artificial separation that delineates the confines of real property.”
17. It is inconceivable that a road of access can ever be a boundary within the meaning of the term so as to form the basis of a dispute of the nature that would require a Land Registrar to solve it within the meaning of Section 18(2) of the Land Registration Act. This is because, a road does not delineate the confines of any real property. For these reasons, I find the Preliminary Objection absolutely unmeritorious, mischievous and cheeky. It is nothing but an abuse of the process of the Court. I dismiss it with costs to the Plaintiffs.
18. The Application dated March 7, 2023 herein has lain in Court for more than sixty (60) days after it was certified urgent, yet it is because of delaying tactics of some parties. Therefore, I fix the Application for inter partes hearing virtually on July 3, 2023 at 8.30 am.
19. The parties are given three (3) days each to file and serve written submissions on the Application. The Applicants shall first file theirs and serve and the Respondents shall follow after the lapse of the 3 days, irrespective of whether or not the Applicants shall have filed and/ or serve theirs. Each parties' submissions should not to exceed three typed pages of New Times Roman Font 12, and 1.5 spacing. Parties should comply strictly with these directions.
20. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 20TH DAY OF JUNE, 2023.

HON. DR. IUR FRED NYAGAKA



JUDGE, ELC KITALE

