



**Munyasia v Munyasia & 4 others (Environment & Land Case
7 of 2022) [2023] KEELC 19050 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19050 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 7 OF 2022
EC CHERONO, J
JULY 28, 2023**

BETWEEN

MAGRET NABANGALA MUNYASIA PLAINTIFF

AND

PIUS MAKHANU MUNYASIA 1ST DEFENDANT

LAND REGISTRAR BUNGOMA COUNTY 2ND DEFENDANT

LAND SURVEYOR BUBGOMA COUNTY 3RD DEFENDANT

NATIONAL LAND COMISSION 4TH DEFENDANT

THE HON. ATTORNEY GENERAL 5TH DEFENDANT

RULING

Introduction

1. The plaintiff herein filed a suit against the defendants dated May 17, 2022 seeking for judgment against the defendants jointly or severally as follows;
 - a. That Bungoma County Land Registrar and Bungoma County Surveyor do re-survey land parcel number E. Bukusu/S.kanduyi.9471, 13025,13671 and 13672 and reinstate the curved acreage of 0.36 Ha which was unlawfully, illegally and unprocedurally curved/removed from land parcel number E.Bukusu/ S. Kanduyi/9471 to its original state to reflect the correct acreage of 1.64 Ha and further reinstate the tempered beacons between parcels in dispute herein.
 - b. Permanent injunction restraining the defendants whether by themselves, their agents and/ or third parties or anybody acting or claiming through them from encroachment on or



- demarcating, tilting, wasting, occupying, alienating and/or claiming ownership of any portion and/or whole of land parcel number E.Bukusu/ S. Kanduyi/9471 measuring 1.64 Ha.
- c. General damages for trespass on suit property land parcel number E.Bukusu/ S. Kanduyi/9471 measuring 1.64 Ha.
 - d. The caution registered on May 5, 2000 by the 1st defendant be removed or vacated
 - e. Costs of this suit and interests at court rates
 - f. Any other relief court may deem fit to grant.
2. The office of the Attorney General and department of justice entered appearance for the 2nd, 3rd and 5th defendants and filed their written statement of defence dated June 26, 2022 and June 3, 2022 respectively.
 3. The 1st defendant through the firm of Omundi Bw'onchiri advocates entered appearance *vide* a memorandum of appearance dated June 11, 2022 and filed his statement of defence dated September 15, 2022 on September 19, 2022.
 4. The 1st defendant filed a notice of preliminary objection for dismissal on the plaintiff's suit dated October 13, 2022 raising the following grounds;
 - a. That the suit contravenes the provisions of section 6 & 7 of the *Civil Procedure Act*, cap 21 Laws of Kenya
 - b. That the suit contravenes the provisions of section 18 of the *Land Registration Act* No 3 of 2012.
 - c. That the suit is an abuse of the due process of the law and procedure.
 5. Parties thereafter took directions to canvass the Preliminary objection by way of written submissions.

Plaintiff's Submissions

6. The plaintiff submitted that the issues raised in the plaint involve reclaiming illegally obtained land and trespass which in her view falls within the mandate of this court. She placed reliance on section 101 of the *Land Registration Act* No 3 of 2012. She contended that the 1st defendant has misconstrued the provisions of section 6 and 8 of the abovementioned Act as her claim is not based on a boundary dispute but an alleged encroachment/trespass. She quoted the decision of Olao J in *Apollo Omusala Manyasi v Kariuki Kiragu* ELC No 10 of 2020-Bungoma.

Defendant's Submissions

7. The 1st defendants submits that the issues raised in the plaintiff's case herein revolve on the question of ownership of E. Bukusu/ S. Kanduyi/ 9471 which subject matter was determined in a former case wherein judgment was delivered on July 19, 2021 thus in contravention of section 7 of the *Civil Procedure Act*. The 1st defendant placed reliance on the pronouncements of the court in the case of *Diocese of Eldoret Trustees (Registered) v Attorney General (on behalf of Principal Secretary Treasury) & another* (2020)Eklr.
8. The defendant further submitted that section 18 of the *Land Registration Act* ousts the courts jurisdiction on matters involving boundaries. He made reference to prayer number 1 in the plaintiffs plaint and stated that the prayer calls upon the court to determine the issue of boundaries. The defendant relied on various cases; *Reuben Kioko Mutyaene v Helen Kiunga Miriti & 4 others* (2021)



Eklr, The Court of Appeal in *Azzuri Limited v Pink Properties Limited* (2018)Eklr, *George Kamau Macharia & Dexka Limited* (2019) Eklr, *Willis Ochola v Mary Ndege* (2016) Eklr, The Court of Appeal in the *Estate of Sonrisa Ltd & another v Samuel Kamau Macharia & 2 others* (2020) Eklr and finally in *Speaker of National Assembly v Karumei* (1992) KLR 21.

He urged this court to strike out the suit with costs.

Analysis And Determination

9. I have considered the rival submissions on the preliminary objection dated October 13, 2022. The preliminary objection is predicated on the grounds that this suit is both sub – judice and *res – judicata* the previous and ongoing suits being Bungoma ELC No 41 of 2010 and Kisumu Court of Appeal civil appeal No 223 of 2021 respectively and also that this court lacks the jurisdiction to determine this dispute in view of section 18(2) of the *Land Registration Act*,
10. It now settled that a preliminary objection is a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. This position was held in the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696, 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. 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.”
11. In *Oraro v Mbaja* 2005 Eklr, Ojwang J (as he then was) described it as follows: -

“I think the principle is abundantly clear. A “preliminary objection” correctly understood, is now well identified 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 process of evidence. An assertion which claims to be a preliminary objection and yet it bears factual aspects calling for proof, or seeks to adduce evidence for it’s authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed.” emphasis added.
12. Indeed, as has been seen hereinabove, the effect of upholding a preliminary objection is to summarily dispose of an entire case without giving a party its day in court. Such summary dismissal or striking out of a case is a draconian issue that must be exercised with caution and as a last resort.
13. Undeniably issues of *res-judicata* and sub-judice are pure points of law and the previous case has been referenced. I will now consider the merits of the defendant’s preliminary objection.

i. Sub-judice

14. This is provided for in section 6 of the *Civil Procedure Act* in the following terms: -

“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.”

15. From the above quoted provision it is clear that sub – judice rule only applies where another “suit or proceeding is pending” in another court involving the same parties or their privies over the same subject. I have perused the pleadings by the parties herein which relate to the suits previously instituted and those alleged to be proceeding between the parties herein over the suit property. Moreso, I have looked at the memorandum of appeal (Kisumu Court of Appeal civil appeal No 223 of 2021) attached by the 1st defendant wherein he asserts that he has preferred an appeal against the decision of the court in Bungoma ELC No 41 of 2010.
16. It is my observation that the same does not bear the stamp of the superior court to demonstrate that it was received at their registry for filing purposes neither does it bear a date nor the signature of the Deputy Registrar to confirm receipt. Further the 1st defendant has not attached a notice of intention to appeal, an application for leave to appeal or a certificate of appeal. It is therefore unclear whether there is an ongoing appeal and to verify this, it would require the court to go beyond the facts presented before it and investigate the same by hearing the parties or by calling for further evidence.

The bar of sub – judice has not therefore been properly invoked.

ii. Res Judicata

17. This is provided for in section 7 of the [Civil Procedure Act](#) as follows: -

“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.”
18. Before a plea of *res – judicata* can properly be invoked to terminate a suit, the following must be established: -
 - 1: The matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suits.
 - 2: The former suit must have been between the same parties or parties under whom they claim.
 - 3: The parties must have litigated under the same title.
 - 4: The court which decided the former suit must have been competent and; lastly,
 - 5: The former suit must have been heard and finally decided by the court in the former suit.
19. It is not in contention that there exists Bungoma ELC No 41 of 2010, however the said matter was between the plaintiff and the 1st defendant and did not involve the other four parties. Further, the claim that was instituted by the 1st defendant herein was in relation to the estate of a deceased person and the issue for determination was whether the plaintiff herein had acquired proper title of the suit property. The matter that was directly and substantive in issue in the previous case is distinct from what is before this court for determination which in my view is a follow up case on enforcement/execution of the courts orders in Bungoma ELC No 41 of 2010.
20. It cannot therefore be concluded that the dispute between the plaintiff and the defendants was considered and judicially determined in the previous litigation.



21. The bar of res-judicata has not therefore been properly invoked.

iii. Jurisdiction

22. The 1st defendant also raised the objection with regard to the jurisdiction of this court to determine the dispute herein. The jurisdiction of this court is clearly spelt out in section 13 of the Environment and Land Court Act. The 1st defendant asserts that this being a boundaries dispute the same falls under the jurisdiction of the Land Registrar per section 18 (2) of the Land Registration Act, 2012 which states;

(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.

23. The locus classicus case on jurisdiction is the case of Owner of Motor Vessel "Lillian S" v Caltex Oil (K) Ltd (1989) KLR. However, on a quick look at the plaint it emerges that the suit is based on the claim that 1st defendant encroached into the plaintiff's land, caused it to be surveyed, survey maps approved by the Land Surveyor and a title issued by the Land Registrar, Bungoma and later a further survey done for purposes of subdivision and titles issued. From the foregoing it is clear that the actions of the 1st defendant were ratified by the Land Registrar and Land Surveyor and as such this is not a dispute that can be referred to an office that already ratified the alleged wrong for determination.

The bar for lack of jurisdiction also fails.

Disposition

24. I find that the plaint has raised substantive issues for hearing and just determination by this court and as provided for in articles 10, 47 and 50 of the Constitution of Kenya, 2010, the policy of the law is to hear and determine cases and not summarily dismiss the same.

25. For the reasons foregoing, the defendant's notice of preliminary objection dated October 13, 2022 and filed on October 18, 2022 is not merited and the same is hereby dismissed. Costs shall be in the cause.

READ, DELIVERED AND SIGNED IN THE OPEN COURT AT BUNGOMA THIS 28TH DAY OF JULY, 2023.

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HON E C CHERONO

ELC JUDGE

In the presence of

M/S Shimoli H/B for Wa'ttang'a for plaintiff

Mr. Nyarotso H/B for Bwonchiri for 1st defendant

2nd, 3rd, 4th & 6th defendants/Advocate-absent

M/S Joy C/A-present

