



**Magak & 2 others v Achieng & 3 others (Environment & Land Case
E006 of 2023) [2023] KEELC 19847 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19847 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE E006 OF 2023
E ASATI, J
SEPTEMBER 21, 2023**

BETWEEN

**GIDEON MAGAK 1ST PLAINTIFF
DAVINE ACHIENG 2ND PLAINTIFF
PHANICE ANJENDO ONDIEK 3RD PLAINTIFF**

AND

**ESTHER ACHIENG 1ST DEFENDANT
IVONE ABONGO 2ND DEFENDANT
NYANDO, NYAKACH, MUHORONI COUNTY LAND REGISTRAR 3RD
DEFENDANT
ATTORNEY GENERAL 4TH DEFENDANT**

RULING

1. This ruling is in respect of a Preliminary Objection raised by the 1st and 2nd Defendants vide the Notice of Preliminary Objection dated March 12, 2023. The Preliminary Objection seeks to strike out the entire suit for want of statutory jurisdiction. The objection is based on the grounds that:
 - a. The subject dispute as described in the plaint and admitted by the 1st and 2nd Defendants vide their defence is a boundary dispute with regards to the position of the common boundary of registered lands being Lr Kisumu/kamnwa/keyo Goro/531, 53 and 56 belonging to the Plaintiff on the one hand and land parcel number Lr Kisumu/kamnwa/keyo Goro/55 belonging to the 1st and 2nd Defendants on the other hand.
 - b. The Plaintiff in their prayers and pleadings in the plaint, seek the court not only restrain the Defendants from interfering with the common boundaries of the above described registered



parcels of land but also to determine the position of the common boundaries of the same via re-survey.

- c. Section 18(2) of the [Land Registration Act, 2012](#) 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 by the Land Registrar.
 - d. Hence under Section 18(1) and (3) and 19 of the [Land Registration Act 2012](#), the jurisdiction to the determination of boundary disputes concerning registered land rests with the Land Registrar and not the court of law.
2. On March 20, 2023 directions were taken that the Preliminary Objection be canvassed by way of written submissions.

Submissions for the 1st and 2nd Defendants.

3. It was submitted on behalf of the 1st and 2nd Defendants vide their written submissions dated 28/3/2023 filed on their behalf by the firm of Bruce Odeny & Co Advocates that the suit in its entirety is a boundary dispute hence the same ought to be struck out for want of jurisdiction. It was further submitted that the position of the law with regard to Preliminary Objection was well settled in the case of *Mukisa Biscuits Manufacturing Co Ltd –vs- West End Distributors Ltd* (1969) EA 696 where it was held that;

".....a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which if argued on the presumption that all the facts pleaded by the other side are correct. I cannot be raised if any fact has to be ascertained on if what is sought is the exercise of judicial discretion. The proper raising of preliminary objection does nothing but unnecessarily increases costs and on occasion, confuse the issues and this improper practice should stop...".

4. Counsel submitted that it is not in dispute that the Plaintiffs are the registered and beneficial owners of land parcel numbers Kisumu/kamnwa/keyo Goro/531, 530 and 56. That it is also not in dispute that the 1st and 2nd Defendants are the registered and/or beneficial owners of land parcel number Kisumu/kamnwa/keyo Goro/55. That vide paragraph 7 of the plaint, the Plaintiff pleaded that on diverse dates within the months of January and February, 2023, the Defendant together with their agents, servants or authorized agents trespassed onto the Plaintiff's suit parcel of land and cut down mature trees along the boundaries, moved their boundaries beyond the natural boundaries and blocked public access road leading to the plaintiff's homestead without any colour of right.

That on the particulars of the trespass the Plaintiff pleaded that the Defendants' unilaterally moved the natural boundaries that have been in existence for over 40 years and established their own boundaries right into the Plaintiff's parcel of land. And that among the prayers sought was a prayer for an order directed at the Land Registrar Nyando, Nyakach and Muhoroni to carry out a resurvey of all parcels known as Kisumu/kamnwa/keyo Ogoro/53, 530 and 56 within Kisumu and Kisumu/kamnwa/keyo Ogoro/55 to re-establish the damaged boundaries.

5. That the dispute as described in the plaint and admitted by the 1st and 2nd Defendants in their defence is a boundary dispute and that by the clear provision of Section 18(2) of the [Land Registration Act](#), this court is barred from entertaining this matter for lack of jurisdiction. That the Land Registrar has power under Section 19 of the same Act to fix boundaries and until that is done, this court cannot determine whether or not the Defendants are trespassers or have blocked a road of access.



That the prayers in the plaint can only be determined with the section 19 of the Land Registrar complying with Section 19 of the [Land Registration Act](#).

6. Counsel relied on the use of [Willis Ocbola -vs- Mary Ndege](#) (2016) eKLR, the Court of Appeal decision in [Azzuri Limited -vs- Pink Properties Limited](#) (2018) eKLR and [Estate of Sonrisa Ltd & Another -vs- Samuel Kamau Macharia & 2 others](#) (2020) eKLR to support his submissions that dispute relating to boundaries ought to be resolved by the Land Registrar in the first instance. That where the law has given a legal obligation to a department of government, it is important for the court to let that department proceed to meet the legal obligation. Counsel urged the court to find that the Preliminary Objection is merited and allow it with costs.

Submissions for the Plaintiffs/Respondents.

7. In response to the submissions by the 1st and 2nd Defendants, the Plaintiff also relied on the case of [Mukisa Biscuits Manufacturing Ltd -vs- West End Distributors](#) (1969) EA 696 on what constitutes a Preliminary Objection and the case of [Owners of the Motor Vessel "Lilian S"](#) and article 162(2)(b) of the [Constitution of Kenya 2010](#) to submit that the Environment and Land court has both original and appellate jurisdiction to hear and determine all disputes touching on environment and the use and occupation of and title to land. Counsel further submitted on behalf of the Plaintiffs that within the provisions of Section 19 of the [Land Registration Act](#), the District Surveyor visited the disputed parcels of land and filed a report dated January 20, 2019 and made findings. That from his observations the District Surveyor concluded that the dispute is nothing to do with the boundaries. That the dispute is about access and closure of a public road. That hence the court has jurisdiction.

Counsel relied on the case of [George Mbugua Kirori -vs- Peter Nyaga Kairu](#) [2018] eKLR to support his submissions that the dispute is not a boundary dispute. Counsel urged the court to find that the Preliminary Objection lacks merit and to dismiss the same with costs to the plaintiffs.

Analysis and Determination

8. From the grounds contained in the Notice of Preliminary Objection, the submissions filed in support and in opposition of the Preliminary Objection, I find that there are two issues that emerge for the court's determination namely;
 - a. Whether or not the Preliminary Objection as raised constitutes a Preliminary Objection as envisaged by law,
 - b. Whether or not the Preliminary objection has merit,
 - c. What orders to make on costs.
9. Both parties relied on the case of [Mukisa Biscuits](#) where the court described a Preliminary Objection as follows;

“...a Preliminary Objection consists a point of law which has been pleaded, or which order by clear implication out of pleadings and which if argued, as a Preliminary point may disposed of the suit.

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



The court further held that;

"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 has to be ascertained or if what is sought is the exercise of judicial discretion."

10. From the foregoing decision, a preliminary objection must be based on pure points of law, must arise from the pleadings, may dispose of the suit/case if argued as a pure point of law and must be argued on the assumption that all facts pleaded by the opposite party are correct; it cannot succeed if any fact has to be ascertained; or if what is sought is the exercise of the court's discretion.
11. In the present case, the preliminary objection is premised on the provisions of Section 18 and 19 of the *Land Registration Act* and raises the issue of the court's jurisdiction where the dispute before court is a boundary dispute. The objection is based on the pleading and prayers as contained in the plaint and if successful, will result in the suit being struck out as that is the prayer in the Notice of Preliminary Objection. I find that the Preliminary Objection as raised and argued is properly before the court and constitutes a preliminary objection as envisaged by law.
12. The next issue is whether the Preliminary Objection is merited. The Preliminary Objection is anchored on Section 18(2) of the *Land Registration Act*. The entire of Section 18 makes provisions on boundaries, it provides;

"18

- (1) Except where in accordance with Section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate situation only of the parcel.
- (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.
- (3) Except where it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel receive such evidence as to its boundaries and situations as may be necessary.

Provided that where all the boundaries are defined under Section 19(3), the determination of the position of any uncertain boundary shall be done as stipulated in the Survey Act Cap 299."

13. The case of the 1st and 2nd Defendants is that in view of the provisions of Section 18(2) the court lacks jurisdiction as the dispute herein is a boundary dispute for which it is the Land Registrar who has jurisdiction under the provisions of Section 19 of the *Land Registration Act*.
14. The Plaintiff's position is that the dispute herein is not a boundary dispute but a dispute on closure of road of access. Secondly, that the dispute had already been handled by the Surveyor who prepared the report dated February 6, 2023 and filed in court with the plaint.



- In paragraph 10 of the plaint, the Plaintiff pleaded that the County Surveyor has made a report and advised that the Defendant desist from their action of trespass but that they are adamant.
15. It is common ground as it is the position in law that unless a boundary has been fixed in accordance with the provisions of Section 18 and 19 of the [Land Registration Act](#), no court will have the jurisdiction to entertain the matter.
 16. I have read the report dated February 6, 2023 by Valentine Oiro, City Surveyor Kisumu. There is nothing on the report to indicate that the boundaries were fixed. The report indicates that the Surveyor was mandated by the proponents of land parcel numbers 530 and 531 to accurately illustrate the position of the boundary line separating their parcels (530, 531) and the neighbours parcel number 55. There is no evidence that the owner of parcel number 55 was involved in the exercise or that the provisions of Section 18 and 19 of the [Land Registration Act](#) were complied with. There is no evidence that the Land Registrar was involved yet it is the Land registrar to whom the law donates the jurisdiction to determine boundary disputes.
 17. From the report however, I gather that the problem between the two parties is the position of the boundaries separating their respective land parcels. The uncertainty of the position of the boundaries is revealed by the findings of the Surveyor who firstly recommended that any change of boundary be sanctioned by the Land Registrar and secondly that a re-survey of the entire area be done “due to the differences in actual ground measurements and the scaled map measurements.”
 18. The essence of provisions of Section 18 and 19 is to allow the expert in matters to do with boundaries to handle the dispute in the first instance. Even if the court decides to entertain the matter, it cannot be competent to adjudicate the matter to the end as it will still require to fall back to the expertise of the Land Registrar.
 19. I find that the dispute herein is a boundary dispute which falls within the mandate of the Land Registrar to determine in the first instance as per the provisions of Section 18 and 19 of the [Land Registration Act](#). In the circumstances, the court lacks jurisdiction in view of the provisions of Section 18(2) of the same Act. I find that the Preliminary Objection has merit.
 20. On costs, although the provisions of Section 27 of the [Civil Procedure Act](#) are that costs follow the event, taking into account that indeed there exists a dispute between the parties and that the dispute has not been conclusively resolved, it is my view that each part bear own costs.
 21. On the basis of the finding herein that the dispute herein is a boundary dispute, I uphold the preliminary objection and strike out the application and the entire suit. Each party to bear own costs.

Orders accordingly.

RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 21ST DAY OF SEPTEMBER 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

**E. ASATI
JUDGE.**

