



**Wakwabubi v Moi's Bridge Quarry Ltd (Environment & Land Case
E013 of 2023) [2023] KEELC 19855 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19855 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE E013 OF 2023
JM ONYANGO, J
SEPTEMBER 21, 2023**

BETWEEN

WYCLIFFE WAKWABUBI PLAINTIFF

AND

MOI'S BRIDGE QUARRY LTD DEFENDANT

RULING

1. What is before me for determination is the Plaintiff's Notice of Motion dated 3rd March 2023 seeking the following orders:
 - a. Spent
 - b. That the 2nd Respondent be ordered to establish the boundary between plot No. Moi's Bridge/Ziwa Block 16 (chebarus)/1248 and 1296.
 - c. That a clear and transparent survey be conducted on the said parcel of land parcel No. Moi's Bridge/Ziwa Block 16 (CHEBARUS)/1248 and 1296 pending hearing and determination of this suit.
 - d. That the costs of this application be provided for.
2. The grounds upon which the application is based are set out on the face of the Notice of Motion and the Applicant's Supporting Affidavit sworn on the 3rd March, 2023. The gist of the matter is that the Plaintiff is the administrator of the estate of Solomon Wekesa who is the registered owner of land parcel number Moi's Bridge/Ziwa Block 16 (Chebarus)/1296. The Plaintiff alleges that the defendant who is the registered owner of land parcel number Moi's Bridge/Ziwa Block 16 (Chebarus)/1248 has constructed a perimeter wall that has encroached on the plaintiff's land. The matter was referred to the Land Registrar Uasin Gishu (2nd Defendant) sometime in February 2022 but he failed to resolve the dispute.



3. The application is opposed by the 1st Defendant through the Replying Affidavit of Shah Jiten Rasiklal sworn on the 4th April 2023 in which he acknowledges that there is a boundary dispute between the plaintiff and the defendant which was reported to the Chief Matunda location. The chief in turn referred the matter to the Land Registrar Uasin Gishu County but despite the surveyors from the Uasin Gishu County Survey office having visited the parcel of land in dispute in February 2022, they have never released their report to the parties.
4. Mr. Shah avers that they engaged a private surveyor to ascertain their boundary after which they constructed a perimeter wall to secure their property as they await the decision of the Land Registrar who is vested with the power to determine boundary disputes under section 18 and 19 of the [Land Registration Act](#) 2012.
5. He further depones that the Plaintiff instituted a similar suit vide Eldoret Cm Elc No. 130 Of 2022 over the same subject matter which was dismissed on 3rd March, 2023 for want of jurisdiction. He is therefore of the view that this honourable court lacks jurisdiction and the matter is res judicata.
6. In addition to the Replying Affidavit, the 1st Respondent filed a Notice of Preliminary Objection in which he raised 3 grounds. The first one being that the proceedings herein offend the provisions of sections 12 and 13 of the [Government Proceedings Act](#) Cap 40 of the Laws of Kenya. The second ground is that the suit offends the express provisions of section 18(2) and 19 of the [Land Registration Act](#) and consequently, the court lacks the jurisdiction to hear and determine this matter. The third ground is that the suit herein is res judicata as the plaintiff filed a similar suit vide Eldoret Cm Elc Case No. 130 Of 2022 Wycliffe Wakwabubi & Another V Moi's Bridge Quarry Ltd and the same was dismissed for want of jurisdiction.
7. The court directed that the Preliminary Objection and application be disposed of jointly by way of written submissions and both parties filed their submissions which I have considered.

Applicant's Submissions

8. The Applicant submitted that he had filed the instant application with a view to compelling the Land Registrar to release his report following the site visit by the surveyors. It was his contention that the Preliminary Objection was intended to prevent him from accessing justice as no prejudice would be occasioned if the application was allowed since the court would be able to determine the issues in dispute. He therefore urged the Court to dismiss the Preliminary Objection and allow his application.

1st Respondent's Submissions

9. Learned counsel for the 1st Respondent submitted that the court lacked the jurisdiction to heard and determine this suit. She relied on the case of *Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Ltd* (1989) eKLR for the proposition that where the court lacks jurisdiction there would be no basis for continuing with the proceedings. She further relied on the case of [Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 Others](#) (2012) eKLR where the court held that the court cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by the law.
10. It was counsel's contention that section 18(2) of the [Land registration Act](#) barred the court from entertaining this matter as section 19 vests the power to fix boundaries in the Land Registrar. He added that the court could not be able to determine whether there is encroachment on the suit land until the Land Registrar determines the boundary between the plaintiff and 1st defendant. He was therefore of the view that Applicant had approached the court prematurely.



11. With regard to the second ground in the Notice of Preliminary objection counsel submitted that the proceedings herein offend the provisions of sections 12 and 13 of the *Government Proceedings Act* which require that civil proceedings by or against the government be instituted against the Attorney General and that all documents that require to be served on the government in connection with any civil proceedings be served upon the Attorney General. He relied on the case of *David G. Katiba vs District Land Registrar Muranga* (2012) eKLR where the court held that service of civil proceedings against the government must as a matter of law be effected upon the Attorney General. It was her contention that in the instant case, the Applicant had not demonstrated that he had served the Attorney General with the pleadings.
12. Submitting on the third ground, counsel expounded on the doctrine of res judicata under Section 7 of the *Civil Procedure Act* which bars the court from trying a suit which 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 in a court competent to try it.
13. She pointed out that the Plaintiff had filed a similar matter vide Eldoret Cm Elc Case No. 130 Of 2022 Wycliffe Wakwabubi & Another V Moi's Bridge Quarry Ltd where the court held that the dispute between the parties relates to a boundary which is the preserve of the Land Registrar and that the Land Registrar should be given the opportunity to resolve the issue before it is brought to court.
14. With respect to the application, counsel restated her position that the court lacked jurisdiction to hear and determine the matter and that the matter was res judicata.
15. She relied on the case of *Speaker of the National Assembly v Karume* (1992)KLR 2 for the proposition that where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. She further relied on the case of *George Kamau Macharia v Dexka Limited* (2019) eKLR where the court held that the framers of section 18(2) of the *Land Registration Act* placed the mandate of fixing boundaries on the Land Registrar who has the technical advice and resources of the District Surveyor to determine and ascertain boundaries.
16. Lastly, she submitted that the orders sought in the application were final in nature and that they could not be issued in an interlocutory application.
17. Having considered the Notice of Motion and Notice of Preliminary Objection, the following issues fall for determination;-
 - i. Whether the Preliminary objection should be allowed.
 - ii. Whether the Applicant is entitled to the orders sought in the application.
18. Before delving into the merits of the Preliminary Objection it is important to consider whether what has been raised herein falls within the definition of a Preliminary Objection. in the case of *Mukisa Biscuit Company Ltd v West End Distributors Limited* (1969) E.A 696. In the said case the court held 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, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter 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 has to be ascertained or if what is sought is the exercise of judicial discretion.

19. In the instant matter, the Applicant has stated that the court lacks the jurisdiction to hear and determine this matter. This is no doubt a point of law.

Section 18(2) of the Land Registration stipulates as follows:

- (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 boundaries and 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. (Emphasis added)
20. The mandate of fixing boundaries is given to the Land Registrar under Section 19 of the Act. As was held in *Speaker of the National Assembly v Karume* (1992) eKLR 21:
- “Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”
21. Since the law has provided the procedure for dealing with boundary disputes, I am constrained to agree with counsel for the 1st Respondent that it was premature for the Applicant to file this case in court without giving the Land Registrar a chance to determine the boundary. On this ground alone I would hold that the Preliminary Objection has merit.
22. There is however, the added question as to whether the matter is res judicata. It is not in dispute that the Applicant filed Eldoret Cm Elc Case No. 130 Of 2022 Wycliffe Wakwabubi & Another V Moi’s Bridge Quarry Ltd. The said case is between the same parties and the issues raised therein are the same. In the said case the Magistrate’s court held that it had no jurisdiction to hear and determine the matter. This court is being called upon to determine the same issues that were before the Magistrate’s court. The doctrine of res judicata bars the court from entertaining a suit in which the matter was directly and substantially in issue in a former suit between the same parties and the same was finally determined by a competent court.
23. The issue of the court’s jurisdiction was determined by the magistrate’s court. The Applicant did not appeal against the ruling of the court and has instead filed a similar suit seeking the same remedy. I therefore find and hold that the suit is res judicata.
24. The upshot is that the Preliminary objection has merit and it is hereby allowed. Consequently, there would be no need to deal with the application as the court lacks jurisdiction and the matter is res judicata. The suit is hereby struck out with costs to the 1st Respondent.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 21ST DAY OF SEPTEMBER, 2023

J.M ONYANGO

JUDGE

