



**Muango v Kombudo (Environment and Land Appeal E081 of 2021)  
[2023] KEELC 20980 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20980 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL E081 OF 2021**

**E ASATI, J**

**OCTOBER 26, 2023**

**BETWEEN**

**GRACE MUSIMBI MUANGO ..... APPELLANT**

**AND**

**OJWANG KOMBUDO ..... RESPONDENT**

*(Being an appeal from the Ruling of Hon. J. Wambilianga (Senior Principal Magistrate) given on 14th October, 2021 at Kisumu in Kisumu ELC No.116 of 2019)*

**JUDGMENT**

1. Vide the Memorandum of Appeal dated 26<sup>th</sup> November, 2021, the Appellant herein appealed against the Ruling of J. Wambilianga SPM, given on 14<sup>th</sup> October, 2021 in Kisumu CMELC CASE NO.116 OF 2019 (the suit). In the suit, the Appellant herein sued the Respondent seeking, inter alia, for eviction of the Respondent from land parcel known as Kisumu/Migosi/87 and an order of permanent injunction.
2. In response to the suit, the Respondent filed a statement of Defence dated 23<sup>rd</sup> October, 2019 denying the Appellant's claim and raising a Preliminary Objection to the Appellant's claim on the ground that;
  - a. the dispute was a boundary dispute hence the suit was incurably defective and misconceived by dint of the provisions of Section 18(2) of the *Land Registration Act*;
  - b. the Plaintiff has not obtained a statutory title to her alleged parcel of land and hence lacks locus standi to institute the suit.
  - c. the defendant is none suited to the Plaintiff.
3. The Preliminary Objection was heard before the trial Magistrate who delivered her ruling on 21<sup>st</sup> October, 2021. The trial Magistrate found that the preliminary objection had merit. That the



provisions of Section 18 of the [Land Registration Act](#) had not been complied with considering that the matter touched on boundaries. The trial court upheld the Preliminary Objection and struck out the Appellant's suit. Aggrieved by the ruling, the appellant proffered the Appeal herein.

4. The grounds of appeal as contained in the Memorandum of Appeal are that;
  - a. The learned trial Magistrate erred in law and in fact in failing to find that there was no boundary dispute between the Appellant and the Respondent despite the uncontested documents and evidence tendered before her.
  - b. The trial Magistrate erred in law and in fact in failing to find that the suit parcel of land is not free hold but Lease hold and that this land regime does not fall under the ambit of the District Land Registrar/Surveyor hence the jurisdiction lies wholly with the court.
  - c. The trial Magistrate completely misunderstood the evidence before her and wrongly analyzed the evidence thus dismissing the Appellant's case without considering the fact that the suit parcel is legally owned by the Appellant and that the Respondent constructed a permanent wall on the land blocking the sewer line thus depriving her of the sewer services and preventing her from accessing and utilizing a sizable portion of her land.
  - d. The trial Magistrate erred in law and fact by failing to appreciate the totality of the evidence before her, the submissions made on behalf of the Appellant and the fact that in his statement of defence, the Respondent admits that he is not the owner of the parcel of land adjacent to the Appellant's plot that he has wrongly occupied the Appellant's suit parcel. The trial Magistrate erred in fact and in law in failing to put into consideration the fact that the Appellant is suffering as a result of the Respondent's actions, thus reaching to a conclusion that was contrary to the evidence before her.
  - e. The trial magistrate erred in law and in fact by disregarding all the evidence that was adduced by the appellant as proof that the matter is not a boundary dispute but that the Respondent has encroached on the Appellant's parcel of land.
5. The Appellant sought for orders that;
  - i. The appeal be allowed.
  - ii. The ruling of the learned trial magistrate be set aside and the prayers in the plaint be allowed.
  - iii. Costs of the appeal be awarded to the Appellant.
6. Directions were taken on 18<sup>th</sup> May, 2023 that the appeal be argued by way of written submission, pursuant to which written submissions dated 1<sup>st</sup> June, 2023 were filed by the firm of Sala Mundany Advocates on behalf of the Appellant and written submissions dated 24<sup>th</sup> June 2023 filed by the firm of Onsongo & Company Advocates for the Respondent.

#### **Issues for Determination**

7. The Appellant framed the following as the issues for determination;
  - a. whether or not the Land Registrars have jurisdiction over leasehold land;
  - b. whether or not the trial court had jurisdiction to entertain the suit; and
  - c. whether or not the preliminary objection raised a point of law.



I adopted these as the issues for determination in the appeal as they encompass the Appellant's complaint and response by the Respondent.

### **Analysis and Determination**

8. The first issue for determination herein is whether or not Land Registrars have jurisdiction over leasehold land. Counsel for the Appellant submitted on this issue that the Land Registrar has no jurisdiction to handle issues pertaining to the suit land as it is a leasehold and not freehold that hence the Land Registrar cannot hear and determine any issues concerning the same. That the land parcel number is L.R. NO.23444 is a lease issued at the Central Land Registry in Nairobi and not the District Land Registry at Kisumu. That the deed plan was issued by the Director of Surveys at Nairobi, as opposed to the District Land Surveyor in Kisumu. Authority/jurisdiction over the parcel of land can only be donated by the Chief Land Registrar and Director of Survey; to the County Surveyor (under the County Government of Kisumu) if need be.
9. Counsel for the Respondent submitted that in the Preliminary Objection the Respondent stated that an objective assessment of the pleadings in the plaint showed that the dispute between the parties was on the exact location/position of the boundary between the Appellant's parcel of land. That under sections 18 and 19 such disputes should be handled by the Land Registrar. Counsel submitted that the law does not distinguish between leasehold and freehold land. That the Act provides for the first port of call in a case of a boundary dispute between two or more parcels of land.
10. Section 18 of the [Land Registration Act](#) refers to registered land. It states;

“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 appropriate 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.
  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 the boundaries are defined under Section 19(3), the determination of the position of any uncertain boundaries shall be done as stipulated in the [Survey Act](#) (Cap 299).”
11. There is no provision of law that has been cited to for the submissions that the Land Registrar has no jurisdiction to handle boundary disputes over leasehold land. Lease hold land is registered land under the provisions of section 18 of the [Land Registration Act](#).
12. On the basis of the provisions of section 18 and 19 of the [Land Registration Act](#), I find that the Land Registrars have jurisdiction to determine boundary disputes involving leasehold land in accordance with the provisions of the law.
13. The second issue for determination is whether or not the trial court had jurisdiction to entertain the suit. It was submitted on behalf of the Appellant that the Defendant raised a preliminary objection on the jurisdiction of the Honourable court to hear and determine the suit on the grounds that section 18(2) of the [Land Registration Act](#) ousts its jurisdiction. Counsel submitted that however the dispute in the suit was not a boundary dispute. That land parcel KISUMU/MIGOSI/87 i.e. L.R. NO.23444 is owned by the Appellant. That the Respondent has built a permanent wall on the Plaintiff's portion of the parcel of land blocking her sewer line hence the matter cannot be a boundary dispute. That a



boundary dispute can only arise between two or more neighbouring land owners and not between a land owner and a trespasser.

14. Counsel submitted further that the Respondent's Preliminary Objection was misplaced and misguided. That the plaint together with the witness statements clearly show that the claim was one seeking for a permanent injunction and eviction orders as a result of the Defendant's building of structures on the Appellant's land parcel thereby devaluing and defacing the said parcel.

That there is no mention of boundary in the plaint. That therefore, there was no need for the matter to be settled by the Land Registrar as per section 18 of the [Land Registration Act, 2012](#).

Counsel relied on the case of *Stephen W. Maina v Francis Otiso Onchomba & Another* [2021] eKLR where it was held that

“it is trite law that Section 13 of the [Environment and Land Court Act](#) confers jurisdiction to this court and I opine that the issue raised in the plaint are within the jurisdiction of the Environment & Land Court and the Magistrates mandated to deal with land matter”

That the trial court hence had jurisdiction to handle the matter.

15. It was submitted on behalf of the Respondent that the preliminary objection was on pure point of law in line with the Court of Appeal's decision in the case of *The Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* 1989 KLR 1 on jurisdiction. That it can be discerned from the pleadings that the Appellant's complaint was on alleged trespass by the Respondent onto land parcel NO. KISUMU/MIGOSI/87. That the Appellant raised the issue and asked a Surveyor to undertake a survey which has been done and established that the offending wall is being constructed exclusively within her said parcel of land. That there was nothing left to interpret or guesswork. That the dispute in question relates to the position of the common boundary between the Appellant's parcel of land and that of the Respondent. That the boundaries had not been determined in line with section 18 of the [Land Registration Act, 2012](#).

16. Counsel relied on the case of *Geoffrey Muthinja Kabiru & 2 Others –vs- Samuel Munga Henry & 1756 Others* (2015) eKLR to submit that the Appellant was obligated to exhaust the other dispute resolution mechanisms available to her before moving to court. That she ought to have had the common boundary determined by the County/district Land Registrar and the District Land Surveyor in line with Section 18 and 19 of the [Land Registration Act](#) and the [Survey Act](#). Counsel relied further on the case of *Azzuri Properties v Pink Properties Ltd* [2018] Eklr where it was held inter alia that

“reference of the dispute to the Environment and Land court at first instance was proscribed by statute and on that account alone, the Appellant's case was a non-starter”.

17. I have read the Plaint and the Defence in the suit. I note that Section 18(2) ousts the jurisdiction of the court in a dispute relating to boundary where the boundaries have not been determined under the Act. The plaint does not refer to any boundary dispute. My reading of the plaint is that the dispute relates to an alleged act of trespass by the Respondent on the Appellant's land. That the Respondent entered the land unlawfully and constructed a permanent wall thereon thereby blocking the appellant's sewer line.

The Defence does not refer to any boundary or boundary dispute. The Defendant did not claim to own land that shares a common boundary with the Appellant. The Appellant did not claim that he was building the wall within his land. He simply denied the appellant's claim and raised the preliminary objection.



I do not find that the dispute before the trial court was a boundary dispute and hence within the ambit of Section 18 and 19 of the *Land Registration Act*.

I find that the trial court erred in finding that the dispute was a boundary dispute and that it had no jurisdiction.

18. The last issue raised is whether or not the Preliminary Objection raised was a point of law. Counsel for the Appellant relied on the case of Mukisa Biscuit Manufacturing Company Ltd v West Ford Distributors Ltd [1969] EA 696 and submitted that there is no point of law that was raised by the Respondent as the section of law relied on is misplaced.

For the Respondent, it was submitted that the preliminary objection raised a pure point of law which could be gathered from the pleadings.

19. From the case of Mukisa Biscuits relied upon by the Appellant, a preliminary objection must be based on pure points of law, must arise from the pleadings, may dispose of the suit 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 through production of evidence; or if what is sought is the exercise of the court's discretion and must not raise substantive issues from the pleadings which must be determined by the court upon consideration of the evidence.

20. The purpose of preliminary objections is to ensure compliance with the procedural and substantive law obtaining at the time. I find that the preliminary objection raised by the Respondent was on pure point of law but lacked merit as the dispute before the court was not a boundary dispute.

21. Under Article 50 and 159 of *the Constitution* of Kenya, courts should give parties their day in court unless their case is so hopeless that no amount of amendment can cure the defects or the claim is proscribed by statute.

22. For these reasons, I find that the appeal has merit. I allow the appeal and make the following orders;
- a. The Ruling and orders made in KISUMU CM ELC NO.116 OF 2019 on 14th October, 2021 is hereby set aside.
  - b. The suit is reinstated to hearing and determination by the Chief Magistrate's Court – Kisumu.
  - c. Each party to bear own costs of the appeal.

Orders accordingly.

**JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 26TH DAY OF OCTOBER, 2023 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

---

**E. ASATI**

**JUDGE.**

In the presence of:

Maureen: Court Assistant.

Sala for the Appellant.

No appearance for the Respondent.

