



REPUBLIC OF KENYA



KENYA LAW

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Songok (As the Administrator of the Estate of Joseph Songok alias Kibitok Arap Songok - Deceased) v Tabut & 2 others (Environment & Land Case E011 of 2023) [2023] KEELC 20987 (KLR) (19 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20987 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAPSABET

ENVIRONMENT & LAND CASE E011 OF 2023

MN MWANYALE, J

OCTOBER 19, 2023

BETWEEN

EMILIANA JELANGAT SONGOK (AS THE ADMINISTRATOR OF THE ESTATE OF JOSEPH SONGOK ALIAS KIBITOK ARAP SONGOK - DECEASED) PLAINTIFF

AND

PAUL TABUT 1ST DEFENDANT

THE LAND REGISTRAR 2ND DEFENDANT

THE SURVEYOR, NANDI COUNTY 3RD DEFENDANT

RULING

1. This Ruling in respect of the Notice of Preliminary Objection raised by the Defendants against the Plaintiffs suit.

The 1st Defendant raised a Notice of Preliminary Objection dated 25th of May 2023 on grounds inter alia, that this Court lacked jurisdiction to hear and determine the suit as the jurisdiction to hear and determine boundary disputes is reserved to the Land Registrar under Section 18 (2) of the [Land Registration Act](#).

2. The second point being of the misjoinder of the 1st Defendant who is sued yet he is not the registered owner of the suit property, the suit property having still being registered in the name of David Kiptabut (now deceased).
3. The 2nd and 3rd Defendants separately raised a preliminary objection dated on the same Section 18 (2) of the [Land Registration Act](#).

Being similar in nature the Court allowed the parties to argue the preliminary objections orally.



- Ms. Koech Learned Counsel for the 1st Defendant submitted that the Court ought not to entertain the suit as from its very nature the same is a boundary dispute.

It is the 1st Defendants further submissions that from the pleadings, it is clear that the dispute related to Nandi/Kaboi/515 and Nandi/Kaboi/516 and the same is a boundary dispute.

- The 1st Defendant urged the Court to look at paragraph 8 of the plaint where the Plaintiff has pleaded that the same is a boundary dispute and the 1st Defendant places reliance on the decision in the case of *Henry Kosgei v Brian Cutribert and another* 2019 eKLR, where it was held that the jurisdiction of the Court in determining dispute should be considered in light of Section 18 of the *Land Registration Act*.
- On capacity the 1st Defendant submits that the property is registered in the name of David Kiptabut and no letters of administration have been taken
- On the strength of the above submissions the 1st Defendant urges the Court to dismiss the suit, as the Plaintiff is non-suited against him.
- On their part the 2nd and 3rd Defendants through their learned Counsel Miss Jepkemei, sought for dismissal of the suit as the Court lacks jurisdiction by dint of Section 18 (2) of the *Land Registration Act* to deal with a boundary dispute.
- Ms. Jepkemei; equally cites paragraph 8 of the Plaintiff in which she submits brings out the whole claim to be purely a boundary issue. She submits further that the prayers sought equally relate to the issues of boundaries.
- The 2nd and 3rd Defendant further submit that there is a dispute resolution mechanism set out under Section 18 of the *Land Registration Act* granting jurisdiction to the Land Registrar to resolve the matter.
- In support of their submissions, the 2nd and 3rd place reliance on the Speaker of National Assembly v Njenga Karume as well as the decision in the case of *Reuben Kioko Mutane v Hellen Kyunga Miriti and 4 others* (2021) eKLR.
- On the strength of the above submissions the Court was urged to dismiss the suit.

In response to the above sets of submissions, Mr. Choge Learned Counsels for the Plaintiff, submits that the Court has original and Appellate jurisdiction to deal with all matters of Environment and Land as per section 13 (1) of the *Environment and Land Court Act* as read together with Article 162 (2) (b) of *the Constitution*.
- The Plaintiff Counsel submits that he had sought for findings, determination and permanent injunction and a restoration of boundaries, which makes it a claim of land as opposed to a boundary dispute.
- The Plaintiff's Counsel submits further that the 2nd and 3rd Defendant have not filed a defence and that a preliminary objection ought to be pleaded in the pleadings.
- In support of this limb of submissions, Mr. Choge Learned Counsel places reliance on the decision in the case of *Charles Onchari Okoti v Safaricom and another* (2020) eKLR and the decision in the case of *Independent Electoral Boundaries Commissions v Jane Cheberengen* (2015) eKLR.
- He sought that the preliminary objection be dismissed. In a rejoinder, Miss Koech for the 1st Defendant, submitted that the jurisdiction of Section 13 of the *Environment and Land Act* should be considered in light of Section 18 (2) of the *Land Registration Act*, and submitted the Court has



jurisdiction. In her rejoinder, Miss Jepkemei for the 2nd and 3rd Defendants, submitted that Section 18 (2) of the [Land Registration Act](#) created a dispute resolution mechanism that was distinct from the jurisdiction of the Court under Section 13 of the [Environment and Land Act](#); she submits that this being a boundary dispute, the provision of Section 18 (2) come into play. She urged the Court to allow the preliminary objection as the same is merited and the dismiss the suit.

17. Upon hearing of the rival submissions by Counsels in the matter and upon perusal of the pleadings and the authorities cited by Counsels, the Court frames the following as issues for determination.
 - i) whether or not there are proper preliminary objections before Court.
 - ii) whether or not the preliminary objections are merited
 - iii) who bears the costs preliminary objections.
18. On the first issue, what constitutes a preliminary objection was defined and discussed in detail in the decisions in the cases of *Mukbisa Biscuit Manufacturers Limited v West End Butchery Limited* as well as in [Omondi v National Bank of Kenya Limited and 2 others](#) a decision quoted in the decision of [J. N. and 5 others v Board of Management St. G. School Nairobi and another](#).
19. In Mukhisa Biscuit case, the preliminary objection was defined as follows; -

“so far as I am aware of preliminary objection consists of a pure point of law which has been pleaded or which arises by clear implications out of pleadings and if argued as a preliminary objection is in the nature argued as a preliminary objection is in the nature of what used to be a demurer. It raises a pure point of law, which if argued on the assumptions on the assumptions that all acts pleaded by the other side are correct. If cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion.”
20. In the Omondi case, the Court held in respect of a preliminary objection, as follows;

“a preliminary objection of a point of law may dispose off the suit..... where a Court needs to investigate facts, a matter cannot be raised as a preliminary point. Any thing that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.....”
21. The Plaintiff has pleaded being the administratrix of the Estate of Joseph Kibitok Songok and at paragraph 2 pleads that the 1st Defendant is a son of the registered proprietor of Nandi/Kaboi/516.
22. At paragraph 8 of the plaint, the Plaintiff pleads that determination of the boundary dispute would deprive the Plaintiff proprietary rights over the said part and there is a prayer to fix the boundaries as has always existed on the ground, while prayer (c) of the plaint seeks restoration of the boundaries.
23. It is clear as daylight from the plaint that the cause of action pleaded herein related to a boundary dispute, and further that the 1st Defendant is pleaded to be a son of the deceased proprietor and not an Administrator of the deceased proprietor’s estate.
24. All the above are found by clear implications from the plaint and do not need ascertainment of factual evidence.
25. It follows from the principles set out in the above cited decisions, that the preliminary objections dated 25th May 2023, and 30th May 2023 are property before Court and thus the answer to issue number 1 herein is in the affirmative, that there is a proper notice of preliminary Objection before Court.



26. Having answered issue number 1 in the affirmative, the Court shall now consider whether the notices of preliminary objection are merited.

27. The first limb of the 1st Defendants preliminary objection, is that the Plaintiff is non-suited against him since he is not the registered owner neither an administrator of the estate of the deceased registered owner.

It is trite law as was held by the Court of Appeal in their decision in the case of *Evans Obino Nyamoisi v Ndege Okangi* Civil Appeal No. 32 of 1998 where the Court held *inter alia*, that “a party to have capacity to sue or be sued on behalf of an estate of a deceased person he/she must have a grant of letters of administration....”

28. From the pleadings, it is evident that the Defendant is sued as the son of the deceased but not as an Administrator of the Estate, and I agree with the submissions of the 1st Defendant’s Counsel that the Plaintiff is non-suited against him and that limb of the preliminary objection is merited and succeeds.

29. The second limb of the 1st Defendants preliminary objection shall be considered together with the 2nd and 3rd Defendants preliminary objection, as both are grounded on Section 18 (2) of the [Land Registration Act](#).

30. Whereas the 1st Defendant submits placing reliance on the decision of [Henry Kosgei v Brian Cutbber and another](#) that this Court has no jurisdiction to hear and determine a boundary dispute, the 2nd and 3rd Defendant submit that Section 18 (2) of the [Land Registration Act](#) provides for a Dispute Resolution Mechanism in respect of boundary disputes and by virtue of the said mechanism this Courts lacks jurisdiction.

31. On his part, the Plaintiff submits that the suit relates to a claim of land of some 52 by 17 metres on another property and hence it is matter squarely for this Court.

32. As observed at paragraph 22 of this ruling, the dispute herein is a boundary dispute Section 18 (2) of the [Land Registration Act](#) provides as follows;

“The Court shall not entertain any action or other proceedings relating to a dispute as to boundaries of registered land unless the boundaries have been determined with this section.”

33. The Plaintiff seeks the Court to determine the boundaries as they exist on the ground in prayer (c) of his plaint; yet Section 18 (2) prohibits the Court from entertaining such claim and vests at Section 18 (3) the power to Land Registrar.

34. There is thus merit in the arguments by both Counsels for 1st, 2nd and 3rd Defendant that the jurisdiction of this Court should be considered in view of Section 18(2) of the [Land Registration Act](#), as was held in the Henry Kosgei decision, and since a mechanism exists on how such disputes such as the boundary disputes such as the boundary dispute herein, then the procedure needs to be exhausted as was stated in the decision in the case of [The Speaker of National Assembly v Karume](#).

35. Only after exhaustion of the mechanism will a claim be ready to be filed in Court. In other words, the boundary has to be established firstly by the Land Registrar before a claim to ascertain the loss of the 52 by 17 meters as claimed by the Plaintiff can be filed in Court.

34. I thus find merit in the preliminary objection before Court and thank Counsels who appeared in the matter for the industry in providing Court with the relevant authorities.



35. The upshot is that the preliminary objections are upheld and the suit is dismissed with costs to the Defendants.

RULING, DELIVERED AND DATED AT KAPSABET THIS 19TH DAY OF OCTOBER 2023.

HON. M. N. MWANYALE,

JUDGE

In the presence;

Mr. Choge for the Plaintiff

Ms. Jepkemei for 2nd and 3rd Defendants and holding brief for Mrs. Koech for 1st Defendant

