



**Mwilaria v Mangachiu & 3 others (Environment & Land Case
E001 of 2023) [2023] KEELC 20908 (KLR) (18 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20908 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E001 OF 2023
CK NZILI, J
OCTOBER 18, 2023**

BETWEEN

DENNIS GITARI MWILARIA PLAINTIFF

AND

PAUL KIRIMI MANGACHIU 1ST DEFENDANT

TIMOTHY MUNGATHIA 2ND DEFENDANT

**THE DISTRICT LAND ADJUDICATION SETTLEMENT OFFICER TIGANIA
WEST 3RD DEFENDANT**

ATTORNEY GENERAL 4TH DEFENDANT

RULING

1. This ruling relates to an application dated 4.7.2023, and a preliminary objection by the 1st and 2nd defendants dated 20.7.2023. In the application, the plaintiff seeks the court to grant an order that the boundaries existing on the ground and the status quo be maintained and, secondly, a temporary injunction to issue barring and restraining the 1st and 2nd defendants, their agents, servants, or employees from transferring, trespassing or interfering with LR no Meru/Mbeu 1/42 pending hearing and determination of this suit. The reasons are contained on the face of the application and in a supporting affidavit sworn by Dennis Gitari Mwilaria. The applicant avers he is the registered owner of LR no Meru/Mbeu1/42, whose title deed was issued on 9.3.2016, whereas the 1st and 2nd defendants are the registered owners of LR no's Meru/Mbeu 1/418 and 10366, respectively. It is averred that the titles were issued in terms of the boundaries shown in the Registry Index Map, which unfortunately was not reflective of what was on the ground since what the applicant occupies is 1.21 ha as opposed to 0.92 ha.
2. The applicant avers that from the map, it appears that the 1st and 2nd defendants' parcels of land have been mistakenly placed in his parcel of land. Further, the applicant avers that he wrote a letter dated



- 22.3.2022 to the land registrar requesting for the correction of the acreage and the amendment of the map to reflect the actual position on the ground, who summoned the parties with a view of settling the dispute, but the 1st and 2nd defendants failed to comply the various summons which were issued.
3. The applicant also avers that he consulted a land surveyor to visit the ground and notified the 1st and 2nd respondents through the area chief by a letter dated 4.5.2023. That he paid the requisite fees and the land surveyor attended the land on 11.5.2023 and prepared a report dated 23.5.2023, concluding that there was an error on the acreage on the Registry Index Map as opposed to what was on the ground, which ideally was not a boundary dispute. It was averred that following the report, the 1st and 2nd defendants were summoned by the land registrar to sign the mutation form but failed. The plaintiff attached the copy of the title, Registry Index Map and ground presentation, letter dated 23.3.2022, copy of summons, receipt and chief's letter, and survey report as annexures marked DGM "1-8", respectively. Therefore, the plaintiff urged the court to protect and safeguard his land by issuing the orders sought.
 4. By a joint replying affidavit sworn on 20.7.2023, the 1st and 2nd defendants opposed the notice of motion on the ground that they are the owners of the two parcels mentioned in the application, which they inherited from their late father, Mungachio Nchebere. The 1st & 2nd defendants averred that they demarcated the suit parcels of land during the demarcation stage, where they put up various dwelling houses and other developments, and that there was no complaint against them at that stage, which parcels of land were distinct and separate from the plaintiff's land. The 1st and 2nd defendants denied the alleged mistaken placement of their land to what belongs to the plaintiff, who essentially wants to take up their land unjustly.
 5. The 1st and 2nd defendants denied they were ever summoned to the land office as alleged or at all, nor had they seen any land surveyor on the ground. Further, the 1st and 2nd defendants insisted that the court lacked jurisdiction to hear and determine the matter since it was a boundary dispute. Therefore, urged the court to find it has no jurisdiction as per the preliminary objection dated 20.1.2023 and paragraph 9 of the defense dated 20.7.2023.
 6. Coming to the preliminary objection, the 1st and 2nd defendants take the view that the court lacks jurisdiction to hear the suit on a boundary dispute, as can be seen from paragraphs 7, 8, 10, 11, and 12 prayers (a) and (b) of the plaint and the documents numbers 2, 3, 5 & 6 in the list of documents. The 1st and 2nd defendants, based on Sections 14, 16, 17, 18, and 19 of the [Land Registration Act](#), urged the court to find the nature of this suit frivolous, vexatious, scandalous, and an abuse of the court process.
 7. The court on 10.7.2023 certified the applications urgent and listed it for inter-parties hearing on 25.7.2023. Parties were also directed to file written submissions. On 25.7.2023, Miss Mbaikyatta's counsel appearing for the 3rd and 4th defendants told the court that she was unable to file any response since the land was already titled and, therefore, the right party to be sued was the Land Registrar and not the District Land Adjudication Officer. On the application before the court, learned counsel indicated associating her submissions with those of the 1st and 2nd defendants.
 8. Therefore, the court directed the parties to submit written submissions to both the application and the preliminary objection.
 9. In written submissions dated 26.7.2023, the plaintiff submitted that the preliminary objection dated 20.7.2023, was unmeritorious since the issue was not a boundary dispute but a mistake committed during the titling process, which a land registrar lacks jurisdiction to adjudicate, under Section 18 (2) of the [Land Registration Act](#), given that title deeds were issued after the completion of the adjudication process after boundaries had been determined.



10. The plaintiff submitted that the suit was about correcting both the title and the Registry Index Map to reflect the position on the ground, which the land surveyors' report had identified. The plaintiff urged the court to find that the cause of action arose from the titles as issued after the adjudication process, which, unfortunately, the 1st and 2nd defendants had misconstrued in the preliminary objection and left out the gist of the suit. Reliance was placed on the *Estate of Gabriel Kiprof Chebet v Director of Land Adjudication & Settlement and another* (2022) eKLR. The plaintiff urged the court to find that the suit should be sustained since it does not infringe on Section 18 (2) of the *Land Registration Act*.
11. The 1st & 2nd defendants, by written submissions dated 24.7.2023, urged the court to find paragraphs 7, 8, 10, 11, 12, prayers (a) & (b) of the plaint and documents numbers 2, 3 & 5 in the list of documents refer to a boundary dispute hence the claim was over boundaries not the ascertained by the land registrar or a surveyor, the court cannot entertain under Sections 14, 16, 17, 18 (2) and 19 of the *Land Registration Act*. Reliance was placed on *Kinyuni v Nyambura & another* (2022) KECA 923 (KLR) & *Estate Sonrisa Ltd & another v Samuel Kamau Macharia & others* (2020) eKLR.
12. The 1st and 2nd defendants submitted that the court was bereft of jurisdiction without a determination by the land registrar on the alleged boundary dispute. The court was asked to strike out both the suit and the application for being frivolous, vexatious, scandalous, and an epitome of abuse of the court process.
13. A preliminary point of law has been defined as a pure point of law that has been pleaded or arises by a clear implication out of pleadings and which, if argued, a preliminary point may dispose of the suit. See *Mukbisa Biscuits Manufacturing Co Ltd v West End Distribution Ltd* 1969 EA 696. In *Muiruri v Kimemia* (2002) eKLR 677, the court observed that a preliminary objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of the court's discretion.
14. Courts of law, if bereft of jurisdiction, must stop for jurisdiction is everything without which a court has to down its tools as held in *Owners of Motor Vessel Lilian "S" v Caltex Oil (K) Ltd* (1989) KLR 1 and *Republic v Karisa Chengo & 2 others* (2017) eKLR. A preliminary objection that would call for evidence and is raised on a matter of fact that is contested ceases to be valid, as held in *Oraro v Mbaja* (2005) KLR 141.
15. The facts of this matter are contained in the plaint dated 4.7.2023. The plaintiff avers that there are glaring inconsistencies over his title LR no Meru/Mbeu 1/42 and that of the 2nd and 3rd defendants, namely LR no's Meru Mbeu 1/418 and 10366, regarding the acreage and what was reflected on the Registry Index Map and the ground. It is averred that the land registrar's jurisdiction was invoked, resulting in a land surveyor's report dated 23.5.2023, confirming that the dispute was beyond a boundary dispute whose root was from the title mapping exercise.
16. Therefore, the plaintiff averred that the claim required the correction or cancellation of the register and titles to reflect the suitable acreage or size and the possible re-issuance of a fresh one. The plaintiff attached a list of documents, including the title deed, respondent as per page 9 draft Registry Index Map ground representation, correspondences, and the land surveyor report dated 23.5.2023.
17. In the defense dated 20.7.2023, the 1st and 2nd defendants admit the ownership of the adjacent parcels of land, which they have occupied and developed since they inherited the same from their late father Mangachiu Nchebere and were demarcated under their respective names during the adjudication stage with no complaints from anyone.
18. The 1st and 2nd defendants denied the contents of paragraphs 7, 8, 9, 10, 11, 12, and 18 of the plaint, saying that their parcels were separate from the plaintiff's land. They denied the alleged mistaken "placement"



of their land on the plaintiff's property, which they termed an attempt to "grab" their land. Further, the 1st and 2nd defendants averred that the court lacks jurisdiction since the dispute borders on a boundary dispute.

19. In *Gabriel Kiprop Chebet (supra)*, a preliminary objection had been raised under Sections 18 (2) *Land Registration Act*. The contestation was that the errors had occurred during the titling process, which the land registrar could not determine under Section 18 (2) of the *Land Registration Act*. The court cited with approval *Susan Wairimu Ndiangui v Pauline W. Thuo & another* (2005) eKLR that a preliminary objection should not be drawn vaguely to fail to disclose the point of law or issue intended to be raised. The court held that the preliminary objection, as introduced, called for an assessment and proof of facts.
20. In *Republic v Chief Land Registrar & another ex parte Yosabia Kerubo Manyura* (2018) eKLR, the court held that a land registrar had no powers to cancel or revoke a title except in instances under Section 79 of the *Land Registration Act* where he could effect rectification of the register only where there were errors, mistakes or omissions that did not materially affect the interests of the registered proprietor. The court observed that only the court under Section 80 (1) *Land Registration Act* could order for rectification of the register by directing any cancellation or amendments if satisfied that the registration was obtained made or omitted by fraud or mistake.
21. In this suit, the plaintiff has raised issues of mistakes or errors made during the titling process. The land surveyor has confirmed the claim as beyond a boundary dispute. The defendants have not tendered a rival land surveyor or land registrar's report showing its jurisdiction over the claim.
22. The basis upon which the defendants believe this is a claim bordering on a boundary dispute is unclear and would need an ascertainment of the facts through evidence. This would make the preliminary objection shift beyond a pure point of law. Therefore, I hold that the preliminary objection is misconceived and does not meet the threshold set in *Mukbisa Biscuit (supra)*. The same is as a result of this dismissed with costs.
23. As to the application, since parties are contesting both the size and acreage of their respective parcels of land, the most prudent order is to direct the status quo subsisting at the filing of the suit to prevail until the matter is heard and determined. Meantime, I direct the land registrar to visit the locus in quo and furnish a report to this court.

Orders accordingly.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 18TH DAY OF OCTOBER 2023

HON. CK NZILI

JUDGE

