



**Kipyegen (Suing on Behalf of the Estate of the Late Obadiah Kipyegen Kimasas)
((Suing on behalf of the Estate of the Late OBADIAH KIPYEGEN KIMASAS)
v Baringo County Administrator & 2 others (Environment & Land Case
434 of 2017) [2023] KEELC 21891 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21891 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 434 OF 2017**

**LA OMOLLO, J
NOVEMBER 30, 2023**

BETWEEN

**ESTHER KABON KIPYEGEN (SUING ON BEHALF OF THE ESTATE OF THE
LATE OBADIAH KIPYEGEN KIMASAS) PLAINTIFF
(SUING ON BEHALF OF THE ESTATE OF THE LATE OBADIAH KIPYEGEN
KIMASAS**

AND

**BARINGO COUNTY ADMINISTRATOR 1ST DEFENDANT
BARINGO DISTRICT LAND REGISTRAR 2ND DEFENDANT
BARINGO DISTRICT LAND SURVEYOR 3RD DEFENDANT**

RULING

Introduction

1. This ruling is in respect to the 1st Defendant's application dated 26th May, 2023 which seeks the following orders:
 - a. Spent.
 - b. That this Honourable Court lacks the jurisdiction to hear and determine this suit hence the same should be struck out for want of jurisdiction.
 - c. That this Honourable Court do declare this suit as premature, misconceived, vexatious, scandalous and an abuse of the due court process.



- d. That a declaration do issue that the Honourable Court is not competent to adjudicate on the suit herein because it is a boundary dispute that falls under section 18(2) of the [Land Adjudication Act](#) No. 3 of 2012 and ought to be dealt with by the Land Registrar Baringo.(sic)
- e. The costs of this application be provided for.

Factual Background.

2. The Plaintiff commenced this suit vide a Plaint dated 16th November, 2017 which was amended on 15th November, 2022.
3. In the Amended plaint, she prays for judgment against the Defendants for:
 - a. A permanent order of injunction restraining the Defendants by themselves, their agents, their servants and all other persons acting under them from entering, remaining on, demolishing or dealing with or in any way interfering with the Plaintiff's parcel of land known as Baringo/ Kewamoi A/371.
 - b. A declaration that the original survey done and the map issued is correct and the measurement of the parcel of land.
 - c. Costs of this suit be borne by the Defendants.
4. The 1st Defendant filed its amended Statement of Defence dated 5th December, 2022 where it denied the Plaintiff's allegations in the plaint.
5. The 1st Defendant stated that the court lacks the jurisdiction to adjudicate over the case as it is a boundary dispute. Subsequently, the 1st Defendant filed the instant application which now forms the basis of this ruling.

1st Defendant's Contention.

6. The 1st Defendant contends that they have since discovered that this suit involves a boundary dispute which this court lacks jurisdiction to adjudicate.
7. It further contends that the suit ought to have been first referred to the Land Registry Baringo for determination.
8. The 1st Defendant contends that the suit is thus premature and adds that it is trite law that where there is a laid down mechanism for dispute resolution, the same ought to be first exhausted before moving to court.
9. The 1st Defendant contends that this court therefore lacks jurisdiction and adds that the Plaintiff did not exhaust the dispute resolution mechanism process as provided for under Section 18(2) of the [Land Registration Act](#) No. 3 of 2012.
10. In conclusion, the 1st Defendant urges this court to strike out the suit with costs.

Plaintiff's Responce.

11. The Plaintiff filed her Replying Affidavit dated 3rd July, 2023 in response to the application.
12. She deposes that the issue between herself and the Defendants is that of trespass and encroachment onto her deceased's husband property.



13. The Plaintiff deposes that the Defendants have encroached on the said property in the guise of expanding a road that is adjacent to the suit land.
14. She further deposes that on 30th January, 2018 the 1st Defendant and herself entered into a consent that an injunction order be issued against the Defendants pending the hearing and determination of the application dated 16th November, 2017.
15. She also deposes that it was also agreed that the surveyors should visit the land to establish whether or not there was any encroachment. She deposes that there are two reports filed in court; dated 16th October, 2018 and 20th July, 2018.
16. The Plaintiff states that further injunctive orders were issued on 6th December, 2017 against the Defendants despite the two reports by the surveyor.
17. She deposes that from the above it is clear that her claim is based on trespass and encroachment on the suit property.
18. The Plaintiff adds that the 1st Defendant is alive to the fact that the issue before the court is on trespass as averred at paragraph 13 of its Statement of Defence.
19. She deposes that she has attached photos of the alleged trespass and adds that the issue for determination remains as trespass which should be heard.
20. In conclusion, the Plaintiff states that the instant application is misconceived aimed at distorting the facts of the claim to suit its side. She urges the court to dismiss the application with costs.

Supplementary Affidavit.

21. The 1st Defendant filed a Supplementary Affidavit dated 15th July, 2023 in response to the Plaintiff's Replying Affidavit.
22. It reiterated its supporting affidavit to the application and states that the issue to be addressed concerns ascertaining the exact positions of the suit land, road reserve and the earmarked beacons.
23. It deposes that paragraphs 8,9,10,11,12 and 17 of the Plaintiff's Reply raises issues to do with boundary and not trespass.
24. The 1st Defendant adds that the list of documents as presented in court by the Plaintiff deals with the issue of boundary. It highlights the said instances as stated in the Plaintiff's Reply.
25. It states that the orders as mentioned by the Plaintiff were part of the normal orders issued during the hearing which had nothing to do with the issues raised in the instant application.
26. It further states that the surveyors report confirm that the issue is a boundary dispute to be dealt with by the Land Registrar. It adds that the Plaintiff under paragraph 6 of her Replying Affidavit supports their position that the suit involves a boundary dispute.
27. In conclusion, the 1st Defendant prays that their application be allowed with costs.

Issues For Determination.

28. The 1st Defendant filed its submissions on 18th July, 2023. It gave a background of the case and identified the following issues for determination:
 - a. Does the Honourable Court have the jurisdiction to adjudicate on this case?



- b. Who bears the costs?
29. On the first issue for determination, the 1st Defendant while submitting in the negative relies on various judicial cases such as *Sagala Rancher Limited V Saumu Mwanganjoni & 19 Others* [2022] eKLR and *Nelly Atieno Aluoch V Damaris A. Nyamalo & 2 Others* [2021] eKLR.
 30. It submits that the instant case concerns a boundary dispute and the parties ought to have it referred to the Land Registrar before coming to court.
 31. It further submits that where there is a laid down dispute resolution mechanism provided by a statute it is incumbent upon the aggrieved party to pursue the same before going to court.
 32. The 1st Defendant relies on the judicial decision of *Geoffrey Muthinja & Another V Samuel Muguna Henry & 1756 Others* [2015] eKLR.
 33. It submits that the vide a letter dated 24th March, 2014 the Plaintiff wrote to the Land Registrar, Baringo. The 1st Defendant argues that the same concerned a boundary dispute and the Plaintiff became impatient and choose to file the instant suit. It submits that the said move was premature and maintains that the dispute is still within the Land Registrar's jurisdiction.
 34. It submits that the Plaintiff did not follow the laid down mechanism provided under Section 18(2) of the *Land Registration Act*. It ends by stating that the instant application be allowed and the suit be struck out with costs.
 35. On the second issue, the 1st Defendant relied on the judicial case of *Haraf Traders Limited V Narok County Government* [2022] and submits that the Plaintiff compensates it for dragging it to court in a suit that does not meet the threshold for being adjudicated by court.
 36. It submits that it has been subjected to unnecessary litigation by the institution of this suit.
 37. In conclusion it submits that it has demonstrated that the instant case is premature and should be dismissed with costs.
 38. The Plaintiff on the other hand filed her submissions on 17th October, 2023 and submits that Section 18(2) of the *Land Adjudication Act* No. 3 of 2012 does not exist.
 39. She reiterates the contents of her Replying Affidavit sworn on 3rd July, 2023 and insists that the subject matter of the instant suit is trespass and/or encroachment by the Defendants onto her parcel of land.
 40. The Plaintiff relies on the judicial decision in Nakuru H.C ELC NO 28 OF 2015 *Ochako Obinchi V Zachary Oyoti* [2018] eKLR. She also relies on the article by Sophie Campbell Adam on "boundary disputes".
 41. In conclusion, the Plaintiff urges the court to disallow the instant application with costs.

Analysis and Determination.

42. Upon perusal of the Application, Replying Affidavit, Supplementary Affidavit and Submissions filed in respect of this Application, it is my considered view that the main issue for determination is:



a. Whether or not this court has the requisite jurisdiction to hear and determine the suit.

43. 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 the boundaries of registered land unless the boundaries have been determined in accordance with this section.

44. The Plaintiff at paragraph 17 of her Complaint averred as follows:

“The claim is that the Plaintiff’s parcel of land is lying within a road reserve and for this reason the Defendants have vowed to demolish the Plaintiff’s houses/structures built on his parcel”

45. At paragraph 20 of her Complaint, she further averred as follows:

“The Plaintiff’s claim against the Defendants, their agents and servants is for a permanent order of injunction restraining them from entering, remaining on, demolishing or in any other way dealing with or interfering with the Plaintiff’s parcel of land No. BAringo/Kewamoi A/371.”

46. The 1st Defendant contends that this court lacks the requisite jurisdiction to hear and determine the instant suit since it is a boundary dispute.

47. It argues that the Plaintiff’s Complaint at paragraphs 8,9,10,11,12 and 17 revolves around boundary issues. He further argues that the documents presented by the Plaintiff deal with boundary issues.

48. The Plaintiff on the other hand argues that her claim is based on trespass and encroachment of the suit property. She states that both parties had agreed to have the surveyor visit the suit land and establish whether there was encroachment and reports were filed.

49. In the judicial decision of [Bernard Otieno Alosi & Another v Kepha Omulo Opap & 3 Others](#) (2017) eKLR the court held as follows:

“It is evident that the law recognizes that the Court lacks the technical ability to determine disputes relating to boundaries and that explains why the Land Registrar and the surveyor are given that mandate expressly under the law since they are the ones who possess the technical ability to do so.”

50. This court has perused the court records and established that there is a Surveyor’s Report filed dated 16th October, 2018.

51. The said report confirmed that there was encroachment of buildings on the access road. There is a map attached to the said report. From the Surveyor’s Report, it is clear that the boundary between the access road and the suit parcel had been fixed. The surveyor’s finding that there had been encroachment clearly infers that the boundaries had been identified.

52. Therefore, this court is of the view that the provisions of Section 18 of the [Land Registration Act](#) are not applicable in the present suit.

53. In [Fredrick Nganga Thuo v Peter Mungai Njubo](#) [2017] eKLR it was stated thus;

“It is not in doubt that the two parcels of land are registered and each piece has its own distinct title deed with measurements.



There is also a surveyor's report dated 12th April 2017, which shows that L. K. Ngetich, the County Surveyor, Kiambu went to the ground to re-state the boundary between Kikuyu/Kikuyu Block 1/819 and 820. From the above letter, it shows that the boundary for the two parcels of land had been fixed.

Section 18(2) of the *Land Registration Act* applies where the boundaries have not been fixed. However, in this instant case, the respective parcels of land have their boundaries clearly demarcated and fixed as per the letter of L. K. Ngetich, the County Surveyor. The Registrar would have jurisdiction where the boundaries have not been fixed. In the instant case, the boundaries have been fixed and therefore the Court has jurisdiction." [Emphasis mine]

54. The Plaintiff in her submissions submits that the suit be struck out since Section 18(2) of the *Land Adjudication Act* No. 3 of 2012 does not exist. I believe that this a typo for the reason that the 1st Defendant in other parts of the application refers to Section 18(2) of the *Land Registration Act* No. 3 of 2012.
55. Taking the foregoing into consideration and particularly the surveyor's report, I find that the boundaries in the instant suit have already been fixed. It follows that this court possesses the requisite jurisdiction to hear and determine the suit.

Disposition.

56. The upshot of the foregoing is that the 1st Defendant's application dated 26th May, 2023 is hereby dismissed with costs.
57. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU

THIS 30TH DAY OF NOVEMBER, 2023

L. A. OMOLLO

JUDGE.

In the presence of:

Mr. Mwaita for the 2nd Defendant

Mr. Karanja Mbugua for the Plaintiff/Respondent.

Court Assistant: Ms. Monica Wanjohi.

