



**Magiri v Mugambi & 2 others (Environment and Land Appeal
E014 of 2022) [2023] KEELC 22244 (KLR) (6 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22244 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E014 OF 2022
CK NZILI, J
DECEMBER 6, 2023**

BETWEEN

JOSEPH MWENDA MAGIRI APPELLANT

AND

GERALD KIRIMA MUGAMBI 1ST RESPONDENT

PLANNING MERU 2ND RESPONDENT

THE HON ATTORNEY GENERAL 3RD RESPONDENT

*(Being an appeal from CMC ELC Case No. E93 of 2021
delivered on 21.2.2022 by Hon. John M. Njoroge – CM)*

JUDGMENT

1. The appellant sued the respondents at the lower court, alleging that they had fraudulently altered, cancelled or reduced his LR No. Ntima/Igoki/2526 from 0.36 ha to 0.07 ha. The appellant claimed that his land parcel was a resultant LR No. Ntima/Igoki/2489, whose mother title was originally subdivision of LR No. Ntima/Igoki/433 which was subdivided into LR No's 2086, 2087, and 2088. He had averred LR No.2088, which was later subdivided into LR No.2097 and 2098 was subdivided into 2180 & 2081. LR No. 2081 was later subdivided into LR No.2098, giving rise to LR No. 2488 and 2489, measuring 0.20 ha and 048 ha, respectively.
2. He prayed for:
 - a. Declaration that the cancellation was unlawful.
 - b. Vacant possession of the land by the 1st respondent
 - c. Rectification of LR No. Ntima/Igoki/2526 and 2488 to reflect the correct acreage/hectares and ownership documents.



- d. Re-establish the correct beacons for the two parcels per the original and GPRS.
 - e. Special and general damages.
3. The 1st respondent opposed the claims by a statement of defence dated 6.9.2021 and a preliminary objection dated 26.8.2021 on jurisdiction. He denied all the allegations contained in the plaint and stated that the boundary between his land and that of the appellant had remained intact for over 40 years. He averred that the court had no jurisdiction under Sections 18, 19, and 20 of the [Land Registration Act](#); hence, the suit was premature and ill-founded.
 4. The 2nd and 3rd respondents opposed the claim through a preliminary objection dated 20.9.2021, that the suit was defective, misconceived, mischievous and otherwise an abuse of the court process. Secondly, the 2nd and 3rd respondents indicated that the subject matter was a boundary dispute whose jurisdiction fell before a land registrar.
 5. Thirdly, the 2nd and 3rd respondents averred that since there was an alternative remedy as per statute, it was only in exceptional circumstances that the courts could hear the matter. Fourthly, the 2nd and 3rd respondents averred that the orders sought in the plaint could only be issued in an application for judicial review; hence, the suit was untenable and meant to defeat the cause of justice. The 2nd and 3rd respondents did not file any statement of defence pleading to the fact in the plaint.
 6. In reply to the preliminary objection, the appellant swore an affidavit on 6.9.2021 stating the preliminary objection was based on facts which could only be determined at the hearing the case; was also based on fraud, collusion between the 1st and 2nd respondents; the land registrar had no powers to determine fraud/collusion cases; he had registered a boundary complaint with the land registrar on 8.8.2018, after establishing the alleged fraud who sent officers to the ground but did a shoddy job as alluded to in the plaint. He averred that the land registrar had made some findings by a letter dated 25.1.2021, which he was aggrieved of, hence the suit before court, inter alia why the 2nd respondent failed to use a modern method of survey or explain why the map had been amended to include his land into the respondent's land or why his green card was altered or cancelled on the size section in favour of the 1st respondent, without his consent. The appellant attached the complaint letter and findings by the land registrar as annexures JMM "1" – "2".
 7. In a ruling dated 21.2.2022, the trial court upheld the preliminary objection. The appellant faults the trial court for:
 - i. Failing to appreciate his entire claim.
 - ii. Failing to find he had exhausted the alternative remedy available in law.
 - iii. Finding merits in the preliminary objection.
 - iv. Not finding that Sections 18, 19, 20 and 40 of the [Land Registration Act](#) provided a recourse to an aggrieved party before the court.
 - v. Failing to appreciate his documentary evidence
 8. The appellant relied on written submissions dated 31.10.2023, to support the grounds of appeal. It is stated that as per paragraphs 5, 9, 19 of the plaint, the trial court had jurisdiction under Section 9 (a) (1) & (v) of the [Magistrates Court Act](#) 2015 to hear and determine the dispute. Further, the appellant submitted the 1st respondent had in his defendant at paragraph 6 admitted the existence of a definite boundary in existence for over 40 years, meaning it had been fixed and determined per Sections 18 (2), 19 & 20 of the [Land Registration Act](#) which therefore did not apply to the suit.



9. The appellant submitted that the cause of action was based on fraud or collusion, which could only be determined by the trial court. Reliance was placed on *Fredrick Ng'ang'a v Prof. Peter Mungai Njuho* Thika ELC No. 602 of 2017.
10. In opposing the appeal, the 1st respondent relied on written submissions dated 3.11.2023.
11. The 1st respondent submitted that the claim by the appellant, as captured in paragraph 16 of the plaint, had triggered several actions, including reporting the dispute to the area chief, who wrote a letter dated 30.8.2018 to the land registrar to intervene the county land surveyors letter dated 25.1.2020 to the land registrar and moving to court after the findings by the land registrar.
12. The 1st respondent referring to the reply to the preliminary objection submitted the suit was premature; the land registrar had not decided on the issue, and the county surveyor's report was a mere recommendation. Reliance was placed on *Ledero Group Ranch v Nauneri Group Ranch* (2021) eKLR. Similarly, the 1st respondent submitted that contrary to the grounds in the memorandum of appeal, the appellant did not even attempt to wait for the land registrar's decision, who should have been given a chance to address the boundary and encroachment issues raised against him. Reliance was placed on *Sagella Ranches Ltd v Saumu Mwanganjohi & others* (2020) eKLR.
13. The 2nd and 3rd respondents filed written submissions dated 25.10.2023. They isolated two issues for the court's determination. In appreciation of the exhaustion doctrine, they submitted the pleadings before the trial court related to a dispute on the position of the boundary between the two parcels of land, yet no evidence was tendered to show the land registrar's jurisdiction was invoked and declined. Without resorting to the land registrar, the 2nd and 3rd respondents submitted that the trial court was precluded from entertaining the suit. Reliance was placed on *Willis Ocholla v Mary Ndege* (2016) eKLR, *George Kamau Macharia v Dexka Ltd* (2019) eKLR, *Geoffrey Muthinja Kabiru and others v Samuel Munga Henry & 1756 others* (2015) eKLR. The 2nd and 3rd respondents urged the court to find that the preliminary objection raised was based on points of law as envisaged in Sections 18 and 19 of the *Land Registration Act*.
14. The role of an appellate court is to approach the lower court record with an open mind and a fresh perspective and come up with individual findings on both facts and the law. See *Gitobu Imanyara & 2 others v Attorney General* (2016) eKLR.
15. A preliminary objection is a pure point of law pleaded or arising from clear implication out of pleadings, argued on the basis that all the facts pleaded by the opposite party are correct. It cannot be raised on contented facts or an issue of the court's discretion. See *Mukhisa Biscuits v West End Distributors Ltd* (1969) EA 696.
16. In *Samuel Kamau Macharia and another v KCB & others* (2003) eKLR, the court said a court can only exercise jurisdiction as donated by a statute or a Constitution. Article 162 (2) (b) of the *Constitution* grants an Environment and Land Court powers to hear and determine disputes, among other things, on boundaries, environment and land. In *Reuben Kioko Mutyaene v Hellen Kiunga Miriti and others* (2021) eKLR, the court observed disputes over boundaries should be heard by the land registrar first and only after that can the decision be challenged in court under Sections 79 (3) (a), 80, 86 & 91 (a) of the *Land Registration Act*.
17. In the suit before the trial court, the 2nd and 3rd respondents had not filed any statement of defence to the claim to raise the issue that the jurisdiction of the land registrar had not been invoked and a decision rendered. In the statement of defence dated 6.9.2021, the 1st respondent did not plead to the facts contained on pages 2-3 of his written submissions. However forceful and persuasive, submissions



- cannot replace pleadings and or amount to evidence as held in *Daniel Toroitich Moi v Stephen Murithi* (2014) eKLR. Unfortunately, legal practitioners are unusually replacing pleadings and evidence with lengthy written submissions at the tail end of a hearing or after an application has been filed and responses made.
18. Order 2 of the *Civil Procedure Rules* provides that only facts and not evidence should be pleaded. There are specific matters that must be pleaded and particulars given. Order 7 thereof provides for matters that must be pleaded in a defence or counterclaim or set off, as well as the documents that must accompany a defence and counterclaim. As much as order 2 rule 9 thereof states, a party may raise any point of law in a pleading that does not absolve a party from filing a defence to a claim.
 19. Through pleadings, parties define the parameters and form of their claims or defences, from which issues for the court's determination flow. See *Raila Odinga v IEBC* (2017) eKLR.
 20. Order 2 Rule 11 of the *Civil Procedure Rules* relating to admissions and denials. Only through a defence or counterclaim does a party deny and or traverse allegations of facts contained in the plaint.
 21. Orders 2 and 7 Rule 13 of the *Civil Procedure Rules* provide that pleadings close 14 days after service of the defence. Compliance with the Rules of procedure and the timelines regarding pleadings is critical in dispensing justice. Order 2 Rule 4 thereof is specific on claims relating to recovery of land. It provides that a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he owns the land by himself or his tenants shall not be sufficient.
 22. In the statement of defence, the 1st respondent failed to plead to key facts other than general denials.
 23. The letter dated 25.1.2020 from the land surveyor's office confirms a site visit on LR No. Ntima/Igoki/2525, 2526 and 2488 happened on 10.11.2020. Boundaries were confirmed as marked. The marker of the report established that the situation on the ground and the survey records was that corresponding parties were directed to maintain their existing boundaries.
 24. A list of documents accompanied with the plaint dated 23.7.2021. Among them was the demand letter dated 20.5.2021 to the 2nd and 3rd respondents raising issues with the land registrar's report dated 25.1.2021, on the alleged cancellation alteration and interference with acreage. It also included the land surveyor report and a certificate of boundary dated 2.1.1973.
 25. Having looked at the pleadings, it is apparent the suit by the appellant spoke and related to a cause of action beyond a boundary dispute. A cause of action is an act on the defendant's part that gives the plaintiff his cause of complaint. See *AG & another v Andrew Maina Gitbinji & another* (2016) eKLR. It is the factual situation, the existence of which, entitles one person to obtain a remedy against another person from the court. These were the words of Lord Diplock in *Anne Jepkemboi Ngeny v Joseph Tireito and another* (2021) eKLR as cited with approval by the court of appeal regarding *Letang v Cooper* (1964) 2 ALL ER 929.
 26. The appellant had made serious allegations against the 2nd and 3rd respondents on how they had executed their statutory duties regarding the suit parcels of land. The appellant had averred that his land had been encroached onto by the 1st respondent, and his acreage, size and measurement were reduced from 0.36 ha to 0.07 ha by the 2nd respondent.
 27. In *Henry Onyango Oketch v Jennifer Owuor* (2017) eKLR, the court said a boundary/fence line, trespass dispute was highly technical and could only be resolved after receipt of viva voce evidence and not through a preliminary objection.



28. The 2nd and 3rd respondents did not plead to the issues of fraud, illegalities and the status of the titles to land in dispute as regards their acreage, sizes and measurements.
29. The 1st respondent did not plead to whether there was an encroachment or whether the size or acreage of his land was less or more than what was on the ground and if there had been an overlap between the disputed parcels. The appellant had pleaded that he was disputing the land surveyor's report since it was neither based on the correct survey maps nor was it scientifically based.
30. Section 86 (1) of the *Land Registration Act* 2012 provides that any aggrieved party may move the court for redress. In my view, the issues raised by the respondents were not pure points of law since they required viva voce evidence and bordered on the exercise of the court's discretion. The facts on fraud, illegality and collusion on the alleged interference with land records by the 2nd respondent in favour of the 1st respondent had not been pleaded to by the 2nd and 3rd respondents.
31. The upshot is that I find there are merits in the appeal. The same is allowed, and the lower court suit is hereby reinstated for hearing on merits by a different trial court. Costs to the appellant.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 6TH DAY OF DECEMBER 2023

In presence of

C.A Kananu

Mr. Muthomi for the 1st respondent

M/s Maina for 2nd & 3rd respondents

HON. CK NZILI

JUDGE

