



**Shah (Suing through her Power of Attorney - Umesh Jayantilal Shah)
v Samar Gardens Management Limited (Environment & Land Case
26 of 2021) [2022] KEELC 2292 (KLR) (15 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2292 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 26 OF 2021**

JA MOGENI, J

JUNE 15, 2022

BETWEEN

MANIBEN JAYANTILAL SHAH PLAINTIFF

**SUING THROUGH HER POWER OF ATTORNEY - UMESH JAYANTILAL
SHAH**

AND

SAMAR GARDENS MANAGEMENT LIMITED DEFENDANT

RULING

1. Before me for determination is the notice of preliminary objection dated 4/02/2022 by the defendant which seeks to strike out the plaintiff's plaint dated on November 1, 2021 on the following grounds:-
 - I. THAT this Court lacks jurisdiction to hear the suit as it offends the express provisions of section 18 and 19 of the [Land Registration Act](#) no. 3 of 2012 for reasons that:-
 - a. The substratum of the matter is a boundary issue which falls within the jurisdiction of the Land Registrar.
 - b. Further, it is an established principle of law that where there is an alternative remedy and especially where parliament has provided a statutory appeal procedure, parties should seek redress in the forum established.
 - II. THAT the suit is fatally defective, misconceived and mischievous or otherwise an abuse of the Court process on the fact that it is premature. The suit is incompetent, an abuse of this Honorable Court's process and ought to be struck out with costs.
2. The preliminary objection was canvassed by way of written submissions. In their submissions dated March 22, 2022 and filed on March 25, 2022, the Defendant submitted that their preliminary



objection is purely on a point of law hence qualifies to be considered by this Court. It is their submission that in their view, the dispute between the parties herein relates to the positions of the boundary wall between the Plaintiff's parcel of land known as Plot No. 1870/111/389 and the Defendant's property known as Plot No. 1870/111/103. That they have demonstrated that the dispute herein is a boundary dispute on a general boundary and the powers to hear and determine the same is vested in the Land Registrar therefore it is proper that the Plaintiff follows the procedure of law and seek redress at an appropriate forum. They relied on the following authorities: *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696, *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited* [1989] KLR 1 and *Azzuri Limited v Pink Properties Limited* [2018] eKLR, *George Kamau Macharia v Dexka Ltd* [2019] eKLR.

3. In his submissions dated 9/05/2022 and filed on 10/05/2022, the Plaintiff submitted that the suit is not in any way within the realm of the Land Registrar and if the Land Registrar were to proceed to adjudicate the same, it would be a sacrilegious overreach on his part which would no doubt amount to usurpation of the powers of this Court. The Plaintiff contends that the preliminary objection does not meet the test in *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 and neither does it meet the objectives of a preliminary objection. They submit that grounds 1b and 2 of the preliminary objection are vague and do not provide sufficient information to allow the plaintiff to respond. They relied on the following authorities; *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696, *John Musakali v Speaker County of Bungoma & 4 others* [2015] eKLR, *Oraro v Mbaja* [2007] KLR 141, *David Nyekorach Matsanga & another v Philip Waki & 3 others* [2017] eKLR, *Bashir Haji Abdullahi v Adan Mohammed Noor & 3 others* [2004] eKLR, *William Opondo Omalla v Gabriel Ochong Oriwo & another* [2019] eKLR, Nelly Atieno Oluoch v Damaris A Nyawalo & 2 others [2021] eKLR, *Fredrick Nganga Thuo v Peter Mungai Njubo* [2017] eKLR and *Rhoda S Kiilu v Jiangxi Water and Hydropower Construction Kenya Limited* [2019] eKLR.
4. I have considered the pleadings, the Preliminary Objection raised, rival submissions and the authorities cited to me. The main ground of objection is that the plaintiff's suit against the defendant is over a boundary dispute and that Section 18 and 19 of the *Land Registration Act* ousts the jurisdiction of this court from entertaining boundary disputes.
5. The Plaintiff sued the Defendant and sought for the following prayers:
 - i. A declaration that the Defendant has encroached on the Plaintiff's parcel of land known as Plot No 1870/111/389.
 - ii. This Honourable Court be pleased to order the Defendant to demolish its boundary wall encroaching on parcel of land known as Plot No 1870/111/389 within 14 days and in default the Plaintiff is at liberty to demolish the encroaching boundary wall at the Defendant's sole costs.
 - iii. A permanent injunction restraining the Defendant either acting by itself, its servants, staff and/or agents or any other person whomsoever from encroaching, trespassing, occupying and/or in any other manner interfering and/or dealing with any part of the parcel of land known as Plot No 1870/111/389.
 - iv. General damages for trespass.
 - v. Costs of this suit.
 - vi. Any other or further relief the Honourable court may deem fit and just to grant.



6. I have looked at both the plaint and the defence filed in the primary suit. I do not in fact intend to go into great detail into the contents of these averments as most of the issues raised go to the root of the main suit and cannot be determined at this preliminary stage.
7. From a casual glance of the plaint dated January 11, 2021, the claim by the plaintiff is one of encroachment, trespass and an order of permanent injunction among other prayers that have direct nexus with the alleged encroachment. It is a mix of issues, but the overriding issue is that of encroachment.
8. The basis of the Plaintiff's claim emanates from the alleged survey report which gave rise to the encroachment on his land. The Plaintiff alleges that the encroachment is regarding a boundary wall on Plot No 1870/111/103 which encroached on part of their land Plot No. 1870/111/389. The court has been told how it can possibly locate the plaintiffs' alleged plot from the defendant's share. He implies that there is a determined boundary. They have also adduced a survey map purporting to show fixed boundaries of Plot No 1870/111/389 and Plot No 1870/111/103. The plaintiff is not seeking for determination of boundaries. The Plaintiff's alleges that the directors of the Defendant formally accepted to rectify and relocate the boundary beacons and corrections. The issue of boundaries was raised by the Defendant in his statement of defence wherein he averred that the impugned boundary wall was already in place when their developer purchased LR No 1870/111/103 in 2009 and constructed residential apartment blocks. The Defendant averred that in principle, the Plaintiff was to correct the encroachment at its own expense. The Defendant did not even raise the issue of boundaries by way of a counter-claim to make it qualify even as an issue for determination.
9. To start with, it is important to define what a Preliminary Objection is all about. The case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 has been the watershed as to what constitutes preliminary objections. The Court of Appeal in *Nitin Properties Ltd v Singh Kalsi & another* [1995] eKLR also pellucidly captured the legal principle when it stated as follows:

“...A Preliminary Objection raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”
10. In the same case, Sir Charles Newbold, President stated as follows:

“A preliminary objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. ”
11. This statement of the law has been echoed time and again by the courts: see for example, *Oraro v Mbaja* [2007] KLR 141. In *Hassan Ali Jobo & another v Suleiman Said Shabal & 2 others* SCK Petition No 10 of 2013 [2014] eKLR the Supreme Court stated that

“.... a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit”. [emphasis added]
12. Furthermore, when an issue is raised on jurisdiction of a court to hear and determine a matter, the court must first deal with it as jurisdiction of a court is everything as was held in the case of *The Owners of the Motor Vessel Lillian 'S' v Caltex Kenya Limited* [1989] KLR 1. On the issue that this Court does



not have jurisdiction to deal with the instant case. I wish to refer to section 13 of the *Environment and Land Court Act* which confers jurisdiction to this Court and provides that:

‘(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

Section 13 (2) (c) & (d) further stipulates that ' in exercise of its jurisdiction under Article 162 (2) (b) of *the Constitution*, the Court shall have power to hear and determine disputes - (c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land’

13. The above provisions are distinct in terms of the jurisdiction of the Environment and Land Court. I note the Plaintiff has alleged encroachment and trespass in its Plaintiff and in relying on the legal provisions cited in their submissions, I find that this court indeed has jurisdiction to handle the instant suit. In the circumstance, I beg to disagree with the Defendant that this Court is devoid of jurisdiction to determine this case.

14. The plaintiff’s claim is for a permanent injunction and a declaration that the Defendant has encroached on the Plaintiff’s land known as Plot No 1870/111/389, general damages for trespass among other prayers. From the pleadings, it cannot be said that the case is purely one of a boundary dispute as submitted by the Defendant. From the pleadings the issues are highly contested. In the circumstances, I find and hold that the instant Notice of Preliminary Objection dated 4/02/2022 does not raise a pure point of law as it requires some investigations of some facts. In my view, these are matters that are fit and proper arguments in the substantive suit. For the foregoing, I am inclined to dismiss the Notice of Preliminary Objection dated 4/02/2022 with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF JUNE 2022.

MOGENI J

JUDGE

In the presence of

Ms Mbaabu holding brief for Mr. Gitonga for the Plaintiff

Mr. Makori holding brief for Mr. Juma for the Defendant

Mr. Vincent Owuor.....Court Assistant

