



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**

**Civil Case 54 of 2004**

**EDMUND MWANGI MBIYU ..... PLAINTIFF**

**VERSUS**

**GABRIEL WANJOHI WAWERU ..... DEFENDANT**

**RULING**

The subject matter of this ruling is the preliminary objection raised by **Mr. Macharia**, learned advocate for the defendant. It is the submissions of the learned advocate that the suit before this court relates to a boundary dispute. It is said that though the pleadings has referred the cause of action as based on trespass but it is purely a boundary dispute. **Miss Munyi**, the learned Provincial Litigation Counsel representing Kenya Forest Service, the 3<sup>rd</sup> Party herein was in agreement with the submissions of Mr. Macharia.

**Mr. Wahome Gikonyo**, learned advocate for the Plaintiff was of the view that the preliminary objection lacks merit because the suit is based on the tort of trespass hence it is not a boundary dispute.

I have considered the rival arguments presented by learned advocates from both sides. In order for me to determine whether or not the dispute is a boundary dispute, I must peruse the pleadings. If it turns out that the quarrel is a boundary dispute then the only recourse is to have it withdrawn from this court and refer it to the District Land Registrar for hearing and determination under Section 21(2) of the Registered Land Act. In the plaint dated 8<sup>th</sup> June 2004, the Plaintiff has sought for an order of eviction against **Gabriel Wanjohi Waweru**, the Defendant herein. In paragraphs 4 and 5 of the plaint, the plaintiff has alleged that the defendant entered without any colour of right the parcel of land known as L.R. No. **Narumoru/Block II/Muriru/752** and has remained therein despite protests from the Plaintiff. The Defendant on his part filed a defence alleging that the Plaintiff's claim is statutorily time-barred. The defendant further alleged that the plaintiff has an unresolved boundary dispute with a third party owning the adjacent parcel of land. In paragraph 9 of the defence, the defendant averred that since there is a boundary dispute the claim for trespass is untenable and premature. The defendant contended that this court has no jurisdiction to hear and to determine the dispute. In reply to the defence, the Plaintiff denied that existence of any boundary dispute.

I have carefully considered the issues raised in the plaint and in the defence. What has emerged in those pleadings is that the question as to whether this action is based on the tort of trespass or is it a boundary dispute. The question can only be resolved upon receipt of either affidavit or viva voce evidence. It cannot be resolved on a bare preliminary objection. In my view the two issues i.e. trespass and boundary dispute shall only be resolved upon the reception of evidence. One cannot safely say that the case is one of those clearest cases. A careful reading of the ruling of **Lady Justice Okwengu**, delivered on 27<sup>th</sup> July 2005 will reveal that the honourable judge pointed out that there are certain issues which must go for trial. In fact it was expressly stated that it is evident that the defendant has been having some structures on the ground and that there is an issue as to whether the structures are on the Plaintiff's land.

In the final analysis I am convinced that the preliminary objection is for dismissal which I hereby order. I award the plaintiff costs. In calculating costs, it should be noted that the preliminary objection prompted this court to adjourn the hearing of the suit, consequently, the defendant should meet those costs attendant to the postponed hearing. This punitive cost should discourage the raising of such objections which appear to be geared to forestalling a substantive hearing of an action. In my view the preliminary was frivolous to say the least.

***Dated and delivered this 21<sup>st</sup> day of May 2010***

**J. K. SERGON**  
**JUDGE**