



**Coral Land Limited v Mastermind Tobacco (K) Ltd & 3 others (Environment & Land Case 255 of 2012) [2022] KEELC 14592 (KLR) (31 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 14592 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 255 OF 2012  
CA OCHIENG, J  
OCTOBER 31, 2022**

**BETWEEN**

**CORAL LAND LIMITED ..... PLAINTIFF**

**AND**

**MASTERMIND TOBACCO (K) LTD ..... 1<sup>ST</sup> DEFENDANT**

**MANAGING DIRECTOR ..... 2<sup>ND</sup> DEFENDANT**

**ISAAC LERAPTO ..... 3<sup>RD</sup> DEFENDANT**

**MUNICIPAL COUNCIL OF MAVOKO (NOW MACHAKOS COUNTY  
GOVERNMENT) ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. What is before the court for determination is the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants' notice of preliminary objection dated the May 18, 2022, premised on the following grounds:
  1. That in so far as the suit is founded on the alleged encroachment by the 1<sup>st</sup> to 3<sup>rd</sup> defendants, licenses of Syokimau dump site (LR No12715/209) on the plaintiff's land LR No 122715/208, this honourable court lacks jurisdiction to hear and determine this suit at the first instance as it offends the mandatory provisions of section 18(2) of the [Land Registration Act](#) No 3 of 2012 for reasons that:
    - a. The subject matter of this suit is a boundary issue of LR No12715/209 and LR No 12715/208 which falls within the jurisdiction of the land registrar.
    - b. It is an established principle of law that where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order would be granted by courts and this suit does



not establish any exceptional circumstances for the court's acquiescence of jurisdiction that vests with the land registrar at the first instance.

2. Court redress a boundary dispute of LR No 12715/209 and LR No12715/208 can only be invoked in an application for judicial review or an appeal, thus the suit filed in this court at the first instance is premature and untenable in law.
3. The suit is fatally defective, misconceived and mischievous or otherwise an abuse of the court process and therefore is unsustainable in the obtaining circumstances.
2. The notice of preliminary objection was canvassed by way of written submissions.

### **Analysis and Determination**

3. Upon consideration of the instant notice of preliminary objection including the rivalling submissions, the only issue for determination is whether this court has jurisdiction to handle this suit.
4. The 1<sup>st</sup> to 3<sup>rd</sup> defendants submitted that before the court can determine the question as to whether they indeed encroached on the plaintiff's land being LR No 12715/408, the issue of boundaries between LR No12715/408 and the adjoining Syokimau dump site LR No 12715/409, hereinafter referred to as the 'suit lands', has to be determined. They argued that jurisdiction to determine the issue of the boundaries of the suit lands does not lie in this honourable court at the first instance but vests with the land registrar in accordance with section 18(2) of the *Land Registration Act* (Cap 300) Laws of Kenya. They insist that a claim for trespass can only crystallize for the court's consideration where encroachment is alleged to have occurred having been properly defined on the ground by the Land Registrar.
6. To buttress their averments, they relied on the following decisions: *Azzuri Limited v Pink Properties Limited*, Malindi CA No 93 of 2017 [2018] eKLR; *Estate Sonrisa Ltd & another v Samuel Kamau Macharia & 2 others*, Mombasa CA No 14 of 2016 [2020] eKLR; *Willis Ocholla v Mary Ndege, Kisumu* [2016] eKLR; *Telkom Kenya Limited v County Government of Muranga* (2019) eKLR and *Reuben Kioko Mutyane v Hellen Kiunga Miriti & 4 others; Ntalala Eric Mutura & another (Interested Parties)* (2021) eKLR.
7. The plaintiff submitted that the 1<sup>st</sup> to 3<sup>rd</sup> defendants herein admitted to the jurisdiction of this honourable court in paragraph 21 of their amended statement of defence but later challenged it vide the instant notice of preliminary objection. The plaintiff reiterated that the substratum of the instant suit revolves around trespass and not a boundary dispute hence the court has jurisdiction to handle it. It insists the instant notice of preliminary objection is unmerited and should be dismissed with costs.
8. To support its arguments, it relied on the following decisions: *Geoffrey Mungui Njenga & another v Registrar of Titles & another* (2021) eKLR; *Maungu Ranching (DA) Company Limited v Abdi Starr Haji & another* (2022) eKLR; *NWN V LNM* (2021) eKLR; *Noah Kaisha Kedogo v Chania Construction Company Limited* (2018) eKLR; *Willis Ocholla v Mary Ndege*, Kisumu [2016] eKLR and *Mukhisa Biscuit Manufacturing Co Ltd v West End Distributors Company Limited* (1969) EA 696.
9. The 1<sup>st</sup> to 3<sup>rd</sup> defendants argue that this court does not have jurisdiction to handle this claim as it is a boundary dispute which has to be first determined by the land registrar before proceeding to court. The plaintiff insists the dispute herein revolves around trespass to land.
10. As per the prayers sought in the further amended plaint dated the March 2, 2015, the plaintiff seeks the following orders:



- a. An order by this honourable court restraining the defendants from dumping the soil and other waste on the plaintiff's private land which is harmful not only to the environment but diminishing the value of the property.
  - b. An order by this honourable court compelling the defendants to remove accumulated soil and waste on the plaintiff's private land and or pay Kenya shillings two hundred and fifty million (KShs 250,000,000) or thereabouts as total cost for excavating and providing new dumpsite for the dumped cotton soil and other waste from the private land.
  - c. Damages for loss of use of property "profit mesne".
  - d. The defendants provide compensation to the plaintiff.
  - e. Interest on (c) above at court rates.
  - f. Costs of this suit.
11. In the case of *Mukbisa Biscuit Manufacturers Ltd v West End Distributors Ltd* [1969] EA 696 – the Court of Appeal held that: -
- A preliminary objection is in the nature of what used to be a 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily the costs and on occasion, confirm the issues. This improper practice must stop."
12. See also the decision of *Independent Electoral & Boundaries Commission -v- Jane Cheperenger & 2 Others* [2015] eKLR.
13. It is not in doubt that the plaintiff is the registered owner of parcel No 12715/408 and it is also not in doubt that vide the deed plan dated October 28, 1985, the boundary to its land was clearly demarcated.
14. Further, I wish to refer to section 13 of the *Environment and Land Court Act* which confers jurisdiction to this court as 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.
15. 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."
16. In the foregoing, while associating myself with the decisions cited above, I opine that the instant notice of preliminary objection has not raised pure points of law as required but proceeded to dwell on facts that require to be ascertained before the court can make a final determination of the dispute herein.
17. Since the plaintiff has alleged trespass and sought injunctive orders including damages, I find that this court is indeed clothed with jurisdiction to handle the instant suit as stipulated in section 13 of the *Environment and Land Court Act*.



18. In the circumstance, I find the notice of preliminary objection dated the May 18, 2022 unmerited and will disallow it.

19. Costs will be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 31<sup>ST</sup> DAY OF OCTOBER, 2022.**

**CHRISTINE OCHIENG**

**JUDGE**

