



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**Civil Case 153 of 2008**

**GERALD GACHERU WAMBUGU ::::::::::::::::::::::::::::::::::: PLAINTIFF**  
**VERSUS**  
**JONATHAN PATITA KATUA**  
**GODFREY SAITOTI MOI ::::::::::::::::::::::::::::::::::: DEFENDANTS**

**RULING ON A PRELIMINARY OBJECTION**

1. I have seen the Preliminary Objection dated 14.10.2008 and the argument by Mr. Githuka is this; that because the cause of action relates to alleged trespass and the dispute is primarily one tied to a boundary dispute, section 21(4) of the Registered Land Act, Cap 300 ousts the jurisdiction of this court to determine the matter and therefore the suit and any proceedings in it should be struck off.

2. Section 21(4) aforesaid provides as follows:

***“No court shall entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in this section.”***

3. In relation to that section, the Court of Appeal held as follows in Wamutu vs Kiarie (1982) KLR 480 ;

***“Section 21(4) of the Registered Land Act provides that the court has no jurisdiction to hear a matter relating to boundary disputes or registered land, unless the boundaries have first been determined by the Land Registrar. The court, in this instance, had no inherent power to hear and determine the suit because Section 21(4) of the Registered Land Act (Cap 300), deprives it of jurisdiction.”***

4. If that be the law, what is the issue to be determined in the present suit? In the Complaint, dated 30.9.2008, the Plaintiff at paragraph 7 thereof states thus;

***“a) The 1<sup>st</sup> and 2<sup>nd</sup> Defendant’s actions amount to trespass.***

***The 1<sup>st</sup> Defendant took possession, entered into and grazed his livestock on the plaintiff’s land parcels***

*known us;*

- i. KJD/KITENGELA/263*
- ii. KJD/KITENGELA/264*
- iii. KJD/KITENGELA/265*
- iv. KJD/KITENGELA/262*
- v. KJD/KITENGELA/266- without leave, authority and or permission from the plaintiff.*

*b) The 1<sup>st</sup> defendant and the 2<sup>nd</sup> Defendant entered upon the Plaintiff's parcels of land known as-*

- i. KJD/KITENGELA/263*
- ii. KJD/KITENGELA/264*
- iii. KJD/KITENGELA/265*
- iv. KJD/KITENGELA/262*
- v. KJD/KITENGELA/266”*

5. At paragraph 11, the Plaintiff then avers as follows:-

**“(i) The 1<sup>st</sup> Defendant has entered upon and assumed possession of the Plaintiff's land parcels known as;**

- a. KJD/KITENGELA/263*
- b. KJD/KITENGELA/264*
- c. KJD/KITENGELA/265*
- d. KJD/KITENGELA/262*
- e. KJD/KITENGELA/266- while knowing or having reason to know that the same Land parcels, belonged and still belong to the plaintiff.*

**(ii) The 1<sup>st</sup> Defendant has converted to his own use land parcels known as;**

- i. KJD/KITENGELA/263*
- ii. KJD/KITENGELA/264*
- iii. KJD/KITENGELA/265*
- iv. KJD/KITENGELA/262*
- v. KJD/KITENGELA/266-to the exclusion of the Plaintiff who is the registered owner, without the plaintiff's authority*

**iii) The 1<sup>st</sup> Defendant has caused to be mined building stones from the Plaintiff's land parcels mentioned in (1) and ii) above without right so to do.”**

6. Upon establishing the above twin claims, the Plaintiff then seeks the following orders;

**“a. An order of permanent injunction restraining**

***The defendants whether by themselves, individually or jointly, their agents or otherwise howsoever from remaining on or continuing in possession, occupation or use of the land comprised in title numbers-***

**i. KJD/KITENGELA/263**

**ii. KJD/KITENGELA/264**

**iii. KJD/KITENGELA/265**

**iv. KJD/KITENGELA/262**

**v. KJD/KITENGELA/266**

**b. An order of eviction of the defendant from the Plaintiffs land comprised in title numbers;**

**i. KJD/KITENGELA/263**

**ii. KJD/KITENGELA/264**

**iii. KJD/KITENGELA/265**

**iv. KJD/KITENGELA/262**

**v. KJD/KITENGELA/266**

**c) An Order for demolition of any structures (if any) erected by the Defendant’s or any one of them upon the Plaintiff’s land comprised in title numbers;**

**i. KJD/KITENGELA/263**

**ii. KJD/KITENGELA/264**

**iii. KJD/KITENGELA/265**

**iv. KJD/KITENGELA/262**

**v. KJD/KITENGELA/266**

**d) An order directed to the Officer commanding, Kajiado Police Station to supervise the eviction and demolition (if any) envisaged in(a), (b) and (c).**

**e) Compensation for the damage and loss occasioned by the Defendant’s acts of trespass and fraud.**

**f) Mesne profits**

**g) Exemplary damages**

**h) Costs**

**i) Any other or further relief that this Honourable court.”**

7. I have deliberately set out what is in the Plaint to show that the Plaintiff claim is one relating to trespass and what he claims to be acts of fraud relating to ownership of the disputed parcels of land and losses arising therefrom. Without predetermining the issues in contention, it seems to me that whereas trespass may well be an issue in contention, there is no clear evidence that in fact the dispute is one relating to a boundary per se. In fact in his submissions, Counsel for the Plaintiff stated that some of the land parcels in issue do not share a common boundary. That issue therefore remains unagreed and cannot be resolved by way of a Preliminary Objection.

8. Lastly, in the prayers set out above, there are issues of mesne profits and damages which the Registrar cannot determine under section 21(4) of the Registered Land Act.

9. In the event, I do not think that on the whole the objection is well founded and is struck off with costs to the Plaintiff.

10. Orders accordingly.

Dated and delivered at Machakos this 16<sup>th</sup> day of December 2008.

**Isaac Lenaola**

**Judge**

In the presence of: Mr. Makau h/b for Mr. Githuka for Defendant.

No appearance for Plaintiff.

**Isaac Lenaola**

**Judge**