



**Nduni v Kirui & 4 others (Environment & Land Case E092 of 2022)
[2022] KEELC 13527 (KLR) (11 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13527 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E092 OF 2022**

**MD MWANGI, J
OCTOBER 11, 2022**

BETWEEN

LAWRENCE WARARI NDUNI PLAINTIFF

AND

TERESIA KARAGI KIRUI 1ST DEFENDANT

CATHERINE WANJIRU KURIA 2ND DEFENDANT

DAVID KIRUI HIUHU (DECEASED 3RD DEFENDANT

ALOISE NJOROGE HIUHU 4TH DEFENDANT

KENYA POWER AND LIGHTING COMPANY 5TH DEFENDANT

(In respect of the Preliminary Objections by 1st, 2nd and 3rd Defendants dated the 4th April, 2022 and by the 5th Defendant's dated 26th March, 2022)

RULING

Factual Background

1. The plaintiff in his plaint dated March 7, 2022 prays for judgement against the defendants for: -
 - a. A permanent injunction restraining the defendants from encroaching into land parcel number Dagoretti/Riruta/1655.
 - b. An order directing the 1st – 4th defendants to demolish and remove the structures constructed on parcel LR No Dagoretti/Riruta/1655.
 - c. An order directing the 1st – 4th defendants to allow the plaintiff unobstructed access to parcel LR No Dagoretti/Riruta/1655.



- d. An order directing the 5th defendant to remove the electricity posts placed on parcel LR No Dagoretti/Riruta/1655.
 - e. An order that the boundary line between LR No Dagoretti/Riruta/1655, 5884 and 5883 be straightened as per the provincial surveyor's findings.
 - f. General and exemplary damages for trespass.
 - g) Costs of this suit and interests.
2. The plaintiff's case is that he is the registered owner of parcel of land known as LR No Dagoretti/Riruta/655, whereas the 4th defendant is the registered owner of parcel land known as LR No Dagoretti/ Riruta/5883 and the deceased David Kirui Hiuhu (now represented by the 1st, 2nd and 3rd defendants who are the administrators of his estate) was the registered proprietor of LR No Dagoretti/ Riruta/5884. The three parcels of land are adjacent to one other.
 3. The plaintiff's plea is that the 1st to the 4th defendants have unlawfully encroached his land and unlawfully erected temporary structures on it. The plaintiff avers that the unlawful encroachment has been confirmed by a survey that was conducted by the provincial surveyor, who noted that there was a slight shift of the boundary line between the three parcels. The surveyor's findings according to the plaintiff were that the existing temporary fence which was leaning inside parcel LR No Dagoretti/ Riruta/1655 needed to be cleared and a straight boundary line re-established in accordance with the registry index map. The plaintiff further accuses the 1st to the 4th defendants of blocking access to his property.
 4. The 5th defendant on its part is accused of encroaching and trespassing into the plaintiff's land by installing electricity posts in the plaintiff's property without following laid down procedural requirements.
 5. Upon being served with the pleadings, the defendants entered appearance accordingly. The 1st, 2nd and 3rd defendants filed their statement of defence dated April 4, 2022 in which they deny all the allegations against them in the plaint. In their defence, the 1st, 2nd and 3rd defendants contend that the provincial surveyor's conclusion was that the temporary fence was leaning slightly inside the plaintiff's property and not the other way round as the plaintiff puts it. The surveyor then recommended the straightening of the fence along the correct boundary line.
 6. The 1st, 2nd and 3rd further claim that there is another pending court case (HC Succ No E997/2020) partly in regard to the suit properties.
 7. Alongside their statement of defence, the 1st, 2nd and 3rd defendants raised a preliminary objection dated the April 4, 2022, which is now before the court for determination.
 8. On its part the 5th defendant in response to the plaintiff's suit also raised a preliminary objection dated the March 26, 2022. That notice is also before this court for determination.

The 1st, 2nd and 3rd Defendants' Preliminary Objection

9. The three defendants contend that this court lacks jurisdiction to hear the plaintiff's suit as it offends the express provisions of section 18 and 19 of the [Land Registration Act](#) on the basis that plaintiff's cause of action is a boundary dispute which falls within the jurisdiction of the Land Registrar under the provisions of the [Land Registration Act](#).



10. Further, that the orders sought can only be issued in an application for judicial review or an appeal and not by way of an ordinary suit as in this case. Consequently, that the plaintiff's suit should be struck out with costs.

The 5th Defendant's Preliminary Objection

11. The 5th defendant contests the jurisdiction of this court to hear and determine this suit as against the 5th defendant on the basis that the suit offends the provisions of sections 3(1), 10; 11(e), (f), (i), (k) & (l); 23; 24; 36; 40; 42 and 224 (2) (e) of the *Energy Act*, 2019 as read together with regulations 2, 4, 7, and 9 of the *Energy (Complaints and Disputes Resolution) regulations*, 2012 and article 159(2) (c) and 169 (1) (d) and (2) of the *Constitution of Kenya*, 2010 and sections 9(2) and (3) of the *Fair Administration Act*, 2015.

Court's Directions

12. The court directed that the two preliminary objections be dispensed with together and by way of written submissions. Parties complied. The 1st-3rd defendants filed their submissions dated June 17, 2022 whereas the 5th defendant filed its submissions dated June 9, 2022. The plaintiff on his part filed his submissions dated June 17, 2022.

The 1st, 2nd and 3rd Defendant's Submissions

13. The three defendants submit that the plaintiff's claim before this court is 'the slight shift of boundary line' between his parcel of land and those of the 1st to the 4th defendants. They submit that the provincial surveyor's conclusion that the temporary fence be cleared and a straight boundary line be reconstructed indicates that the contention is a boundary dispute which ought to be resolved by the Land Registrar. They cite the case of *George Kamau Macharia vs Dexka Limited* (2019) eKLR.
14. It is their submission that the plaintiff has not exhausted the dispute resolution mechanisms as provided under section 18, 19 and 20 of the *Land Registration Act*. Therefore, they pray that the court allows the preliminary objection and strike out the plaintiff's suit with costs.

5th Defendant's submissions

15. The 5th defendant submitted that the plaintiff's claim against it is based on the alleged installation of electricity posts on his property 'without following procedural requirements'. It contends that the matter is purely about wayleaves as set out in the *Energy Act*, 2019 and should therefore be heard by either the Energy Regulatory Commission or the energy and petroleum tribunal established under the act.
16. The 5th defendant cited the case of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696 where a preliminary objection was defined as a point of law which may dispose a suit. The court was also referred to the cases of *The Owners of the Motor Vessel "Lilian S" vs Caltex Oil (Kenya) Ltd.* (1989) KLR 1 that a court must ascertain its jurisdiction first before embarking on the determination of any matter before it.
17. Counsel for the 5th defendant submitted that the first port of call by the plaintiff should have been the Energy Regulatory Commission, a body established under section 4 of the *Energy Act* and whose mandate is to be found at section 6 of the same act. He submitted that the plaintiff's complaint should have been filed before the Energy Regulatory Commission in the first instance and if it was not handled to his satisfaction, his recourse would be to appeal to the tribunal set up under the same act; not to this court. Counsel cited pronouncements in decided cases emphasizing that where the law provides for or



has established a dispute resolution forum, it is not open to a party to directly file his matter in court without first ventilating his claim before the established forum(s).

18. The 5th defendant further made reference to article 159(2) of the [Constitution of Kenya](#) that recognizes alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.
19. The 5th defendant too made reference to article 169(1)(d) of the [Constitution](#) that authorizes the creation of local tribunals like the ones referred to under the [Energy Act](#).

The Plaintiff's submissions

20. The plaintiff submitted on the issue whether this court has jurisdiction to hear this matter. The plaintiff's counsel conceded that section 18(2) of the [Land Registration Act](#) prohibits this court from entertaining any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined under the said provision. He cited the Court of Appeal case of [George Kamau Macharia vs Dexka Limited](#) (2019) eKLR and the Court of Appeal case of [Azzuri Limited vs Pink Properties Limited](#) (2018) eKLR.
21. The plaintiff however, submitted that he had already submitted to that procedure having already involved the Land Registrar who together with the provincial surveyor ascertained the boundaries and made the recommendations for straightening of the boundary line. That despite the findings, the 1st to the 4th defendants have continued with their encroachment forcing the plaintiff to seek the intervention of this court.
22. On the 5th defendant's preliminary objection, the plaintiff submitted that the [Energy Act](#) does not take away the jurisdiction of this court in land matters especially on trespass as is the case here.
23. He argues that the 5th defendant erected the electricity poles on his land without his consent as required in section 171 of the [Energy Act](#). It therefore became a trespasser. The plaintiff insists that his cause of action, trespass to land, is within the jurisdiction of this court.

Issues for Determination

24. I have considered the gist of the preliminary objections as well as the rival submissions by the parties. I have also considered the relevant constitutional and statutory frameworks together with the prevailing jurisprudence on the key questions falling for determination. The single issue for determination is whether this court has jurisdiction to hear and determine this matter.

Analysis and Determination

25. I will begin with the 1st - 3rd defendant's preliminary objection dated April 4, 2022 in which they challenged the jurisdiction of this court to hear and determine this suit.
26. Section 18(2) of the [Land Registration Act](#), 2012, bars this court from entertaining 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 that section. It provides as follows:

“The Court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.”



27. Section 18(2) of the [Land Registration Act](#) is framed in mandatory terms that a dispute as to the boundaries of registered land should be submitted to the Land Registrar.
28. Section 19 of the [Land Registration Act](#), 2012, vests the duty to fix boundaries to registered land in the Land Registrar.
29. The above provisions of the [Land Registration Act](#), 2012 provides that proprietors of registered land are obliged to first seek redress from the Land Registrar in case of a boundary dispute between them before escalating it to the court. This essentially means that the first port of call is at the Land Registrar's office.
30. From the pleadings as summarized in the preceding paragraphs above, both the plaintiff and the 1st, 2nd and 3rd defendant confirm that the provincial surveyor undertook an exercise of ascertaining the boundaries of the three parcels of land and made the recommendations for the straightening the boundary. Interestingly they disagree on exactly what the recommendations were.
31. The plaintiff further alleges that the 1st to the 4th defendants have continued with their illegal encroachment into his land in spite of the recommendations by the provincial surveyor leaving the plaintiff with no other option but to seek the intervention of this court. The defendants have denied encroaching onto the plaintiff's property.
32. The plaintiff further claims that the provincial surveyor involved the Land Registrar hence, in his opinion, he has complied with the provisions of section 18(2) of the [Land Registration Act](#).
33. In the Court of Appeal case of [Azzuri Limited v Pink Properties Limited](#) [2018] eKLR, the court stated as follows in relation to the application of section 18 of the [Land Registration Act](#);

“This means that under the aforesaid provisions, boundary disputes pertaining to lands falling within general boundary areas must be referred to the Land Registrar for resolution.....From this analysis of the law, it should be clear from the above that, we are in agreement with the learned judge's conclusion that the dispute ought to have been heard by the Land Registrar as stated in the statute. Jurisdiction is everything. It has been said many times before, that, without it a court has no powers to make one more step, irrespective of the strength and nature of evidence in the parties' possession”.

34. In the [Azzuri Limited vs Pink Properties Limited](#) (2018) that was upheld by the Court of Appeal, Angote J had quoted 'Peter K Wanyoike' the author of the paper titled “The Role of the Registry Index Map (RIM) in Land Management in Kenya” and stated that;

‘In his paper, “The Role of the Registry Index Map (RIM) in Land Management in Kenya”, Peter K. Wanyoike has stated that the registered index map is a very useful document in registration and management of land in Kenya within the context of “General Boundaries” or “approximate boundaries.”

35. The paper defines “general boundaries” as follows:

“A boundary of which the precise line is undetermined in relation to the physical features which demarcate it ... However, it is clear on the ground where the parcel is situated and where the boundaries are, for they are clearly visible and unmistakable physical features, though they do not indicate the exact location of the line within the breadth which such physical features necessary process.”



36. Although the plaintiff alleges that the Land Registrar was involved by the provincial surveyor while establishing the boundary line, no report has been exhibited to that effect. There is no proof of involvement of the Land Registrar. Furthermore, the responsibility is bestowed upon the Land Registrar and not the surveyor, though the registrar is at liberty to engage and involve the surveyor.
37. The doctrine of exhaustion of remedies provides that, where a dispute resolution mechanism has been established by a statute outside the mainstream courts, that mechanism should be exhausted before the jurisdiction of the mainstream courts is invoked. Put differently, where there exists a legitimate statutory primary dispute resolution mechanism, such as a tribunal, the mainstream courts should be the fora of last resort and not the first port of call.
38. The Supreme Court of Kenya explained the importance of the doctrine of exhaustion of remedies in the case of *Benard Murage vs Fine Serve Africa Limited & 3 Others* [2015] eKLR in the following words:
- “Where there exists an alternative remedy through statutory law, then it is desirable that such statutory remedy should be pursued first.”
39. The Court of Appeal in the case of *Speaker of National Assembly vs Njenga Karume* [1992] 1KLR 425 held that:
- “.....that where there was a clear procedure for the redress of any particular grievance prescribed by the constitution or an act of parliament that procedure should have been strictly followed and exhausted before invoking the jurisdiction of the court.”
40. In the case of *George Kamau Macharia v Dexka Limited* [2019] eKLR, Kemei J as observed as follows:
- “From the above provisions of the law, it is manifestly clear that the above section gives the mandate to the Land Registrar to resolve boundary disputes of land with general boundaries. Registry Index Map (RIM) only indicates approximate boundaries and the approximate situation on the ground. Even if this court was to hear and determine this matter it will still require the input of the Land Registrar. The framers of section 18(2) of the *Land Registration Act* placed this matter before the Land Registrar who has the technical advice and resources of the District Surveyor to determine and ascertain the boundaries. It is trite law that where the law has given a legal obligation to a department of government, it is important for the court to let that department proceed to meet its legal obligations.”
41. From the foregoing, this court is persuaded that this is a proper case for reference to the Land Registrar under the provision of sections 18 and 19 of the *Land Registration Act*. Accordingly, I partially allow the 1st to the 3rd Defendants’ preliminary objection on that aspect.
42. The plaintiff has other prayers in his plaint. I will therefore not strike out his suit as prayed for by the 1st to the 3rd defendants. I will instead stay any further proceedings in the suit awaiting the report of the Land Registrar.
43. Consequently, I hereby direct that the Land Registrar, Nairobi county to demarcate the boundary between parcels of land known as LR No Dagoretti/Riruta/655, LR No Dagoretti/ Riruta/5883 and of LR No Dagoretti/Riruta/5884 and file a report in court within 60 days. I order that the Nairobi county police commander to provide security during the survey exercise.



44. In respect of the preliminary objection by the 5th defendant, Kenya Power and Lighting Company, I note that there are numerous similar objections raised in almost all the cases where Kenya Power and Lighting Company has been sued challenging the jurisdiction of the Environment and Land Court *viz a viz* that of the Energy and Petroleum Tribunal and the other bodies created under the [Energy Act, 2019](#). I will deliver a separate detailed ruling in that respect on October 27, 2022.

Conclusion

45. The court therefore makes the following orders:

- a. The Land Registrar Nairobi county is hereby directed to demarcate the boundary between parcels of land known as LR No. Dagoretti/Riruta/655 and LR No Dagoretti/ Riruta/5883 and of LR No Dagoretti/Riruta/5884 and file a report in court within 60 days of this date.
- b. The Nairobi County Police Commander is hereby directed to provide security during the survey exercise.
- c. An order is hereby issued staying any further proceedings in this case pending the report by the Land Registrar.
- d. The ruling in respect of the preliminary objection by the 5th defendant will be delivered on October 27, 2022.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAROBİ THIS 11TH DAY OF OCTOBER 2022

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Chepkorir holding brief for Ms. Muhoro for the Plaintiff.

Ms. Swaka holding brief for Kinyanjui for the 1st – 3rd Defendants.

No appearance for the 4th & 5th Defendants.

Court Assistant Hilda.

M.D. MWANGI

JUDGE

