



REPUBLIC OF KENYA



**KENYA LAW**  
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**Rumenya v Kipkutol (Environment and Land Appeal 1 of 2022)  
[2022] KEELC 15280 (KLR) (8 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15280 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ITEN  
ENVIRONMENT AND LAND APPEAL 1 OF 2022**

**L WAITHAKA, J  
DECEMBER 8, 2022**

**BETWEEN**

**ANDREW KIPKURGAT RUMENYA ..... APPELLANT**

**AND**

**JOSEPH KIPCHUMBA KIPKUTOL ..... RESPONDENT**

*(Being an Appeal from the Ruling of PC Biwott  
(PM) in Environment and Land case No 19 of 2018)*

**JUDGMENT**

1. By a plaint dated February 7, 2018 the appellant herein instituted a suit in the lower court to wit Karbanet SPMCC ELC Case No 19 of 2018 seeking the following reliefs:-
  - a) An order of injunction to restrain the defendant either by himself, his agents, servants or any other person whatsoever acting on his instructions from entering, leasing, cultivating, tilting, erecting structures or interfering in any way with the peaceful use and occupation of land parcel number Chebunyur Section 813;
  - b) A permanent order of injunction to restrain the defendant either by himself, his agents, servants or any other person whatsoever acting on his instructions from entering, leasing, cultivating, tilting, erecting structures or in any way interfering with the peaceful use and occupation of land parcel number Chebunyur Section 813;
  - c) Vacant possession of the suit property;
  - d) General damages;
  - e) Costs of the suit and interest on (a) and (b) above at court rates from the date of filing the suit.



2. Simultaneously with the plaint, the appellant filed a notice of motion of an even date seeking to restrain the respondent either by himself, his agents, servants or any other person whatsoever acting on his instructions from entering, leasing, cultivating, tilting, erecting structures or in any way interfering with the peaceful use and occupation of land parcel number Chebunyur Section 813 pending the hearing and determination of the motion/application and the suit.
3. The respondent filed a defence and counter-claim denying the appellant's claim and praying that the map exhibited by the appellant be rectified to reflect the correct position on the ground as per the determination made by the Land Adjudication Officer on February 4, 2015.
4. The respondent also filed a reply to the appellant's application. In the response, the respondent deponed that he lodged objection to the Land Adjudication Officer (LAO) against the registration of the appellant as the owner of parcel number 813 (suit land); that the land adjudication officer allowed his objection and directed that the suit land be subdivided to create the portion he was claiming out of the suit land; that he fenced his portion of the suit land after beacons were identified to him by the surveyor and has lived on his portion ever since that time.
5. Terming the appellant's suit and application bad in law, the respondent contended that the appellant, if aggrieved by the decision of the land adjudication officer, ought to have appealed or complied with the procedure provided for under the *Land Adjudication Act*, Cap 284 Laws of Kenya (LAA) to challenge the decision of the LAO.
6. On July 9, 2019, counsel for respondent informed the court that they had given a notice of preliminary objection and were ready for hearing of the notice. The notice is contained in paragraph 12 of defendant's statement of defence where the defendant pleaded as follows:-
  - “ 15. The Defendant shall state that the Plaintiff's suit is bad in law, incurably defective and shall at the hearing hereof raise a preliminary point of law for determination of this court notice whereof is hereby given.”
7. Counsel for the defendant contended that the suit was in the wrong forum. Based on proceedings of the objection case that the respondent had filed before the LAO showing that the respondent had lodged an objection to the LAO against the registration of the appellant as the owner of the suit land and the decision of LAO showing that the objection was allowed, the respondent's counsel informed the court that a surveyor showed the respondent his portion of the suit Land and that he took possession of his portion, which facts the appellant acknowledges in paragraph 8 and 9 of his plaint. Pointing out that the appellant did not lodge appeal against the decision of LAO within the 60 days provided for by Law (LAA) for lodging an appeal to the Minister against the decision of LAO, if aggrieved, he urged the court to strike out the suit.
8. Counsel for the appellant opposed the objection on the ground that it raised issues of fact as opposed to law. He admitted that the objection proceedings were decided in favour of the respondent and that the land number changed. He further acknowledged that survey work was completed.
9. In a rejoinder, counsel for the respondent submitted that the preliminary objection is based on Section 26 LAA which provides for an appeal to the Minister, if a party is aggrieved by the decision of the LAO.
10. Underscoring the importance of adherence to procedure provided for resolving disputes in the parent statute, counsel for the respondent urged the trial court to strike out the suit.



11. In his ruling delivered on August 1, 2019, the Trial Magistrate (TM) upheld the preliminary objection by the respondent. In so doing the TM observed:-

“It is not in dispute that on February 4, 2015 Baringo Land Adjudication Committee awarded the land in dispute to the defendant and gave plaintiff 60 days to appeal. The appeal lay to the Minister. From the Minister an aggrieved party would then approach the High Court if it wants any remedy.

The plaintiff did not follow the procedural law. I find that his suit therefore is incompetently before me. It must fail. I uphold the preliminary objection raised.

The plaintiff’s suit is therefore struck out with costs to the defendant. The counterclaim is allowed forthwith. This is because the same reaffirms the decision of the Land Adjudication Committee dated February 4, 2015.

Orders accordingly.”

12. Aggrieved by the decision of the TM, the appellant appealed to this court on the following grounds, that the TM erred:-
- 1) Both in law and in fact by striking out his suit without a formal application?
  - 2) Both in law and in fact by striking out his suit without affording him a fair hearing;
  - 3) By failing to evaluate the correct interpretation of the verdict of the LAO which allowed the the objection in part, which part he had complied with;
  - 4) By applying wrong principles of law while deciding on the suit;
  - 5) By failing to consider the content of the pleadings thereby arriving at the wrong decision.
13. The appeal was disposed of by way of written submissions.

### **Appellant’s submissions**

14. Reference is made to the cases of *DT Dobie & Co (Kenya) Ltd v Mbaria Muchina & Another* Civil Appeal No 37 of 1978 and *Kenya Commercial Bank Ltd v James Karanja* [1981]eKLR where the principles that undergird striking out of pleadings were enunciated and submitted that the option of striking out the appellant’s suit ought to have been properly considered and parties given good opportunity to present their case.
15. Based on the cases of *Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & Another* [2018]eKLR and *SM v HG* Civil Appeal No 125 of 2018 where the need to accord parties a fair hearing was underscored, it is submitted that the Trial Magistrate erred by striking out the appellant’s suit without affording him a fair hearing.
16. The Trial Magistrate is said to have failed to correctly interpret the decision of the LAO which gave the respondent a portion of the suit land and not the whole of it. It is contended that the appellant complied with the decision of LAO by creating parcel number 1587. The respondent is said to have disregarded the verdict of the LAO by trespassing into the appellant’s land, burning trees therein and fencing the whole of it contrary to the decision of LAO which gave him a portion of the suit land only.
17. It is submitted that the case before the Trial Magistrate was not an appeal of the decision of Land Adjudication Committee (LAC) but on illegalities caused by the respondent in enforcing the decision of LAC which the appellant honoured by creating parcel number 1587 from the suit land.



18. It is further submitted that the preliminary objection raised by the respondent, did not meet the threshold of a preliminary objection set down in *Mukisa Biscuit Company v West End Distributors Limited* [1969] EA 696 as it raised points on facts and not purely on law.
19. Maintaining that his suit is not challenging the decision of LAC but the respondent's encroachment on the part of the suit land he owns after complying with the decision of the LAC, the appellant urges this court to set aside the decision of the Trial Magistrate on the ground that the Trial Magistrate misdirected himself on the nature of his case.

### **Respondent's submissions**

20. The respondent submits that the appeal is not merited because the appellant did not follow the procedure provided in law, LAA, in raising his appeal. It is reiterated that the court applied the correct law and principles in dismissing the appellant's case.
21. Maintaining that the appellant did not exhaust all remedies available to him under LAA, the respondent submits that the appellant ought to have moved with speed to ensure that the demarcation officer and the surveyor visited the suit premises under section 15(a)(1) and section 16 of the LAA to survey, identify and demarcate the suit property as per the decision of LAO and thereafter, if he felt that the respondent's portion encroached on what he thought was his portion, appealed against the decision under section 29 of LAA.

### **Analysis and determination**

22. From the grounds of appeal and the submissions, I find the sole issue for determination by this court to be whether the Trial Magistrate erred by upholding the preliminary objection by the respondent.
23. With regard to that issue, in discharge of the duty vested in this court as the first appellate court, to reconsider the evidence, evaluate it itself and draw its own conclusions bearing in mind that it neither saw nor heard the witnesses and make due allowance in that respect. See the case of *Selle & Another v Associated Motor Boat Co Ltd & others* [1968] EA 123.
24. In discharge of that duty, I have carefully evaluated the case before the lower court.
25. From the pleadings and documents filed before the lower court, I note that the suit land was subject of a dispute before the LAO. The respondent had lodged an objection against registration of the appellant as the owner of the suit land. The LAO determined that the respondent was entitled to a portion of the suit land. that decision led to subdivision of the suit land to create parcel number 1587. I note that before filing his suit, the appellant obtained the consent of the LAO, required under section 30 of the LAA. To that extent, the suit did not offend that provision of law.
26. In his suit, the appellant acknowledges that the respondent was given a portion of the suit land to be hived off the suit land but complains that the respondent encroached on the portion of the suit land belonging to him.
27. In his statement of defence and counter-claim, the respondent denied having encroached on the part of the suit land belonging to the appellant and contents that the appellant fraudulently caused the map exhibited to be prepared in its favour without strict compliance with the decision of the LAO. Whilst the respondent deponed that he was shown his portion of the suit land by a surveyor following the decision of LAO, in his favour; he did not annex any report or map of demarcation of the portion awarded to him pursuant to the decision of the LAO.



28. In my view, the question as to whether the respondent is occupying the portion of land awarded to him by the LAO or he has encroached on the portion of the suit land belonging to the appellant is as question of fact that the Trial Magistrate required evidence before he could make a determination on. As such, it could not be taken up as preliminary objection. In that regard, see *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 at page 700 where it was stated:

....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. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

At page 701 paragraph B-C Sir Charles Newbold, P added the following:

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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....

29. In the case of *Charles Onchari Ogoti v Safaricom Limited & another* [2020] eKLR while discussing the emerging jurisprudence on preliminary objections, the court held:-

“I would respectively agree that although the general principle is that as found by the Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR, that preliminary objection procedure should be invoked (as with Mukisa Biscuits’ case) where facts are not in dispute, it may it seems the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement (and) it is distinctly improper for a party to resort to the preliminary objection as sword, for winning cases otherwise destined to be resolved judicially, and on the merits”.

30. On the contention that the appellant ought to have appealed, from the pleadings filed in this suit, I note that the appellant is not challenging the decision of LAO but is raising a question as to whether the respondent has encroached on the portion of the suit property belonging to him. For that reason, and on account of my earlier observation that the appellant obtained the consent of the LAO before filing the instant suit, I find and hold that the Trial Magistrate failed to take into account that the appellant’s case is based on alleged encroachment of the portion of the suit land given to him and was not challenging the decision of LAO.

31. The upshot of the foregoing is that the appeal has merit and is allowed. Consequently, I set aside the ruling of the Trial Magistrate delivered on August 1, 2019 and direct that the suit be heard on its merits. I also award the costs of the appeal to the appellant.

32. Orders accordingly.

**Dated, signed and delivered at Iten this 8<sup>th</sup> day of December, 2022.**

**L. N. WAITHAKA**

**JUDGE**

**Judgment delivered orally in the presence of:**

Ms. Esang for the Appellant

Mr. Olonyi for the Respondent

**Christine Towett: Court Assistant**

