



**Owiti v Aridi & another (Environment and Land Appeal E48 of 2022)
[2024] KEELC 610 (KLR) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 610 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E48 OF 2022
SO OKONG'O, J
FEBRUARY 8, 2024**

BETWEEN

BENARD MUGA OWITI APPELLANT

AND

FREDRICK ARIDI 1ST RESPONDENT

JACKLINE ARIDI 2ND RESPONDENT

JUDGMENT

1. The appellant is the registered proprietor of the parcel of land known as Kisumu Municipality/Block 14/262 measuring approximately 0.018 of a hectare (hereinafter referred to only as “Plot No. 262”) while the respondents are the registered proprietors of all that parcel of land known as Kisumu Municipality/Block 14/263 measuring 0.018 of a hectare (hereinafter referred to only as “Plot No. 263”). Plot No. 262 and Plot No. 263 are adjacent to each other. At the time when the dispute giving rise to this suit arose, Plot No. 262 was developed with a two-storey building while Plot No. 263 was being developed with a block of residential apartments. Sometime in September 2022, a dispute arose between the appellant and the respondents over the boundaries of their respective parcels of land. The appellant claimed that the respondents’ building that was under construction on Plot No. 263 had encroached on his land parcel, Plot No. 262 a claim that was denied by the respondents.
2. The appellant filed a suit at the Chief Magistrate’s Court at Kisumu namely, Kisumu CMC ELC No. E097 OF 2022 (the lower court) on or about 15th September 2022 seeking among others, a declaration that the construction that was being carried out by the respondents on Plot No. 263 encroached on the appellant’s Plot No. 262, and a permanent injunction restraining the respondents from carrying out any construction work or development encroaching on Plot No. 262. Together with the plaint, the appellant filed an application for a temporary injunction restraining the respondents from carrying out any construction work or development encroaching on Plot No. 262. In his affidavit in support of the application, the appellant averred that the suit properties had fixed and established boundaries



with beacons and coordinates. The appellant averred that the respondents' development on Plot No. 263 encroached on Plot No. 262. The appellant annexed to his affidavit in support of the application among others, copies of; a certificate of lease in respect of Plot No. 262, a survey plan, and a ground report by Opiyo and Associates Licensed Land Surveyors and Planners in respect of the suit properties showing the alleged encroachment.

3. In response to the application, the respondents filed a Notice of Preliminary Objection dated 23rd September 2022 in which they challenged the jurisdiction of the court. The respondents contended that the appellant's suit was founded on a dispute over the boundaries of Plot No. 262 and Plot No. 263. The respondents averred that the dispute should have been referred to the Land Registrar for determination in the first instance under the provisions of the [Land Registration Act, 2012](#). The respondents averred that Section 18(2) of the [Land Registration Act, 2012](#) prohibits the court from entertaining any action or other proceeding relating to boundaries of registered land in the first instance. The respondents averred that the duty to fix boundaries to registered land is solely vested in the Land Registrar under Section 19 of the [Land Registration Act, 2012](#). The respondents urged the court to find that the appellant's suit offended the provisions of the law and to strike out the same with costs.
4. The respondents' preliminary objection in the lower court was heard by way of written submissions. In a ruling delivered on 16th November 2022, the lower court held that it had no jurisdiction to determine the appellant's suit as it was a boundary dispute that should have been heard and determined in the first instance by the Land Registrar under Sections 18 and 19 of the [Land Registration Act, 2012](#). The lower court held that there was no evidence that the boundaries of the suit properties were fixed. The lower court stated that where a boundary is fixed, the Land Registrar is required to make a note in the land register that the boundary has been fixed. The court held that in the absence of such a note, there was no evidence that the boundaries of the suit properties were fixed.
5. The appellant was aggrieved by the said decision and filed this appeal on 7th December 2022. The appellant challenged the decision of the lower court on the following grounds;
 1. The learned trial magistrate erred in law and fact by making a finding that the dispute before the court fell under Sections 18 and 19 of the [Land Registration Act, 2012](#).
 2. The learned trial magistrate erred in law and fact by failing to find that the dispute before the court was concerning parcels of land with fixed boundaries.
 3. The learned trial magistrate erred in law and fact by failing to find that the dispute before the court was on encroachment and trespass, and not a boundary dispute.
 4. The learned trial magistrate erred in law and fact by allowing a preliminary objection when the pleadings before the court showed a mixture of facts and law which required evidence.
 5. The learned trial magistrate erred in law and fact by failing to find that the pleading by the appellant which was not denied by the respondents was that the suit properties had fixed boundaries and therefore the court had jurisdiction to hear and determine the case.
 6. The learned trial magistrate erred in law and fact by upholding a preliminary objection when the pleadings showed that the issues could not be disposed of by way of a preliminary objection.
 7. The learned trial magistrate erred in law and fact by failing to find that the dispute before the court was not for the establishment of a boundary but one dealing with encroachment, trespass and demolition.



8. The learned trial magistrate erred in law and fact in her analysis of and appreciation of the law and fact thereby arriving at a wrong decision.
 9. The learned trial magistrate erred in law and fact by failing to find that the court had the requisite jurisdiction to hear and determine the case.
 10. The learned trial magistrate erred in law and fact by failing to properly analyse and appreciate the issues that were before the court.
6. The appellant urged the court to set aside the ruling and order of the lower court made on 16th November 2022 and substitute it with an order dismissing the respondents' notice of preliminary objection dated 23rd September 2022. The appellant also prayed for the costs of the appeal.
 7. The appeal was heard by way of written submissions. The appellant filed submissions dated 12th September 2023. The appellant submitted that the appeal raised three issues for determination by the court namely; whether the suit properties had general boundaries and as such the lower court had no jurisdiction to determine a dispute in respect thereof, whether the dispute before the lower court raised a pure boundary issue, and whether the preliminary objection was capable of disposing the dispute before the lower court.
 8. On the first issue, the appellant submitted that the appellant's case before the lower court was that the suit properties had fixed boundaries which had beacons and fixed coordinates. The appellant submitted that it was a misdirection in law and fact on the part of the lower court to hold that the dispute before it fell under Sections 18 and 19 of the Land Registration Act, 2012 and as such it had no jurisdiction to determine the same. The appellant averred that at the time the preliminary objection was raised, the respondents had not filed a defence. The appellant submitted that its contention that the suit properties had fixed boundaries was not denied by the respondents. The appellant submitted that he placed before the court a survey plan, a survey report and a beacon certificate which showed clear boundaries of the suit properties. The appellant submitted that the suit properties had fixed and not general boundaries. The appellant submitted that the lower court had jurisdiction to determine the appellant's suit that was before it.
 9. In support of that submission, the appellant cited *Menkar Limited v. Ratilal Ghela Samat Shah & 2 Others* [2019] eKLR in which the Court of Appeal held that two parcels of land that had been surveyed and their boundaries marked with beacons had defined boundaries and that the issue of encroachment from one to the other fell for determination by the Environment and Land Court.
 10. On the issue of whether the dispute before the lower court raised purely the question of boundaries, the appellant submitted that the dispute that was before the lower court raised issues of encroachment, trespass, and a claim for injunction. The appellant submitted that the reliefs that were sought by the appellant before that court were also diverse. The appellant submitted that the lower court erred in its finding that the appellant's claim was for the determination of the boundaries of the suit properties. The appellant submitted that the dispute before the lower court raised a mixture of issues that the lower court had jurisdiction to determine. In support of this submission, the appellant cited Section 13(2)(a) of the Environment and Land Court Act, 2011 and *Menkar Limited v. Ratilal Ghela Samat Shah & 2 Others*(supra).
 11. On the issue of whether the respondents' preliminary objection was properly raised, the appellant submitted that the dispute before the lower court raised mixed issues of law and fact and as such the same could not be determined through a preliminary objection. The appellant submitted that the determination of the issue of whether the suit properties had fixed or general boundaries required evidence to be adduced by the parties. The appellant submitted that such issue could not be disposed



- of by way of a preliminary objection. In support of this submission, the appellant cited several decided cases including, *Mukisa Biscuit Manufacturing Co. Ltd. v. West End Distributors Ltd.* [1969] E.A 696. The appellant urged the court to allow the appeal.
12. The respondents filed submissions dated 25th September 2023. On ground one of appeal, the respondents submitted that a perusal of the appellant's plaint left no doubt that the appellant's complaint before the lower court related to alleged interference with the boundaries of the suit properties by the respondents. The respondents submitted that since the dispute concerned interference with boundaries, the lower court was right in its finding that the dispute fell within the provisions of Sections 18 and 19 of the *Land Registration Act*, 2012.
 13. On ground two of appeal, the respondents cited Sections 18(2) and (3) of the *Land Registration Act*, 2012 and submitted that a parcel of land would only be deemed to have fixed boundaries where a land registrar makes a note in the register to that effect. The respondents submitted that the appellant did not place before the lower court evidence that the land registrar had made a note on the registers of the suit properties that their boundaries had been fixed with reference to a plan verified by the office or authority responsible for survey of land. In support of this submission, the respondents cited *Willis Ocholla v. Mary Ndege*[2016]eKLR. The respondents submitted that in the absence of evidence of a note by the land registrar that the boundaries of the suit properties had been fixed, the lower court could not be faulted in its finding that the said boundaries had not been fixed.
 14. With regard to grounds 3 and 7 of appeal, the respondents submitted that it was clear from the plaint filed by the appellant that the appellant's complaint concerned interference with the boundaries of the suit properties. The respondents submitted that the appellant and the respondents had accused each other of encroachment. The respondents submitted that even if the appeal was allowed and the suit reinstated for hearing by the lower court, the dispute would still not be resolved until the issue of the boundaries of the suit properties is determined by the land registrar. The respondents submitted that since the appellant pleaded encroachment as the sole cause of action, the lower court had no jurisdiction to determine the dispute.
 15. With regard to grounds 4 and 6 of appeal, the respondents submitted that the respondents' preliminary objection was based on Sections 81(2) and 19 of the *Land Registration Act*, 2012. The respondents submitted that the objection was based on pure point of law that required no evidence to be adduced in support thereof or in response thereto. The respondents submitted that the lower court rightly applied the law and made correct findings. The respondents urged the court to dismiss the appeal with costs.

Analysis and Determination

16. I have considered the ruling of the lower court the subject of this appeal and the grounds of appeal put forward against the same by the appellant. I have also considered the submissions by the advocates for the parties and the various authorities relied on in support thereof. In my view, the only issues arising for determination in this appeal are; whether the lower court erred in its finding that the appellant's claim before it was a boundary dispute in respect of which it had no jurisdiction pursuant to Sections 18(2) and 19 of the *Land Registration Act*, 2012, and whether in the circumstances of the case, the lower court was right in declining jurisdiction on a preliminary objection.
17. In *Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 others* [2014] eKLR, the Supreme Court stated as follows on Preliminary Objection:

"To restate the relevant principle from the precedent setting case, *Mukisa Biscuit Manufacturing Co. Ltd. Vs West End Distributors* (1969) EA 696. '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 parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... 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 exercise of judicial discretion.”

18. In *Oraro v. Mbaja*[2005]1KLR141, the court stated that:

“A preliminary objection correctly understood is a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not as a matter of legal principle, a true preliminary objection which the court should allow to proceed. The court’s discretion is never exercised just on the basis of propositions of law; there must be a factual situation of which the court takes cognizance, and in relation to which its equitable conscience is exercised.”

19. I have at the beginning of this judgment highlighted the appellant’s claim in the lower court. The appellant stated that he was the registered owner of Plot No. 262 while the respondents were the registered owners of Plot No. 263. The appellant averred that Plot No. 262 and Plot No. 263 shared a common boundary “and have fixed boundary which had been established with beacons and fixed coordinates.” The appellant’s complaint was that while carrying out construction on Plot No. 263, the respondents breached the established boundary between Plot No. 263 and 262 and extended their construction works to Plot No. 262. The appellant sought a declaration that the respondents had encroached on Plot No. 262, demolition of part of the respondents’ building encroaching on Plot No. 262, injunction to restrain further encroachment, and general damages for trespass.

20. In his affidavit in support of the application for interlocutory injunction against which the respondents raised the preliminary objection, the appellant had annexed among others; a copy of his title deed for Plot No. 262, a copy of a survey plan, and a survey report by Opiyo & Associates Licensed Land Surveyors and Planners dated 12th August 2022. In the said survey report, Patrick Opiyo Adero, Licensed Land Surveyor stated as follows in part in relation to Plot No. 262 and Plot No. 263:

“The above parcels are depicted on survey plan reference FR221/39. They share a common boundary line namely K415-K387(call it L1). Parcel 262 is developed and occupied while 263 is being developed currently. The house on 262 is developed such that there is a space between it and line L1. The house in 263 is being developed it touches wall of house 262 i.e the developer of parcel 263 claims that the boundary is along the wall a1-a2.

On the ground, the house in parcel 262 is marked green on the attached plan. The developer of parcel 263 has horded the plot using iron sheets (mabati). The house in 263 is also being developed touching the house in 262.”

21. In conclusion, the said surveyor stated that:

“According to our survey, the “mabati” line marked red on the attached plan is 1.6 metres inside parcel 262 at the southern end and 0.5 metres in the middle.”



22. The said surveyor attached to his report, a survey plan showing the beacons marking the boundaries of Plot No. 262 and Plot No. 263 and the extent of encroachment according to him by the developer of Plot No. 263 into Plot No. 262.
23. From the material that was placed before the lower court by the appellant, I am persuaded that Plot No. 262 and Plot No. 263 have fixed boundaries. The two parcels of land had been surveyed and their boundaries marked with beacons. These parcels of land are not under general boundaries that were placed during land adjudication that have to be fixed by the land registrar under Sections 18 and 19 of the *Land Registration Act*, 2012 (hereinafter referred to only as “the Act”).
24. Section 18(3) of the Act provides that:
- Except where it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary:
- Provided that where all the boundaries are defined under section 19 (3), the determination of the position of any uncertain boundary shall be done as stipulated in the *Survey Act*, Cap. 299.
25. Section 19(3) of the Act on the other hand provides that:
- Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section.
26. As I have mentioned above, the suit properties are products of Survey Plan Reference F/R No. 221/39. Before titles for the suit properties were issued, the said survey plan was authenticated by the Director of Surveys. The boundaries of the suit properties are derived from the said survey plan. I am persuaded that the boundaries of the suit properties were fixed pursuant to the provisions of Section 19(3) of the Act and as such any dispute or uncertainty over the boundaries of the two parcels of land could only be resolved by the court with the assistance of surveyors under the proviso to Section 18(3) of the Act.
27. I agree with the respondents that where a boundary is fixed under Section 19(3) of the Act, the land registrar is supposed to make a note in the register to that effect. I wish to say however that the fixing of the boundary is not an event. It is a process. Where the process is proved to have been completed, the failure by the land registrar to make a note of the completion does not nullify the process or render it inoperative. The boundaries of the suit properties were fixed irrespective of the failure of the land registrar to make a note of the fixing of the same in the registers of the properties.
28. In *Menkar Limited v. Ratilal Ghela Samat Shah & 2 others* (supra) cited by the appellant whose facts were similar to the facts of this case, the Court of Appeal stated as follows in part:
- (18) The material before us does not demonstrate this as a pure boundary dispute. This is because these are titled plots and indeed at page 25 of the record contains a letter from Kimoland Surveying Services dated 26th November, 2009 addressed to the 1st respondent which states that;
- “Following your verbal instruction to relocate the boundary beacons for your above property, I visited the site, carried out the survey and here below is my ground report;
1. Five of the six beacons marking the boundaries of this plot are there as intact as approved by the Director of Surveys on F/R 253/87.



2. Beacon No. K36 could not be accessed because of the wall on plot no. 409.
3. The development on plot no. MI/I/409 encroaches on your plot as will be seen on the attached survey print.
4. I have explained to the owner of this development and about the encroachment but I advise that you take up the matter as the registered owner of plot no. MI/I/408.

The above is the situation on the ground and we will be able to relocate beacon no. K36 as soon as you settle out the encroachment issue.” Emphasis added.

Attached to that letter was a surveyor’s map of the property with a depiction of where the wall is erected and what would be supposedly the beacon K.36. It is therefore not in contention that the Title Nos. Mombasa Block I/409 and Mombasa Block I/408 have a defined boundary, they have titles and the issues pleaded in the plaint are matters that fall within the jurisdiction of the Environment and Land Court to determine whether the allegations of encroachment hold water and whether damages can be awarded.”

29. The suit properties having been surveyed and boundary beacons fixed on the ground, there is nothing more that the land registrar is supposed to do in the exercise of his powers under Sections 18(3) and 19(2) of the Act. It is therefore my finding that the suit properties had fixed boundaries and as such, the lower court erred in its finding that it had no jurisdiction to determine the lower court suit.
30. Given the foregoing finding, I do not need to determine the second issue that I have framed. Let me say however that due to the nature of the pleadings by the appellant in the lower court, the issue as to whether the suit properties had general or fixed boundaries required evidence and as such could not be determined through a preliminary objection. Again, like the Court of Appeal in Menkar Limited v. Ratilal Ghela Samat Shah & 2 others (supra), I am also of the view that the boundary dispute was not the only issue that was before the lower court. The appellant had raised other claims that he should have been given an opportunity to prove. The lower court therefore erred in declining jurisdiction thereby denying the appellant an opportunity to prove his other claims even if the court had no jurisdiction to determine the issue of the boundaries of the suit properties.

Conclusion

31. In conclusion, it is my finding that the appellant’s appeal has merit. The appeal is allowed. The ruling and order made by Hon. W.K.Onkunya SRM on 16th November 2022 are set aside. The lower court suit shall proceed to hearing before any other magistrate apart from Hon. W.K.Onkunya SRM. The appellant shall have the costs of the appeal.

DELIVERED AND DATED AT KISUMU ON THIS 8TH DAY OF FEBRUARY 2024

S. OKONG’O

JUDGE

Judgment Delivered Virtually Through Microsoft Teams Video Conferencing Platform in the Presence Of:
Mr. P.D.Onyango for the Appellant



Mr. Mwesigwa for the REEspondents

Ms. J. Omondi-Court Assistant

