



REPUBLIC OF KENYA



**M’Nthaka v Murega (Environment and Land Miscellaneous Application
E014 of 2022) [2023] KEELC 526 (KLR) (1 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 526 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E014 OF 2022**

CK YANO, J

FEBRUARY 1, 2023

BETWEEN

JUSTUS KIURA M’NTHAKA APPLICANT

AND

STEPHEN KITHINJI MUREGA RESPONDENT

RULING

1. By a Notice of Motion dated 22nd June, 2022 and brought under Sections 4,13,19 and 21 of the Environment and Land Court, Cap 12A Laws of Kenya as read with Article 162 (2) (b) of *the Constitution* of Kenya-2010, Order 51 Rule 1 of the Civil Procedure Rules,2010, Section 3A of the *Civil Procedure Act*,2010, Article 159 (2) (a), (b), (d) and (e) of *the Constitution* of Kenya 2010 and all other enabling provisions of the Law, the Applicants seeks the following orders:
 1. That due to advanced age and frail health of the Applicant, the instant application be heard on priority basis.
 2. That this Honourable Court be pleased to direct the District Land Registrar Meru South and the District Surveyor Meru South to visit the Suit Land (Original L.R Karingani/Ndagani/4300) and place the boundary between the Respondent’s L.R Karingani/ Ndagani/4556 measuring 0.203 Ha or thereabout and the Applicant’s plot thereon measuring 0.068 Ha or thereabout.
 3. That the District Surveyor Meru South be directed to allocate a Parcel Number to the Applicant’s plot measuring 0.068 Ha thereabout and which was inadvertently omitted out during the subdivision of L.R KARINGANI/NDAGANI/4300 into three (3) portions of 0.033 Ha,0.203 Ha and the balance of 0.068 Ha



4. That upon the District Surveyor Meru South issuing a Parcel Number to the Applicant's plot measuring 0.068 Ha or thereabout, the District Land Registrar Meru South be directed to issue the Applicant with the necessary Title Deed in respect of the said 0.068 Ha or thereabout.
5. That the costs of this application be provided for.
2. The application is premised on the grounds on the face of the motion and supported by the affidavit of Justus Kiura M'nthakathe Applicant, sworn on 22nd June, 2022. The deponent avers that on 26th August 1997, her late mother one Agnes Kataa M'thaka transferred to him L.R Karingani/Ndagani/4300 measuring 0.304 Ha or thereabout. The applicant has annexed a copy of the Green Card marked "JKM1" and states that on 22nd June 1998 he instructed one Mr. Muritu Surveyor (and who has since passed on) to subdivide his L.R Karingani/Ndagani 4300 measuring 0.304 Ha or thereabout into three (3) portions of 0.033 Ha, 0.203 Ha and 0.068 Ha and to present the Mutation documents to the Survey Offices for allocation of three (3) New numbers. A copy of the Sketch Map instructions to the Surveyor marked "JKM2" has been annexed.
3. The Applicant avers that on 22nd June 1998, he duly transferred LR. Karingani/Ndagani/4555 measuring 0.033 Ha or thereabout to one Mr. Leonard Mugambi and who lawfully settled on the portion and has no boundary issues with the applicant. The applicant has annexed a copy of the Certificate of Register (Green card) marked "JKM3".
4. The applicant states that on 2nd January 2002, he duly transferred LR. Karingani/Ndagani/4556 measuring 0.203 Ha or thereabout to the Respondent and the boundary between the Respondent's Land Parcel and his balance of 0.068 Ha was duly demarcated by the Registered Surveyor, Mr. Muritu (now deceased). The Applicant has annexed a copy of the Certificate of Register (Green Card) marked "JKM4"
5. The applicants avers that after disposing and/or transferring portions of his land measuring 0.236 Ha or thereabout to the Respondent and one Leonard Mugambi from his Original L.R. Karingani/Ndagani/4300, he was left with a portion of land measuring 0.068 Ha or thereabout and which currently borders the Respondent's Land Parcel Registration No. Karingani/Ndagani/4556.
6. The Applicant states that on 8th June 2022, he visited his 0.068 Ha so as to transfer the said Plot to his son only to discover that the Respondent has encroached on the same by fencing it together with his L.R Karingani/Ndagani/4556.
7. The Applicant avers that on 9th June 2022, he visited the Survey and Land Offices and discovered that his plot measuring 0.068 Ha or thereabout, had not been allocated any parcel number, despite his express and clear instructions to his then Registered Surveyor.
8. The applicant avers that it is in the interest of Justice that the Honourable Court do direct the District Land Registrar Meru South and the District Surveyor Meru South to visit the Suit land (the Original L.R Karingani/Ndagani/4300) and Rectify the anomalies and allocate his 0.068 Ha parcel Number and which was inadvertently omitted out when Parcel 0.033 Ha and 0.203 Ha were being allocated New Numbers.
9. The applicant states that the respondent whose interest of 0.203 Ha lies on LR Karingani/Ndagani/4556 stands to suffer no loss and/or damage if the orders sought are granted.
10. The Applicant further states that unless the Orders Sought are granted, the chances of losing his 0.068 Ha plot and which was excised from his Original Parcel L.R Karingani/Ndagani/4300 are highly eminent.



11. In response to the application, the Respondent filed a Notice of Preliminary Objection dated 1st August, 2022 in which he seeks to have the application and the entire suit struck out on the grounds that in so far the claim is founded on alleged encroachment on a parcel of land and alleged boundary, the court lacks jurisdiction to hear and determine the claim by virtue of express provision of section 18(2) of *Land Registration Act* and that the entire suit is misconceived in Law and amounts to abuse of the court process and that the application offends the clear provisions of Order 3 Rule (i) (ii) of the Civil Procedure Rules that provides that every suit shall be instituted by way of a plaint, petition and or an originating summons.
12. The Respondent further filed an undated replying affidavit on 5th August 2022 in which he has deponed inter alia, that the application is devoid of merit, vexatious and offends clear provisions of the Law and should be struck out with cost to him.
13. The Respondent avers that he purchased the whole of land parcel number Karingani/Ndagani/4556 from the Applicant on the 12th of November 2001 and has attached a copy of the agreement marked “SKM1”.
14. The Respondent further deponed that the transfer was to be done to the whole parcel of land which title was indicated as measuring 0.203 Ha and has attached copies of a consent and transfer form marked “SKM2 a & b.”
15. The Respondent has deponed that he acquired a title for land parcel number Karingani/Ndagani/4556 measuring 0.203 Ha and has attached a copy of title deed and green card marked “SKM3 a & b”.
16. The respondent avers that the portion alleged by the Applicant does not exist on the ground on the map and on the mutation forms and has attached a copy of mutation form registered by the Applicant in the year 1998 marked “SKM 4.”
17. The Respondent has deponed that the said mutation form indicates that the Applicant subdivided his land parcel number Karingani/Ndagani/4300 into two portions that is Karingani/Ndagani/4555 and Karingani/Ndagani/4556 in the year 1998 before he sold his land parcel number Karingani/Ndagani 4556 to the Respondent.
18. The Respondent states that the Applicant does not have any land existing in the vicinity of the alleged area and that there is no land without a registered number.
19. The Respondent avers that as per the mutation form dated 8th June 1998, the Applicant land parcel number Karingani/Ndagani/4300 measured 0.304 Ha was subdivided into two parcels Nos. Karingani/Ndagani 4555(0.033Ha and Karingani/Ndagani 4556 (0.203) and an access road measuring 0.068 Ha making a total of 0.304 Ha.
20. The Respondent states that the Applicant does not live in the neighbourhood and does not cultivate within the suit premises and or anywhere in the radius of the subject parcel.
21. The Respondent further states that the Applicant is merely lying to see whether the court can be deceived and hoodwinked to believe his deceitful tactics and hive a portion in the Respondent’s land and create a green card in his property unjustifiably.
22. The Respondent prayed for the Application dated 22nd June 2022 to be dismissed with costs to him.
23. The Applicant filed what he termed as opposition and/or response to the Respondent’s Preliminary Objection on 19th October, 2022.



24. With the agreement of the parties, the court directed that the Respondent's notice of Preliminary Objection be disposed of first by way of written submissions which were duly filed.
25. Counsel for the Respondent cited the provisions of section 18(2) of the [Land Registration Act](#) and submitted that the court does not enjoy the jurisdiction to hear and determine the matter in view of the said provision of law which commits the jurisdiction to determine boundary disputes in the first instance to the Land Registrar as stipulated in the [Survey Act](#) Cap 299 Laws of Kenya. That it is after the Registrar's determination that the matter escalates to court.
26. The Respondent's Advocate relied on the case of Samuel Macharia & Another v Kenya Commercial Bank Ltd & 2 Others [2012] eKLR and the case of George Kamau Macharia v Dexca Limited Muranga ELC 195 of 2017.
27. The Respondent further submitted that the matter has been commenced by way of a notice of motion contrary to the provisions of Order 3 Rule 1 & 2 of the Civil Procedure Rules which provides that "every suit shall be instituted by a plaint, petition or an Originating summons. Counsel for the Respondent also cited section 19 of the [Civil Procedure Act](#) which provides that every suit shall be instituted in such manner as may be prescribed by the rules, and submitted that a notice of motion can only be filed within a properly instituted suit. The Respondent relied on the case of Rajb Kosgei Magut –vs- Nuru Jepleting Choge [2020] eKLR and urged the court to dismiss the Applicant's Notice of Motion dated 22nd June, 2022 with costs.
28. The Applicant submitted that the enactment of section 18 (2) of the [Land Registration Act](#) No. 3 of 2012 did not oust this Honourable court's superior jurisdiction to hear and determine all disputes as provided for under Article 162(2)(b) of [the constitution](#) of Kenya 2010 as read with section 13 of the [Environment and Land Court Act](#) and Section 101 of the [Land Registration Act](#). It is the Applicant's submission that section 18(2) of the [Land Registration Act](#) is inconsistent with Article 162(2)(b) of [the constitution](#) and therefore null and void.
29. The Applicant submitted that his application dated 22nd June, 2022 does not offend the provision of order 3 Rule 1(1) of the Civil Procedure Rules. It is the Applicant's submissions that the expression "in such other manner as may be prescribed" under order 3 Rule 1 (1) includes instituting suits by way of Originating summons or motion as held in Milimani Commercial Division in Miscellaneous Application No. 86 of 2005, and submitted that instituting a suit by way of notice of motion in a miscellaneous Application does not in any way render the proceedings filed incompetent.
30. The Applicant's advocate submitted that the provision of order 2 Rule 14 of the Civil Procedure Rules and Article 159(2) (d) of [the constitution](#) bars raising of technical objection to any pleadings filed and raising of technicalities in administration of substantive justice. It is the Applicant's objection that the Respondent's Preliminary Objections are in the nature of technicalities and ought not see the light of the day.
31. It is also submitted by the Applicant that the Respondent having filed a replying affidavit, the Preliminary Objection raised is not purely based on points of law and relied on the case of Oraro v Mbaya [2005] KLR 141. It is the Applicant's submission that the objection raised by the Respondent does not meet the threshold to warrant the suit to be determined on a point of law as was held in the celebrated case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696, adding that the orders sought in the application dated 22nd June, 2022 are not in any way ousting the jurisdiction of the Land Registrar and surveyor as envisaged under section 18(2) of the [Land Registration Act](#). It is the Applicant's contention that it is in the interest of justice that the claim proceeds to full hearing and on its merits and not to condemn the Applicant unheard by employing



- technicalities to dismiss the suit, noting that the Respondent has filed his response to the claim. The Applicant urged the court to dismiss the Respondent’s preliminary objection and the application do proceed to full hearing.
32. I have considered the Preliminary Objection and the written submissions filed by the Advocates for the Respondent and for the Applicant as well as the authorities cited and the law. The issue for determination by the court is whether the Preliminary Objection taken by the Respondent is sustainable or not.
33. The circumstances in which a Preliminary Objection may be raised was explained in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 as follows:
- “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.”
34. The Preliminary Objection raised by the Respondent is that the court lacks jurisdiction to hear and determine the Applicant’s claim which is on a boundary dispute by virtue of section 18(2) of the Land Registrarion Act and that the application offends the clear provisions of order 3 Rule 1 (1) of the Civil Procedure Rules. In the celebrated case of *Owners of motor vessel “Lillian S” V Caltex Oil (Kenya) Ltd* 1989 KLR1, Nyarangi JA stated:
- “I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide on the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court of law downs tools in respect of a matter before it the moment it holds the opinion that it is without jurisdiction.”
35. Referring to the passage in *Words and Phrase Legally Defined – Volume 3: 1 – N* page 113, Nyarangi, JA went on:
- “By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by statute, charter, commission under which the court is constituted, and may be extended or restricted by the like means...where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”
36. In the case of *Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 Others* (supra), the Supreme Court stated:
- “A court’s jurisdiction flows from either *the constitution* or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law... the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings.”



37. In the Notice of Motion dated 22nd June, 2022, the Applicant has sought orders directing the District Land Registrar and the District Surveyor to visit the suit land (original LR Karingani/Ndagani/4300) and place a boundary between the Respondent's LR. No. Karingani/Ndagani/4556 measuring 0.203 Ha or thereabout and the Applicant's plot measuring 0.068 Ha or thereabout.

38. Section 18(2) & (3) of the [Land Registration Act](#) provides as follows:

“

“(2) 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.”

(3) 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.”

39. Section 19 of the [Land Registration Act](#) provides as follows:

“(1) If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.

(2) The Registrar shall, agree giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.

(3) where the dimensions and boundaries of a parcel are defined by a 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.”

40. Under section 19 of the [Land Registration Act](#), the duty to fix boundaries to registered land is vested in the Land Registrar and section 18(2) is very clear that a court is barred from entertaining such dispute. The said provisions of law mandatorily reserves boundary disputes to the Land Registrar in the first instance. I therefore find that the claim being a boundary dispute has been brought prematurely before the court and this court is not properly seized of the matter.

41. In the Case of *Azzuri Limited vs Pink Properties Limited* (2018) eKLR, the Court of Appeal 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.”

42. In the case of *George Kamau Macharia & Dexka Limited* [2019] eKLR, Kemei J stated 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. In this case the office of the land registrar is mandated to deal with the general boundary dispute first before the same is escalated to the court. It is the view of this court that the dispute is prematurely before the court.”

43. Further, in the case of *Willis Ochola v Mary Ndege* [2016] eKLR Kibunja J rendered himself thus,

“That in terms of Section 18(2) of the *Land Registration Act*, proprietors of registered land with a boundary dispute are obligated to first seek redress or solution from the Land Registrar before moving or escalating the dispute to this court. That where such a party fails to do so, and comes to court without first seeking redress from the land registrar, the court being a court of law, has to remind such a party that he/she has moved the court prematurely. That the provisions of section 18(2) of the *land registration act* shows clearly that the court is without jurisdiction on boundary disputes of registered land until after the land registrar’s determination on the same has been rendered.

44. The aforementioned case law clearly indicate that the dispute relating to boundaries ought to be resolved by the Land Registrar in the first instance.

45. 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 the legal obligation. In this case the Office of the Land Registrar is mandated to deal with the general boundary dispute first before the same is escalated to the Court. It is the view of this court that the dispute is prematurely before the court.

46. The other issue to be addressed is whether the suit offends the clear provisions of order 3 rule 1 of the Civil Procedure Rules which states that every suit shall be instituted by way of a plaint or in such manner as may be prescribed. The applicant’s application which includes a claim for title over land has been made by way of a miscellaneous application.

47. Section 19 of the *Civil Procedure Act* provides that every suit shall be instituted in such manner as may be prescribed by the rules. The rules prescribe that a suit may be instituted by way of a plaint, petition or an originating summons.



48. In the case of Joseph Kibowen Chemior v William C. Kiseru [2013] eKLR the court extensively discussed filing of suits as follows:

“The word “suit” has several meanings. Black’s Law Dictionary defines “suit” as any proceedings by a party or parties against another in a court of law (7) suit of civil nature is defined to be a civil action.

(8) “A civil action is an action brought to enforce, redress, or protect a private or civil right.

(9) Section 2 of the Civil Procedure Act defines “suit” as all civil proceedings commenced in any manner “prescribed” under section 2 means prescribed by rules.

Rules means rules and forms made by the Rules committee to regulate the procedure of the courts.

(12) “Pleadings” includes a petition or summons, and the statements in writing of the claim or demand of any Plaintiff, and of the defence of any defendant thereto, and of the reply of the Plaintiff to any defence or counterclaim of a Defendant.

Under section 19 of the Civil Procedure Act, every suit shall be instituted in such manner as may be prescribed by rules. It will be observed that section 19 does not pretend that the Civil Procedure Rules have a monopoly on how suits should be instituted. It provides that suits may be instituted in the manner prescribed by rules. There could be rules in other statutes on how proceedings may be commenced. For example, the Probate and Administration Rules under the Succession Act (14) prescribe how matters touching on succession of estates of deceased persons need to be instituted.”

49. Going by the above decision, it therefore means that a person commencing a civil suit (in this instance to enforce a civil action) needs to follow the prescribed rules.

50. In the present case, the applicant has come by way of a notice of motion miscellaneous application seeking orders that include issuance of title and there is no substantive suit that the application is predicated, grounded and or premised. In my view, the miscellaneous application by way of notice of motion has been made in a vacuum and is not a suit properly so called. The failure to follow the laid down procedure goes to the root of litigation and therefore cannot be salvaged by Article 159 of the constitution or sections 1A, 1B and 3A of the Civil Procedure Rules as pleaded and submitted by the Applicant.

51. In the case of Salim Tunja Gambo v Commissioner of Lands, Waki J (as he was then) held as follows:

“section 3A of the Civil Procedure Act is not a panacea for all wrongs. The inherent powers of the court ought not to be used indiscriminately when there are specific provisions of law which can be invoked.”

52. In the case of Raila Odinga v IEBC & Others [2013] eKLR the court observed that:

“Article 159(2)(d) of the constitution simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never



meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the court.”

53. The case of Board of Governors Nairobi School v Jackson Ileri Geta [1999] KLR cited with approval in Fidelity Bank Ltd v John Joel Kanyali Miscellaneous Application 8/2014 clarified how a suit can be commenced when it said:

“pleading is defined in section 2 of the *Civil Procedure Act* to:

include a petition or summons and the statements in writing of the claim or demand of any Plaintiff, and the defence of any Defendant thereto, and of the reply of the Plaintiff to any defence or counterclaim of a Defendant; this definition is couched in such a way as to accord with order IV Rule 1 (now order 3 Rule 1) which prescribes the manner of commencing suits, which rule provides that every suit shall be instituted by presenting a plaint to the court, or in such other manner as maybe prescribed...”

54. I am accordingly in agreement with the preliminary objection raised by the Respondent that the proceedings herein are misconceived and bad in law.
55. Consequently, the Preliminary objection has merit and is upheld and it is the finding of this court that the application herein is incompetent, bad in law, and fundamentally defective. The same is devoid of merit and must fail.
56. Accordingly, the notice of motion dated 22nd June, 2022 is hereby struck out with costs to the Respondent.
57. Orders accordingly.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 1ST DAY OF FEBRUARY, 2022 IN THE PRESENCE OF:

C/A: Martha

No appearance for Applicant

No appearance for Respondent

C. K. YANO,

JUDGE.

