



REPUBLIC OF KENYA



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**Ndiema & 8 others v Kaitet Tea Estates (1977) Limited & another; Sabaot Farm
Cooperative Society Limited & another (Interested Parties) (Environment &
Land Case 18 of 2023) [2023] KEELC 18618 (KLR) (11 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18618 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 18 OF 2023
FO NYAGAKA, J
JULY 11, 2023**

BETWEEN

**FREDRICK LACHAU NDIEMA 1ST PLAINTIFF
PATRICK L WOLER 2ND PLAINTIFF
PHILIP KIBET 3RD PLAINTIFF
GEOFFREY CHELIMO 4TH PLAINTIFF
BENJAMIN CHEMOS 5TH PLAINTIFF
BEN CHEMASHAK 6TH PLAINTIFF
FRANCIS CHEMANDWA 7TH PLAINTIFF
IBRAHIM NDIWA 8TH PLAINTIFF
JOHN TRIKOI 9TH PLAINTIFF**

AND

**KAITET TEA ESTATES (1977) LIMITED 1ST DEFENDANT
GATATHA FARMERS COMPANY LIMITED 2ND DEFENDANT**

AND

**SABAOT FARM COOPERATIVE SOCIETY LIMITED INTERESTED PARTY
NATIONAL LAND COMMISSION INTERESTED PARTY**



RULING

(On 1st and 2nd Defendants' Preliminary Objection on Jurisdiction of Court)

1. By a notice of preliminary objection dated April 24, 2023, the 1st defendant challenged the institution of the instant suit. The objection was on the ground that this court lacked jurisdiction to determine the dispute herein pursuant to the mandatory provisions of sections 18 and 19 of [Land Registration Act](#) No 3 of 2012. It prayed that the suit be struck out with costs to it.
2. Similarly, by another notice of a preliminary objection dated April 19, 2023, the 2nd defendant objected to the institution of the instant suit. The objection was on the ground that the 2nd defendant interests in the suit properties were extinguished in the year 2012 when it transferred the said properties and handed over possession to the 1st defendant. It argued that its joinder in the proceedings herein was contrary to the provisions of the [Civil Procedure Rules](#) under order 1 rule 14. The other ground was that the 2nd defendant's joinder in these proceedings was an abuse of court process as no course of action against it is disclosed either in the plaint or the notice of motion dated April 4, 2023
3. The preliminary objection was canvassed by way of oral submissions.

The Objection

4. The oral submissions were taken on May 18, 2023. According to the 1st defendant, the plaintiff's claim was a boundary dispute which was in the province of the Land Registrar. Mr Odongo, the learned counsel appearing for it, argued that the claim fell squarely within the provisions of section 18 (2) of the [Land Registration Act](#) thus offending it. The learned counsel stated that the plaintiffs jumped gun by instituting the suit. He stated that the plaintiffs' claim that the defendants trespassed to their land and altered the boundary line between LR No 5711 and 5712 which was their originally fixed boundary was a matter which fell under the jurisdiction of the Land Registrar.
5. It was the defendants' contention that the present dispute could only be resolved by the Land Registrar as provided in law. To buttress his argument, he relied on the provisions of section 18 (2) and 19 of the [Land Registration Act](#) and the cases of [Sagalla Ranches Limited v Saumu Mwanganjoni and 99 others](#) [2022] eKLR, [Reuben Kioko Mutyaene v Hellen Kiunga Miriti & 4 others; Ntalala Eric Mutura & another \(interested parties\)](#) (2021) eKLR, and [Michael Maluti & 5 others v Julius Mbau Nzyuko & 2 others](#) (2019) ekLR
6. By way of written submissions highlighted through learned counsel, Mr Kiura, the 2nd defendant, objected at paragraph 3 to its inclusion in the suit herein and sought to have its name struck out, under order 1 rule 1 of the [Civil Procedure Rules](#) 2010. The provision is, *inter alia*, that any application to strike out a defendant may be made at the trial of the suit in a summary manner. By way of oral submissions made on May 18, 2023, it urged the preliminary objection. It further stated that the matter before the court was a claim of trespass in which they have no interest in. It stated that it sold the parcel of land LR 5712 to the 1st defendant in 2012 thereby transferring its interest in it hence not capable of trespassing. It claimed it was wrongly joined as a party to the suit relying on the [Civil Procedure Rules](#) order 1 rule 14.
7. The defendant relied on the authority of [Eliud Njoroge Gachiri v Stephen Kamau Nga'ng'a](#) (2018) eKLR.



Plaintiff's Submissions

8. The plaintiffs through their representative made oral submissions on the material date. The representative stated that they did not have an issue with the company that at first used border with them which was the 2nd defendant in the case herein. He further stated that he joined the 2nd defendant so that it can come in and show the 1st defendant the correct borderline. In his submissions, he stated that when the piece of land LR. 5712 was sold to the 1st defendant by the 2nd defendant in 2012, they settled peacefully until 2021 when the 1st defendant altered the borderline. He averred that he came to court so that he could be directed properly on what to do about the issue. He acknowledged that he did not take up the matter with the Land Registrar before filing his case. Instead he decided to make his complaint through the court administration so that he could be heard first.

Determination and Analysis

9. I have carefully considered the contents of both preliminary objections, the submissions by the three parties as well as the statutory law cited and case law relied on. The issues arising for determination were:
 - a. Whether the 2nd defendant was wrongly joined to the suit.
 - b. Whether this suit offends section 18 (2) of the *Land Registration Act*.
 - c. What orders to issue, including who to bear the costs herein.
10. I begin by analyzing the first issue. But before I do so, since the two defendants raised what they referred to as preliminary objections, it is appropriate to first give the meaning and understanding of a preliminary objection.
11. In *Mukhisa Biscuit Manufacturing Co 2Ltd v West End Distributors Ltd* (1969) EA 696, Sir Charles Newbold defined a preliminary objection as follows:

“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... 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 had to be ascertained or if what is sought is the exercise of judicial discretion”
12. In *Bashir Haji Abdullahi v Adan Mohammed Noor & 3 others* [2004] e KLR, the same court held that:

“We are of the considered view that if a party wishes to raise a preliminary objection and files in court a notice to that effect and is subsequently served on other parties to the suit, the preliminary points should be sufficiently particularized and detailed to enable the other side and indeed the court to know exactly the nature of the preliminary points of law to be raised. To state that, the application is bad in law” without saying more does not assist the other parties to neither the suit nor the court to sufficiently prepare to meet the challenge. If it is only at the hearing that the preliminary objection is amplified and elaborated, it gets the other side unprepared and is reminiscent of trial by ambush.”



13. Also, in *Susan Wairimu Ndiangui v Pauline W. Thuo & another* [2005] eKLR, Musinga J as he then was held as follows:-

“A preliminary objection should not be drawn in a manner that is vague and non-disclosing of the point of law or issue that is intended to be raised. It should clearly inform both the court and the other party or parties in sufficient details what to expect.”

14. Therefore, the issues the defendants needed to raise in order for them to succeed in the instant case ought to be based on only points of law which needed no support or clarification by use of facts. Short of that, the issues must go for trial.

a. Whether the 2nd defendant was wrongly joined to the suit

15. This issue can be best understood from the legal position of what amounts to trespass. From a criminal law perspective, trespass is an offence. The offence is defined in section 3 (1) of the *Trespass Act*, cap 294 provides that:

“Any person, who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

16. Thus, trespass is an unauthorized intrusion by another person other than the owner of private land either by himself or property or thing. However, while the definition of the offence gives certain elements of the action, I must limit myself to the civil aspect and meaning of trespass to land. Thus, further definitions are apt herein.

17. The Bryan A. Garner (2019): *Black's Law Dictionary* 11th Edition, Thompson Reuters, St. Paul MN, p. 1810 defines trespass as:

“an unlawful act committed against the person or property of another; especially wrongful entry on another's real property.”

18. In *John Kiragu Kimani v Rural Electrification Authority* [2018] eKLR the court adopted the meaning in *Clark & Lindsell on Torts*, 18th Edition at page 923 which defines trespass as;

‘Any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the plaintiff to prove that the defendant invaded his land without any justifiable reason’.

19. In the instant case, the 2nd defendant is neither in possession nor ownership of the land in dispute. It was clear by the 2nd defendant that it transferred its ownership of the parcels in issue in 2012. The plaintiffs admitted as much save that they alleged that they only wished the 2nd defendant to show the 1st defendant where the correct boundary is. With due respect the issue of determination of boundaries is governed by law, and is not the business of a private unqualified unauthorized entity. Thus, it is inconceivable that the 2nd defendant would trespass onto the plaintiffs' alleged parcels of land.

20. The 2nd defendant brought the objection under order 1 rule 14 which provides for any application to add or strike out or substitute a plaintiff or defendant to be made to the court at any time before trial by chamber summons or at the trial of the suit in a summary manner. It prayed for its name be struck out as it was wrongly enjoined in the suit. It is worth noting that the time at which the 2nd defendant



raised the issue was neither at the trial nor did it do it by way of chamber summons. Therefore, the rule relied on was not relevant.

21. That notwithstanding, the power by the court to add or remove parties in suits is donated under order 1 rule 10(2) of the [Civil Procedure Rules, 2010](#). It provides that:-

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out,’

22. In the instant suit the plaintiffs admitted that they only enjoined the 2nd defendant merely because they wished that the said defendant does indicate to the 1st defendant the correct boundary. With due respect, that cannot found a cause of action against a party in a court of law. This is particularly clear given that the establishment of boundaries of land is the mandate of the Land Registrar if the boundaries have not been fixed, and if fixed, the surveyor. I therefore find that the 2nd defendant was improperly joined in the suit. I hereby direct that its name be and is hereby struck out.

b. Whether this suit offends section 18(2) of the [Land Registration Act](#)

23. The defendants herein pleaded that the court lacked jurisdiction on the ground that the issues raised in the suit lay within the mandate of the Land Registrar. Their arguments were that the issues before the court revolved around a nothing but a boundary dispute. They derived their argument from the provisions of section 18 (2) of the [Land Registration Act](#). The Sub-section provides as follows:

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

24. In the section, there are two parts of the provision in relation to the jurisdiction of the court. One part ousts the jurisdiction of the court while the other firms it. First, the court shall not have jurisdiction on a matter of boundary dispute between parties where land is already registered if a (the) boundary has not been determined by the relevant office. Second, the court shall have jurisdiction over a boundary dispute between parties where one has been determined as per the section. By so stating the Subsection imports a reading of the entire section so that a party may be understand when the boundary is determined. Under subsection 1, the provision reads that the boundary of a parcel of land has to be determined in accordance with section 20 of the Act and it be noted in the Register that way in order for the boundary, whether of a cadastral map or filed plan, not to be deemed approximate, and the situation of the parcel of land approximate too.

25. Thus, to determine whether the limb of the preliminary objection had merit, this court relied only on the pleadings and prayers therein in comparison with the law. And from the pleadings it is clear that the dispute before this court is a boundary dispute. It was even admitted in the submissions of the plaintiffs that indeed the issue before the court was a boundary dispute, and that the same had not been presented by the plaintiffs for determination before the Land Registrar. Thus, did the plaintiffs offend the law by instituting this suit before placing the dispute before the Land Registrar?

26. In [Bethwell Allan Omondi Okal v Telkom \(K\) Ltd \(founder\) & 9 others](#) [2017] eKLR, the court stated as follows:

“The appellant might want to argue that he has a constitutional right of access to justice, and we agree that he does, but the High Court and this court have pronounced themselves many times to the effect that a party must first exhaust the other processes availed by other



statutory dispute resolution organs, which are by law established, before moving to the High Court by way of constitutional petitions”.

27. From the foregoing, I am convinced beyond peradventure that this court is deprived of jurisdiction on the matter before it. Section 18(2) of the *Land Registration Act* took it away from it from the very beginning when the plaintiffs did not first use the avenue available to them. As stated in the case of *Sasomuna Holdings Company Limited v Kenya National Highways Authority* (2022) eKLR at paragraph 35:

“Where the statute contains and provides a specific recourse and mechanism for the determination of a particular dispute, such avenue must be exhausted, complied with and adhered to ...”

28. Thus, I hereby agreed with and find for the 1st plaintiff that this court does not have jurisdiction in this matter.

c. What orders should issue including, whom to bear the costs of the application

29. The upshot is that the preliminary objection has merit. It is hereby allowed in entirety. The plaintiffs shall bear the costs of the suit. Further, I have found even before dismissal of the suit that the 2nd defendant was improperly joined in the suit and I have struck out its name. The said defendant too shall therefore have the costs of the suit.

30. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 11TH DAY OF JULY, 2023.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE

