



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC PETITION NO. E007 OF 2021

DOUGLAS MUINDU MBUVI .....PETITIONER

-VERSUS-

THE INSPECTOR GENERAL OF POLICE .....1ST RESPONDENT

THE COMMANDANT, GENERAL SERVICE UNIT.....2ND RESPONDENT

THE COMMANDING OFFICER, RUIRU KIMBO GSU.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

CLUSTER 2 NEIGHBOURS RESIDENTS ASSOCIATION ... INTERESTED PARTY

RULING

1. The petitioner, **Douglas Muindi Mbuvi**, brought this petition in June 2021. He alleged that **General Service Unit Officers** from **Ruiru Kimbo Barracks (the Barracks)** had trespassed into his land, **Ruiru/Mugutha Block 1/8702**, and had blocked him from continuing with construction works which he was undertaking on the land. He added that the Commanding Officer of the Barracks had maintained that he was undertaking construction works on a wayleave on which water pipes supplying water to the Barracks lay, a contention which he disputed. It was his case that the water pipes had encroached into his land. Consequently, he sought various reliefs against the respondents, among them, a permanent injunction restraining the 1st, 2nd and 3rd respondents against harassing, intimidating, threatening and arresting him and his servants, employees, contractors, and workers; and an order of mandamus directing the 1st, 2nd and 3rd respondents to remove and relocate the water pipes.

2. On or about 13/10/2021, the four respondents responded to the petition through a replying affidavit sworn on 9/11/2021. In addition, they brought a cross-petition dated 12/10/2021 against Douglas Muindi Mbuvi. The cross-petitioners contended that the petitioner had encroached on a Government wayleave that hosts water pipes that supply water to the Ruiru GSU Camp.

3. In their cross-petition dated 12/10/2021, the cross-petitioners contended that in 1990s, the Government of Kenya initiated a water supply project that involved pumping water from Ruiru River to the Ruiru General Service Unit Base. The project was to be in the open land between the coffee plantations and the river, while the water pipeline to the GSU Camp was to be partially through the open land and an existing tract in the coffee plantation. On 24/11/1992, vide Gazette Notice No. 5951, the Government advertised for hearings on any claim for compensation by persons who were to be affected by the said project. The suit property was part of a bigger parcel belonging to Nyakinyua Investment Company and was affected by the project. All the affected proprietors were compensated and the project was carried out without any objections. They contended that the water pipe lay in the wayleave that was duly acquired by the Government of Kenya in the 1990s. They further contended that the petitioner's construction had encroached on the wayleave and was directly on top of the water pipe.

4. On or about 9/11/2021, the petitioner brought a notice of Preliminary Objection dated 4/11/2021, urging the court to strike out the cross-petition *in limine* on the following grounds:

1. **THAT** the 1st, 2nd, 3rd and 4th Respondents Cross Petition dated 12th October, 2021, is **fundamentally defective, incompetent, misconceived, bad in law and violates** the provisions of **Section 18(2) of the Land Registration Act 2012**, which requires registered proprietors of the land with a boundary dispute to first seek redress from the Land Registrar before moving to court.

2. **THAT** this Honourable Court has no jurisdiction in this matter in view of **Section 18(2) of the Land Registration Act, 2012** that require proprietors of registered land with a boundary dispute to first seek redress or solution from the Land Registrar

before moving to court.

**3. THAT the Cross Petition is premature, misconceived, vexatious, frivolous, scandalous and a blatant abuse of due process of the court.**

**4. THAT the in the premises, this Honourable Court herein lacks jurisdiction as the suit is premature and as such the same ought to be dismissed with costs.**

5. The above preliminary objection dated 4/11/2021 is the subject of this ruling. The preliminary objection was canvassed through written submissions dated 23/11/2021, filed through the firm of *Ngwele & Company LLP*. Counsel for the petitioner submitted that by virtue of **Section 18(2)** of the **Land Registration Act, 2012**, this court is expressly barred from entertaining “this action.” Counsel contended that the cross-petition was principally a “boundary issue” hence the court is precluded from entertaining it. Citing the words of Nyarangi JA in *Owners of Motor Vessel “Lillian S” v Caltex Oil Kenya Ltd (1989) I KLR*, counsel urged the court to down its tools by dismissing the cross-petition.

6. The respondents filed written submissions dated 10/1/2022 through **Mr. Benson Njagi, Senior State Counsel**. Counsel submitted that the issue raised in the preliminary objection required ascertainment through evidence. Counsel contended that whereas the petitioner advanced the view that the dispute in the cross-petition was about boundaries, the position of the cross-petitioners was that the boundaries were clear and had been ascertained by the Director of Surveyors and that the petitioner had trespassed on the wayleave. Counsel contended that these required ascertainment through evidence. Counsel added that the issue in the cross-petition related to occupation and use of land, hence the court was properly seized of jurisdiction to deal with it. Counsel urged the court to dismiss the preliminary objection.

7. I have considered the preliminary objection together with the parties’ respective submissions. I have also considered the relevant jurisprudence on the key issues falling for determination in the preliminary objection. Three questions fall for determination. The first question is whether the notice of preliminary objection dated 4/11/2021 meets the threshold of a preliminary objection. The second question is whether there is merit in the grounds set out in the notice of preliminary objection dated 4/11/2021. The third question relates to the appropriate disposal orders that should be made, in any event. I will make brief sequential pronouncements on the three questions in the above order.

8. What should be canvassed as a preliminary objection was defined by Newbold VP in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696* in the following words:-

**“... So far as I am aware, 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.”**

9. The grounds set out in the preliminary objection dated 4/11/2021 focus entirely on the jurisdiction of this court in the context of Section 18(2) of the Land Registration Act. They do not call for ascertainment of facts through evidence. All that the court is required to do is to look at the petition, the response to the petition, the cross-petition, and the response to the cross-petition, and thereafter decipher the nature of the dispute(s) that fall for determination and determine whether it has jurisdiction. The court is, in the circumstances, satisfied that the grounds set out in the notice of preliminary objection dated 4/11/2021 satisfy the threshold of a preliminary objection.

10. As to whether there is merit in the grounds set out in the notice of preliminary objection, I have reflected on the grounds in the notice of preliminary objection and the submissions advanced in support of those grounds. While canvassing the objection, the petitioner focused on the cross-petition but said nothing about the petition and the response to the petition. This, in my view, is not the proper approach in deciphering the issue and the nature of the dispute that fall for determination in this suit. The proper approach to take is to look at all the pleadings, starting with the petition which triggered these proceedings; the response to the petition; the cross-petition; and the response to the cross-petition. Isolation of the cross-petition from the petition would be necessary only when it is established that the cross-petition has no nexus to the dispute in the petition. Can the dispute in the petition herein be properly isolated from the dispute in the cross-petition? A brief outline of the parties’ respective cases in the petition and in the cross-petition will provide the answer to the above question.

11. The petitioner contended in the petition that GSU Officers from Ruiru Kimbo Barracks trespassed into his land, Ruiru/Mugutha Block 1/8702, and blocked him from continuing with construction works contending that he was constructing on a Government wayleave where the water pipes supplying water to the Barracks lay. It was the case of the petitioner that the site where he was undertaking the construction was not a wayleave. It was the petitioner’s case that the water pipes had encroached onto his land. He sought, among other reliefs, an order barring the respondents against encroaching or trespassing on his land.

12. Through the response to the petition and through the cross-petition dated 12/10/2021, the cross-petitioners who are respondents in the petition contend that the petitioner has encroached on the government wayleave where the water pipes supplying water to the GSU Barracks are laid, and he is constructing on the wayleave and directly on top of the water pipes. The cross-petitioners seek, among other reliefs a declaration that the petitioner’s construction has encroached on the Government wayleave.

13. What emerges from the petition, the response to the petition, the cross-petition and the response to the cross-petition is that the dispute in both the petition and the cross-petition relates to the exact boundaries of the petitioner’s land vis-a-vis the exact boundaries or location of the Government wayleave. Put differently, both the petition and the cross-petition raise a boundary dispute. To that extent, I agree with counsel for the petitioner that this court is obligated to down its tools until the Land Registrar makes a determination under Section 18(2) of the Land Registration Act. The court will in the circumstances down its tools in terms of both the petition and the cross-petition until the Land Registrar makes a determination.

14. It is important to make it clear that in a dispute of this nature, what is required of the Land Registrar under Section 18(2) of the Land Registration Act is a quasi-judicial hearing and determination; not merely a surveyor's report. The determination must be signed by the Land Registrar and should make a clear determination of the boundary dispute in question in terms of Section 18(2) of the Land Registration Act.

15. In light of the foregoing, the court makes the following disposal orders in relation to the petitioner's preliminary objection dated 4/11/2021:-

**a. Further proceedings in this suit are hereby stayed for a period of six (6) months to await a determination of boundaries by the Land Registrar under Section 18(2) of the Land Registration Act.**

**b. In the absence of a boundary determination by the Land Registrar within the said period of six (6) months, both the petition and the cross-petition herein shall stand struck out with no order as to costs.**

**c. Costs of the preliminary objection dated 4/11/2021 shall be in the cause.**

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 2ND DAY OF MARCH, 2022**

**B M EBOSO**

**JUDGE**

**In the presence of: -**

Mr Ngwele for the Petitioner

Mr Njagi for the Respondent

Mr Mukamba for the Interested Party

Court Assistant: Lucy Muthoni