



REPUBLIC OF KENYA



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**Njumbi v Njoroge & 2 others (Environment & Land Case 731 of 2011)
[2022] KEELC 14623 (KLR) (3 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14623 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 731 OF 2011**

**JO MBOYA, J
NOVEMBER 3, 2022**

BETWEEN

DOROTHY NJUMBI PLAINTIFF

AND

DANIEL GICHURU NJOROGE 1ST DEFENDANT

JOSEPH MUGO MWANGI 2ND DEFENDANT

ALICE NGIGE 3RD DEFENDANT

RULING

Introduction and Background

1. Vide Notice of Preliminary Objection dated the July 18, 2022, the 2nd and 3rd Defendants herein have approached the court seeking for the following Reliefs;
 - i. This Honourable Court has no jurisdiction to hear and determine the Plaintiff's case herein as the statutory jurisdiction to hear and determine a dispute pertaining to a Boundary between two registered parcels of land is, strictly, reposed and restricted to the Land Registrar under the clear provision of section 18 (2) and (3) as well as section 19 (1) and (2) of the [Land Registration Act, 2012](#).
 - ii. The Plaintiff's suit is, therefore, premature, misconceived in law, frivolous, vexatious and amount to blatant abuse of the court process and should be struck out with costs, *Ex Debito Justitiae*.
2. Following the filing and lodgment of the preliminary objection herein, the Honourable Court ordered and directed that the preliminary objection be heard and canvassed before the substantive hearing could be gone into and or taken.



3. On the other hand, the court also ordered and directed that the preliminary objection be canvased and disposed of by way of written submissions, to be filed and exchanged within set timelines.
4. Pursuant to and in line with the directions, in terms of the preceding paragraph, the Parties proceeded to and indeed filed and exchanged their respective submissions.

Submissions by the Parties:

a. 2nd and 3rd defendants' submissions:

5. The 2nd and 3rd Defendants filed written submission dated the September 23, 2022 and in respect of which same have highlighted, amplified and canvased two (2) pertinent issues for consideration.
6. First and foremost, counsel for the 2nd and 3rd Defendants has submitted that the primary claim sought for vide the amended Plaintiff dated the March 7, 2022 relates to the determination, ascertainment, demarcation and restoration of the correct boundary between LR No's Nairobi/Block 119/3277 and Nairobi/Block 14225/83/7.
7. Premised on the fact that the amended Plaintiff seeks to invite the honourable court to deal with and address issues pertaining to boundary dispute, counsel for the 2nd and 3rd defendants submitted that such Jurisdiction does not lie with or fall under the mandate of this Honourable court.
8. In any event, counsel for the 2nd and 3rd Defendants added that before such a dispute can be raised and ventilated before the honourable court, same ought to have been referred to and dealt with by the Land Registrar, in the manner stipulated and prescribed vide the provisions of Section 18 and 19 of the [Land Registration Act](#).
9. Essentially, counsel for the 2nd and 3rd Defendants has therefore submitted that this honourable court is devoid and bereft of the requisite jurisdiction to entertain and adjudicate upon the subject dispute.
10. In support of the foregoing submissions, counsel for the 2nd and 3rd Defendants has cited and relied upon the case of [George Kamau Macharia versus Deska Ltd](#) (2019)eKLR and [Samson Chembe Vuko versus Nelson Kitumo & 2 Others](#) (2016)eKLR.
11. Secondly, counsel for the 2nd and 3rd Defendants has submitted that where a court of law is devoid and deprived of jurisdiction, such a court cannot continue to entertain and proceed with the impugned proceedings, for purposes of taking further evidence.
12. In the premises, counsel has contended that in the absence of the requisite Jurisdiction, it is incumbent upon the Honourable court to down her tools and to strike out the impugned proceedings.
13. To this end, counsel for the 2nd and 3rd Defendants has cited and relied upon the case of *inter-alia*, [Geoffrey Muthinja Kabiru & 2 Others versus Samuel Munga Henry & 1756 Others](#) (2015)eKLR and [Owners of Motor Vessel Lilian S versus Caltex Oil \(Kenya\) Ltd](#) (1989)eKLR.

b. The 1st defendant submissions

14. The 1st Defendant herein filed written submissions dated the October 26, 2022, and same has similarly raised and highlighted two issues.
15. First and foremost, counsel for the 1st Defendant has submitted that where the law provides an appropriate statutory mechanism for addressing and dealing with a particular situation, then it behooves the claimant to first of all, invoke and rely upon the established statutory mechanism, provided under the law in the first instance.



16. On the other hand, counsel added that it is only upon the exhaustion of the statutorily established Dispute resolution Mechanism that a claimant can thereafter approach the Honourable Court for the hearing and determination of the suit, if at all.
17. Premised on the foregoing submissions, counsel for the 1st Defendant has therefore submitted that the Jurisdiction of this court has been ousted by dint of the provisions of Section 18 and 19 of the [Land registration Act, 2012](#).
18. Secondly, counsel for the 1st Defendant has also submitted that in the absence of Jurisdiction it behoves the court to terminate the impugned proceedings.
19. In a nutshell, counsel for the 1st Defendant joined hands with the 2nd and 3rd Defendants and invited the Honourable court to find and hold that the Plaintiff's suit is premature, misconceived and legally untenable.

c. Plaintiff's submissions:

20. The Plaintiff filed written submissions dated the October 11, 2022, and same raised and amplified two issues for consideration. However, it is curious to observe that the Plaintiff similarly attached a number of documents to the written submissions and the documents were serialized and marked as annexures DN1 to 5 respectively.
21. Having attached the various annexures, details which have been alluded to vide the preceding paragraph, counsel for the Plaintiff thereafter submitted that the issues raised and ventilated at the foot of the impugned preliminary objections are not pure points of law, to warrant same being ventilated as proposed by the Defendants herein.
22. Further, counsel for the Plaintiff added that the facts belying the subject dispute are not agreed upon and hence same would require to be investigated and authenticated during the hearing.
23. Owing to the foregoing, counsel for the Plaintiff has submitted that the parameters which were set and established vide the holding in the case of *Mukisa Biscuit Manufacturers Ltd versus Westend Distributors Ltd* (1969)EA 696, as pertains to raising and canvassing Preliminary objection, have neither been met nor satisfied.
24. Secondly, counsel for the Plaintiff has submitted that prior to the filing of the subject suit, there were various attempts to engage the office of the land registrar with a view to visiting the disputed boundaries and to ascertain the correct boundary position between/involving the named properties.
25. However, counsel has added that despite various and concerted efforts, the Defendants herein were uncooperative and thus their conduct defeated the planed exercise by and at the instance of the land registrar.
26. Pursuant to and as a result of the failure by the land registrar to effectively determine, ascertain and restore the boundaries of the named properties, counsel for the Plaintiff has submitted that the Plaintiff was therefore within her Constitutional right to approach the Honourable Court and filed the instant suit.
27. In support of the foregoing submissions, counsel has cited and relied upon various decisions, *inter-alia* [Nelly Atieno Oluoch versus Damaris A Nyawalo & 2 Others](#) 92021)eKLR, [Hudson kulundu & 2 Others versus Mather Chibeti & Another](#) (2020)eKLR, [Karisa Ngari Kombe versus Esther Nzingo Kalume & Another](#) (2020)eKLR and [Stephen W Maina versus Francis Otiso onchoma & Another](#) (2021)eKLR.



28. Based on the foregoing submissions, counsel for the Plaintiff has therefore invited the court to find and hold that the court is seized of the requisite jurisdiction to hear and adjudicate upon the subject dispute.
29. Finally, counsel for the Plaintiff has also submitted that the raising of the subject preliminary objection is merely meant to delay, obstruct and defeat the intended hearing and effective disposal of the suit.
30. In short, counsel for the Plaintiff has invited the Honourable court to find and hold that the preliminary objection is misconceived and otherwise an abuse of the due process of the court.

Issues for Determination:

31. Having reviewed the Notice of Preliminary objection dated the July 18, 2022 and having similarly considered the submissions filed on behalf of the respective Parties, the following issues do arise for determination;
 - i. Whether the Primary Dispute at the foot of the amended Plaintiff dated the March 7, 2022 relates to ascertainment of the Boundary over and in respect of the named Properties.
 - ii. Whether this Honourable Court is seized of the requisite Jurisdiction to entertain and adjudicate upon disputes pertaining to Boundaries.

Analysis and Determination

Issue number 1 Whether the primary dispute at the foot of the amended plaintiff dated the March 7, 2022 relates to ascertainment of the boundary over and in respect of the named properties.

32. Before venturing to address what is the primary relief sought at the foot of the amended Plaintiff, it is appropriate and imperative to reproduce the reliefs sought at the foot of the impugned amended Plaintiff.
33. To this end, the reliefs sought at the foot of the amended plaintiff are as hereunder;
 - i. Permanent and perpetual injunction as against the 1st and 2nd Defendants, agents, and/or trustees from trespassing, claiming and or interfering with the plaintiffs property LR No Nairobi/Block 119/3277 in any manner.
 - ii. That an order do issue to the Defendants under the supervision of the Nairobi Land Registrar to restore boundary beacons between the two properties to the correct and previous position they were.
 - iii. General damages.
 - iv. Cost of the suit.
34. From the reliefs sought, there is no gainsaying that the Plaintiff's primary complaint relates to the fact that the Defendants herein have interfered with the boundary in respect of the suit property and displaced the boundary beacons.
35. On the other hand, it is also common ground that the Plaintiff is also complaining that after interfering with the boundary of the suit property, the Defendants has trespass onto and are now laying a claim over and in respect of a portion of the suit property.
36. Premised on the named complaints, the Plaintiff has therefore approached the Honourable Court and same is essentially seeking an order that the court be pleased to direct the Nairobi Land Registrar



- to visit the named properties, determine and ascertain the correct boundary and thereafter to restore the boundary beacons.
37. To my mind, the Plaintiff's central and primary complaint relates to the ascertainment, determination and demarcation of the correct boundary between the suit property and the other properties, allegedly belonging to the Defendants.
 38. In any event, the determination of whether or not there is trespass onto the suit property, would be hinged on or anchored upon the determination and ascertainment of the Boundary position.
 39. Having reviewed and considered the entirety of the amended Plaintiff and the reliefs sought thereunder, I come to the conclusion that the primary relief that is sought under the amended Plaintiff touches on and concerns the determination, ascertainment and restoration of the correct boundary position of the suit property as against the other neighbouring properties.
 40. Granted, there is a prayer for Permanent Injunction, but it must be recalled that the prayer for Permanent Injunction can only arise after the ascertainment and determination of the correct boundary position. In this regard, the Issue of Permanent Injunction is a Secondary Relief, for determination by the Honourable Court.
 41. On the other hand, it is also imperative to observe that indeed the lodgment of the boundary dispute with the concerned land registrar, does not prevent the claimant from ultimately approaching a court of law.
 42. Contrarily, the lodgment of the boundary complaint with the land registrar, in accordance with the law, postpones the approach and access to the jurisdiction of the court, so as to enable the Statutorily established Office/ authority to entertain and address her mandate beforehand.
 43. For the avoidance of doubt, what transpires is that the Honourable court does not become the First Port of Call, the moment the storm concerning Boundary Dispute arises and ensues, but becomes one of last resort.
 44. Having made the foregoing observation, it is my considered view that the Primary Complaint and reliefs sought at the foot of the amended Plaintiff dated the March 7, 2022, touches on and concerns determination of a Disputed boundary and not otherwise.

Issue number 2 Whether this honourable court is seized of the requisite jurisdiction to entertain and adjudicate upon disputes pertaining to boundaries.

45. Having found and held that the primary complaint and hence relief sought at the foot of the amended Plaintiff, touches on or relates to boundary dispute, the next critical question that now merits interrogation; is whether this Honourable court is seized of the requisite Jurisdiction to determine such a dispute.
46. Prior to and before venturing to address the issue of Jurisdiction, it is imperative to take cognizance of the relevant provisions of the [Land Registration Act, 2012](#), pertaining to and concerning determination of boundaries.
47. In this regard, the provisions of Sections 18 and 19 of the [Land Registration Act, 2012](#) (2016), are instructive.
48. Consequently and for convenience, same are reproduced as hereunder;
"Boundaries.



18. Except where, in accordance with section 20, it is noted in the register that the
 - (1) boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.
 - (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.

Fixed boundaries.

19. If the Registrar considers it desirable to indicate on a filed plan approved by
 - (1) 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, after 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 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."

49. My understanding of the foregoing provisions is to the effect that where a dispute touches on and concerns the determination or ascertainment of the boundaries/boundaries of parcels of land registered under the *Land registration Act*, then such a dispute ought and should be placed before the Land Registrar at the very first instance for determination and disposal.
50. Secondly, what I discern from the foregoing provisions is that the determination or ascertainment of the boundary dispute by the land registrar is a critical pre-condition and hence pre-requisite before a complainant can approach a court of law vide a civil suit, of whatsoever nature.
51. At any rate, the impugned provisions of the *Land Registration Act* underline and underscore that no court shall engage in, deal with and entertain a suit concerning such boundary issues until such a dispute has hitherto been laid before and determined by the concerned Land Registrar.
52. Premised on the import, tenor and implication of the impugned Sections, the question that does arise is what happens if a claimant approaches the Honourable court prior to and before lodgment and determination of a complaint with/ by the Land Registrar.



53. Put differently, would a court of law, be seized of jurisdiction to entertain and adjudicate upon a dispute, which primarily revolves around determination of boundaries, before same has been lodged with and determined by the Concerned Land Registrar.
54. In my humble view, the mandate to engage with and determine the exact/correct boundary position belongs to a designated and defined statutory officer, namely, a Land Registrar and not otherwise.
55. To the contrary, a court of law, which is not schooled and trained in boundary dispute, would not be best suited to handle and deal with boundary related dispute. Certainly, not at the very first instance, before the designated Officer/ authority has attended to the Dispute, as by Law provided.
56. In respect of the foregoing observation, it is appropriate and apt to recall the holding of the Court of Appeal in the case of *Kiarie Wamutu versus Mungai Kiarie & another*[1982] eKLR, where the court stated as hereunder;

"The judge was right in striking out the plaint as the boundary between the parties not having been determined as provided in section 21 the court had no jurisdiction to entertain the plaintiff's action. With respect on the previous occasion the judge erred in making the order referring the matter to Land Authorities for he too had no jurisdiction to hear and determine the suit because of the provisions of section 21(4) of the Act which deprives the court of jurisdiction in cases involving boundary disputes under the Act. Even if the defendants had not applied to strike out the plaint the court was bound to take note of the provisions of sub-section (4) and do so of its own motion.

I would dismiss the appeal with costs. As Law and Potter JJ A agree it is so ordered.

Law J A I have read in draft the judgment prepared by Madan, J A I agree with it, for the reasons stated by him, and concur with the order proposed. The Registrar must carry out the mandatory duty imposed on him by law and demarcate the disputed boundary, under section 21(2) of the Registered Land Act."

57. Granted that the Court of Appeal was dealing with and interpreting the provisions of Sections 20 and 21 of the *Registered Land Act*, Chapter 300, now repealed, but it is sufficient to recall that the current provisions of Section 18 and 19 of the *Land Registration Act, 2012*, are a replica of the previous provisions.
58. On the other hand, one may well argue that because the suit had already been filed before the Honourable court, then the honourable court has the mandate and authority to transfer same to the Land Registrar for determination and adjudication.
59. However, what needs to be taken into account is whether the court would be seized and possessed of the requisite jurisdiction to do so, that is, to transfer a Suit filed before a Forum without Jurisdiction to any appropriate Forum.
60. In my humble view, where a court of law is not seized or possessed of the requisite jurisdiction, then the court cannot make an order, inter-alia, transferring the impugned dispute to another forum, which is deemed to be seized of Jurisdiction.



61. To this end, it is important to take cognizance of the holding of the Court Of Appeal in the case of *Equity Bank Limited versus Bruce Mutie Mutuku t/a Diani Tour Travel* (2016) eKLR in the following words:-

“In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under S 18 of the Civil Procedure Act to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign, It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks parties cannot even seek refuge under the O2 principle or the overriding objective under the Civil Procedure Act, the Appellate Jurisdiction Act or even Article 159 of the Constitution to remedy the same.

...In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through transfer.” (Emphasis ours)

62. Additionally, the issue as to whether a court may transfer a suit filed before a wrong forum, to the correct forum was re-visited by the Court of Appeal in the case of *Phoenix of EA Assurance Company Limited versus S M Thiga t/a Newspaper Service* [2019] eKLR, where the court stated as hereunder;

“Decided cases on this issue are legion and we cannot cite all of them. The case of Joseph Muthee Kamau & Another v David Mwangi Gichure & Another (2013) eKLR is however on all fours and addresses the issue raised by Ms Wambua as to whether the subordinate court could still hear the suit but only allow the maximum damages allowable within its pecuniary jurisdiction. The Court succinctly settled this point in the following words:-

“When a suit has been filed in a court without jurisdiction, it is a nullity. Many cases have established that; the most famous being Kagenyi v Musirambo (1968) EA 43. The same would apply to pecuniary jurisdiction in a claim for special damages where the liquidated sum claimed exceeds the court’s pecuniary jurisdiction.

We hold that jurisdiction cannot be conferred at the time of delivery of judgment. Jurisdiction does not operate retroactively. Jurisdiction must exist at the time of filing suit or latest at the commencement of hearing.”

63. Nourished and duly guided by the observations in the cited cases, what is common ground is that a suit filed before an incorrect forum is a nullity and the court is thus divested of Jurisdiction to transfer same or better still, to refer such a suit to another forum.

64. Additionally, the primacy and significance of Jurisdiction was underscored in the case of *SK Macharia & Another versus Kenya Commercial Bank Ltd* (2012)eKLR, where the court stated as hereunder;

(68) 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 to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that 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. This Court dealt with the question of jurisdiction



extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

65. In my considered view, the issue at the foot of the amended plaint ought and should have been placed before the Land Registrar as the first port of call and not otherwise.
66. In any Event, it must be stated that the National Assembly did not enact and establish some of the said offices for cosmetic purposes. Indeed, same were created and established and thereafter bestowed with functions, which same are mandated and obligated to carryout and undertake.
67. Consequently, I find and hold that the office of the concerned land registrar, must be allowed to carry out, undertake and perform his/her statutory mandate. For coherence, unless the same are allowed to Function in accordance with the Law, then there is a likelihood of having Officers being paid by the tax payers money, albeit for doing nothing.
68. In this respect, the holding in the case of *Geoffrey Muthinja & another versus Samuel Muguna Henry & 1756 others* [2015] eKLR, is instructive and succinct.
69. For completeness, the Honourable Court of Appeal stated and observed as hereunder;

"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."
70. Finally, it is not lost on this court that there could be instances where the designated/concerned land registrar is reluctant to perform or execute his/her statutory mandate.
71. However, in such situations, the complainant/claimant is not without remedy. For clarity, such a complainant has suitable recourse vide Judicial review Proceedings in the nature of Mandamus to compel the performance and execution of the statutory duties/mandate.
72. In the premises, I come to the conclusion that the Plaintiff's suit was placed and laid before the wrong forum. Consequently, this Honourable court is divested of the requisite Jurisdiction to entertain and adjudicate upon the subject dispute.

Final Disposition

73. In conclusion, it must have become evident and apparent that the claim based on ascertainment and determination of the correct boundary position in respect of the suit property was laid before a wrong forum.



74. In the premises, this Honourable court is not seized of the requisite capacity and Jurisdiction to venture into and adjudicate upon the primary issue laid before her. For clarity, without an appropriate determination of the primary Issue, it would not be possible to venture forward to deal with the incidental issues.
75. In a nutshell, I find and hold that this court is devoid and bereft of the requisite Jurisdiction. In this regard, the suit be and is hereby struck out.
76. Each party shall bear own costs.
77. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF NOVEMBER, 2022.

OGUTTU MBOYA

JUDGE

In the Presence of;

Kevin Court Assistant.

Mr. Kamindo for the Plaintiff.

Mr. Mwaniki for the 1st Defendant.

Mr. Martin Maina for the 2nd and 3rd Defendants.

