



Embu Resort Limited v Jaganath Growers Limited (Environment and Land Case E025 of 2025) [2025] KEELC 5872 (KLR) (17 June 2025) (Ruling)

Neutral citation: [2025] KEELC 5872 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND CASE E025 OF 2025**

**AK BOR, J
JUNE 17, 2025**

BETWEEN

EMBU RESORT LIMITED PLAINTIFF

AND

JAGANATH GROWERS LIMITED DEFENDANT

RULING

1. The Plaintiff filed the application dated 3/10/2024 seeking a temporary injunction to restrain the Defendant from entering and interfering with the land known as Mbeere/Kirima/3184, digging trenches, carrying out excavation works, commencing construction of permanent structures or interfering with the common boundary between Mbeere/Kirima/3184 and Mbeere/Kirima/4449 pending hearing and determination of the suit. It also sought to have the Land Registrar, Kiritiri and the District Land Surveyor, Kiritiri visit the two parcels of land and make a report to court indicating the extent to which the Defendant had encroached on Mbeere/Kirima/3184.
2. The application was made on the grounds that the Plaintiff is the registered owner of Mbeere/Kirima/3184 measuring approximately 40 acres whereas the Defendant is the registered or beneficial owner of Mbeere/Kirima/4449 measuring approximately 42.18 hectares. The two parcels of land share a common boundary. That there was a boundary dispute on the subject parcels of land among others which was referred to the District Land Registrar Kiritiri and that the boundary between the two parcels of land was determined on 17/10/2023 where it was established that the Defendant’s parcel of land had encroached the Plaintiff’s land by several meters.
3. The Plaintiff stated that it had on several occasions pleaded with the Defendant to vacate its land with no success. It reported the matter to various government agencies including the Deputy County Commissioner Kiritiri, the Sub-County Police Commander Kiritiri, the Land Registrar Kiritiri and the Defendant was asked to vacate its land to no avail. It averred that the Defendant sent excavators to the disputed parcel of land and had commenced excavation of deep trenches and holes on the



disputed portion of land which forms part of parcel number 3184. Moreover, that the Defendant had threatened to commence construction of permanent structures on the disputed portion of land. The Land Registrar advised the Plaintiff to seek orders from the court to evict the Defendant from its land because after the boundaries had been fixed, the Defendant destroyed the boundary marks and continued to occupy and use the land to the Plaintiff's disadvantage.

4. The Plaintiff contended that it stood to suffer irreparable loss and damage if the Defendant went ahead to dig the trenches and holes and to construct permanent structures on the portion of the land belonging to the Plaintiff. It added that its suit had high chances of success and that the Defendant would not be prejudiced if the orders sought were granted.
5. Benson Gichohi Mutahi, a director and shareholder of the Plaintiff swore the affidavit in support of the application and attached copies of the certificate of official search for parcel number 4449, summons from the land registrar and photographs of parcel number 3184. He also swore a further supporting affidavit where he deponed that he had the authority of the Board of Directors to commence and prosecute the suit. Mr. Mutahi averred that after the Plaintiff lodged the boundary dispute with the Land Registrar, Kiritiri who concluded that the Defendant was occupying a portion of the Plaintiff's land, it instructed a private surveyor who did a report which confirmed that the Defendant had fenced off a total of 7.3186 ha (18 acres) from the Plaintiff's land parcel 3184 out of which it had constructed a greenhouse on 0.6 ha.
6. Benson Gichohi went on to aver that from the foregoing, the dispute before the court was not a boundary dispute which could be resolved by the land registrar since the registrar could not issue eviction orders. Further, that a representative of the Defendant was present when the Land Registrar and the private surveyors visited the suit land to determine the boundary dispute and that despite their findings, the Defendant went ahead to commit acts of wastage by excavating deep trenches and terraces on the disputed portion of land. He annexed a copy of the company's CR 12 Form confirming he was a director or shareholder of the Plaintiff, minutes of the company giving him authority to institute the suit and a copy of the surveyor's report.
7. The Defendant opposed the application vide the replying affidavit sworn by its Managing Director, Gurvin Bassi, who denied that the Defendant had trespassed onto the Plaintiff's land. He contended that the vast majority of the Defendant's property remained under-utilized and hence there would be no reason for it to encroach on the neighboring properties. He invited the Plaintiff to prove its allegations and stated that the evidential burden was on the Plaintiff who had not provided any report to support its allegations. He denied that the Defendant was aware of a report by the District Land Surveyor showing the Defendant's encroachment on the Plaintiff's land. He denied that there was any construction on the Plaintiff's land or that there was any encroachment, destruction or trespass of the Plaintiff's property. He attached a copy of the title deed for parcel numbers 4449 and 4446 which also border the Plaintiff's land and a copy of a map of the suit properties. The map or sketch is not legible.
8. The Defendant raised a preliminary objection which the court will determine alongside the application for injunction. The preliminary objection is premised on the ground that the Plaintiff lodged its claim before the wrong forum and that it should have lodged a dispute before the district land registrar since the land registrar was mandated by law to determine boundary disputes. Further, that the land registrar would have produced a report in tandem with the district surveyor which this honorable court could then adopt. Lastly, that the Plaintiff did not have the legal authority or mandate to initiate this suit before the honorable court without the prescribed company minutes and resolution.
9. Annexed to the preliminary objection was a supporting affidavit sworn by the Defendant's advocate James Chomba Mugo who deponed that the issue before the court amounted to an abuse of the



court process. He averred that Section 18(2) of the [Land Registration Act](#) prohibits this court from entertaining any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined. He contended that the Plaintiff should have approached the Land Registrar to provide a report prior to approaching this court as required under Section 19 of the [Land Registration Act](#). He averred that the suit was initiated prematurely and that the plaint was filed without proper instructions from the company and that it should be struck out for being a nullity.

10. The court directed parties to file and exchange written submissions which it has considered. The Plaintiff submitted the law on granting interlocutory orders was laid out in *Giella v Cassman Brown & Company Ltd* 1973 E.A which it had satisfied. That it demonstrated that it was the registered owner of parcel 3184 which borders the Defendant's parcel number 4449 by producing a copy of the search and boundary dispute summons. It also produced photographs of the fenced area and a surveyor's report which according to it showed that it had established a prima facie case. The Plaintiff submitted that it would suffer irreparable loss if the Defendant continued to commit acts of waste by digging trenches and excavation of the suit land. It urged that the balance of probability tilted in its favour having produced a surveyor's report indicating that the Defendant had encroached on its land.
11. On the preliminary objection, the Plaintiff submitted that the Defendant's preliminary objection did not meet the criteria set out in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 to warrant it being allowed. The Defendant argued that the Plaintiff filed a suit without the authority of the company and that only an extract of the minute authorizing the filing of the suit was availed to the court. The Plaintiff submitted that a court ought not strike out a suit for the Plaintiff's failure to file the company's resolution at the time of filing suit. It relied on *Yako Supermarket (K) Ltd V County Government of Busia & 3 others* (Environment & Land case E007 of 2023) KEELC 21181(KLR) in support of that position. Further, it submitted that on the boundary issue, the Land Registrar resolved the dispute on 17/10/2023, confirming that the Defendant was occupying 18 acres of the Plaintiff's land which was further supported by a private surveyor's report annexed to their application.
12. The Defendants on their part argued that the Plaintiff filed the suit without proper authority and only attempted to regularize this through its further affidavit dated 23/4/2025, months after the preliminary objection had been raised. It questioned the credibility of the board resolution granting authority to file the suit on the basis that it was made on 10/10/2023, which is a public holiday. It relied on the *Mukisa Biscuit* case and emphasized that section 18(2) of the [Land Registration Act](#) prohibited this court from entertaining any action relating to boundary disputes unless boundaries had been determined in accordance with that section. It submitted that although the Plaintiff lodged a boundary dispute with the Land Registrar, it failed to provide the official report of the surveyor to support its allegations. It urged that a private surveyor's report would not take precedence or substitute the official Land Registrar's report as it is not an impartial or neutral document and hence its accuracy was questionable.
13. On the Plaintiff's application, the defendant submitted that there was no prima facie case with probability of success because the suit was lodged prematurely without obtaining the official report from the Land Registrar. It contended that the Plaintiff would not suffer irreparable loss and that the balance of convenience tilted heavily on the Defendant's side as it had a farming operation of considerable value located on the suit land. That it would be a great injustice to issue injunctive orders for this would deny the Defendant access to its produce and put a halt to all its farming operations. They urge that the application and the suit be dismissed with costs.
14. The issues for determination are whether the preliminary objection has merit and whether the Plaintiff is entitled to an order of temporary injunction.



15. The plaintiff seeks eviction of the Defendant from Mbeere/Kirima/3184 and a permanent injunction to restrain the Defendant from interfering with the Plaintiff's rights over that land. The Defendant argued that the suit arose from a boundary dispute, which should first be determined by the Land Registrar in accordance with Sections 18 and 19 of the Land Registration Act. For a preliminary objection to succeed, it must be based on a pure point of law. In this case, the objection is premised on whether the Plaintiff had proper authority to institute the suit and whether the boundary dispute was determined by the Land Registrar prior to the filing of the suit, as required by Sections 18 and 19 of the Land Registration Act.
16. Although the Defendant conceded that the Land Registrar determined the boundary, its complaint was that the Plaintiff did not furnish an official report from the Registrar but instead chose to rely on a private surveyor's report, which it contended was not impartial. Whether or not there was a determination of boundaries is a factual issue that goes to the substance of the case and cannot be addressed at the preliminary stage for the reason that a preliminary objection must not be founded on contested or disputed facts. During the hearing, the burden will fall on the Plaintiff to prove that the boundaries were indeed determined by the Land Registrar and that the Defendant has encroached onto its land. The preliminary objection lacks merit and it is dismissed.
17. To succeed on an application for a temporary injunction, a party must establish a prima facie case with a probability of success, that it will suffer irreparable harm which cannot be compensated in damages unless the injunction is granted, and that the balance of convenience tilts in its favour.
18. The Plaintiff has demonstrated that it is the registered owner of Mbeere/Kirima/3184 and that there is a boundary issue regarding its land and that of the Defendant being Mbeere/Kirima/4449. It produced a report prepared by a private surveyor which shows that the Defendant had encroached on its land. It also exhibited the summons from the Land Registrar Mbeere, indicating that the boundary dispute had been addressed through the administrative process, a fact which the Defendant did not controvert. The Plaintiff claimed that the Defendant destroyed the boundary marks that were fixed and that it was digging or excavating on the disputed portion of the land. The Plaintiff has established that it has a prima facie case with a probability of success.
19. On the second limb, the Plaintiff contended that if the Defendant were allowed to continue digging trenches, excavating, and constructing permanent structures on the suit land it would suffer irreparable harm that cannot be adequately compensated by an award of damages. The court agrees that the activities complained of would significantly alter the character of the suit land in a manner that may not easily be reversed.
20. Regarding the balance of convenience, the Defendant claimed that it had a farming operation of considerable value on the disputed land and that if injunctive orders were issued it would deny it access to its produce and put a halt to its farming operations. No evidence was placed before the court to show how the grant of a temporary injunction would hinder the Defendant's farming operations or deny it access to its produce.
21. The application dated 3/10/2024 is allowed. The costs of the application shall abide the outcome of the suit.

DELIVERED VIRTUALLY AT EMBU THIS 17TH DAY OF JUNE 2025.

K. BOR

JUDGE

In the presence of: -



Mr. Mwangi Kinyua for the Plaintiff

No appearance for the Defendant

Diana Kemboi- Court Assistant

