

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC SUIT NO. E028 OF 2024

LUCAS OWINO OBIERO.....
.....PLAINTIFF

=VERSUS=

MESHACK MOLO.....1ST
DEFENDANT

LAND REGISTRAR-KISUMU COUNTY.....2ND
DEFENDANT

THE ATTORNEY GENERAL.....3RD
DEFENDANT

RULING

The Plaintiff brought this suit against the 1st and 2nd Defendants on 18th October 2024. The plaint was subsequently amended to add the 3rd Defendant to the suit. The Plaintiff averred that he was at all material times the registered owner of all that parcel of land known as Title No. Kisumu/ Manyatta “B”/1341, which he acquired in 1995 (hereinafter referred to only as “the suit property”). The Plaintiff averred that in 2020, he discovered that the 1st Defendant, who owned the parcel of land known as Title No.Kisumu/ Manyatta “B”/2150 (hereinafter referred to only as “Plot No. 2150”), which is situated adjacent to the suit property, had encroached on the suit property and had erected

a structure thereon. The Plaintiff averred that he sought the help of the Kisumu County Government Surveyor to determine the boundaries of the two parcels of land. The Plaintiff averred that a survey was carried out in 2021, which confirmed that the 1st Defendant had encroached on the suit property.

The Plaintiff sought judgment against the Defendants for an injunction restraining the 1st Defendant from entering into, occupying, trespassing, encumbering, and/or dealing with the suit property, and an order compelling the 1st Defendant to remove the fence he had put up on a portion of the suit property and demolish the structure he had erected on the suit property.

The 1st Defendant filed a statement of defence dated 4th November 2024 in which he denied the Plaintiff's claim in its entirety. The 1st Defendant averred that he had put up the structure complained of on Plot No. 2150 owned by him, and that it was the same plot that he had fenced. The 1st Defendant denied carrying out any activity on the suit property. The 1st Defendant averred that the dispute between the parties was a boundary dispute and the court had no jurisdiction to

determine the same. Together with the defence, the 1st Defendant filed a Notice of Preliminary Objection dated 10th June 2025 in which he contended that the court lacked jurisdiction to entertain the Plaintiff's claim, which was a boundary dispute falling within the jurisdiction of the Land Registrar under Section 18(2) as read together with Section 19 of the Land Registration Act 2012. On their part, the 2nd and 3rd Defendants filed grounds of opposition to the Plaintiff's suit in which they contended that they were wrongly joined in the suit as they had not been accused of any wrongdoing by the Plaintiff.

It is the 1st Defendant's preliminary objection that is the subject of this ruling. The preliminary objection was heard through written submissions. The 1st Defendant filed submissions dated 27th June 2025, while the Plaintiff filed submissions dated 18th July 2025.

Analysis and Determination

I have considered the pleadings and other documents filed by the parties. I have also considered the 1st Defendant's Notice of Preliminary Objection and the submissions by the advocates for

the parties on the same. In my view, the only issues arising for determination in the preliminary objection by the 1st Defendant is whether the dispute between the Plaintiff and the 1st Defendant is a boundary dispute in respect of which this court has no jurisdiction pursuant to the provisions of Sections 18 and 19 of the Land Registration Act 2012, and whether the suit should be struck out for want of jurisdiction.

In Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 others [2014] eKLR, the Supreme Court stated as follows on Preliminary Objection:

“To restate the relevant principle from the precedent setting case, Mukisa Biscuit Manufacturing Co. Ltd. Vs West End Distributors (1969) EA 696. ‘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 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 has to be ascertained or if what is sought is exercise of judicial discretion.”

In Oraro v. Mbaja[2005]1KLR141, the court stated that:

“A preliminary objection correctly understood is a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not as a matter of legal principle, a true preliminary objection which the court should allow to proceed. The court’s discretion is never exercised just on the basis of propositions of law; there must be a factual situation of which the court takes cognizance, and in relation to which its equitable conscience is exercised.”

I have at the beginning of this ruling, highlighted the Plaintiff’s claim and the Defendants’ response thereto. The Plaintiff has contended that he is the owner of the parcel of land known as Title No. Kisumu/Manyatta “B”/1341(the suit property), while the 1st Defendant is the owner of the parcel of land known as Title No. Kisumu/Manyatta “B”/2150 (Plot No. 2150). The Plaintiff has contended that the suit property and Plot No. 2150

share a common boundary. The Plaintiff's complaint against the 1st Defendant is that the 1st Defendant has fenced the suit property together with Plot No. 2150 and has constructed a building thereon. The Plaintiff has averred that he engaged a surveyor from the County Government of Kisumu who visited the two parcels of land in 2021, surveyed the same, and prepared a report which confirmed the 1st Defendant's encroachment on the suit property. The court has perused the said report dated 19th February 2021. According to the survey that was carried out by the Kisumu County Government Director of Surveys, the suit property claimed by the Plaintiff is occupied by the 1st Defendant, who has fenced the same and put up a house thereon. According to the surveyor, the 1st Defendant has "fenced and built on both parcels Kisumu/Manyatta B/1341 and 2150". The Plaintiff has come to court for an injunction to restrain the 1st Defendant's acts of trespass on the suit property and for an order compelling the 1st Defendant to remove his fence and the structure he had put up on the suit property.

From the pleadings and the other material placed before the court by the Plaintiff, I am not persuaded that the dispute between the Plaintiff and the 1st Defendant is over the boundaries of the suit property and Plot No. 2150. The Plaintiff's claim is for the recovery of land which the 1st Defendant is said to have fenced off and constructed a house on. Most of the land registered under the Registered Land Act, Chapter 300 Laws of Kenya (now repealed), situated outside the major urban centers are under general boundaries. The determination of the boundaries of such parcels of land in case of a dispute would require the intervention of the land registrar under Sections 18 and 19 of the Land Registration Act 2012. This, however, does not mean that all cases of alleged trespass between neighbours owning such land would require the intervention of the land registrar under Sections 18 and 19 of the Land Registration Act 2012. There is a distinction between a claim over land and a boundary dispute. From the material before the court, the Plaintiff is claiming land which he has allegedly been dispossessed of by the 1st Defendant. This is not a boundary dispute. There cannot be a boundary dispute in this case in which the Plaintiff has claimed that the 1st Defendant

has taken over, fenced off, and built a house on the Plaintiff's land.

It is my finding that the dispute between the parties is not a boundary dispute. In view of this finding, this court has jurisdiction to hear and determine the dispute.

Conclusion

In conclusion, I find no merit in the 1st Defendant's Notice of Preliminary Objection dated 10th June 2025. The preliminary objection is dismissed with costs to the Plaintiff.

Delivered and signed at Kisumu on this 18th day of December 2025

**S. OKONG'O
JUDGE**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Owino for the Plaintiff

Mr. Omollo for the 1st Defendant

N/A for the 2nd and 3rd Defendants

Ms. J. Omondi-Court Assistant