



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KABARNET**  
**ELCLC NO. E012 OF 2025**

PATRICK KIPTOO CHERUTICH ..... PLAINTIFF

**VERSUS**

LEAH KABON CHELUK ..... DEFENDANT

**RULING**

1. **PATRICK KIPTOO CHERUTICH** (The plaintiff herein) is the Administrator of the Estate of (The deceased) who is the registered proprietor of the land parcel **No. POKOR/KEBEN/MUGURIN/113** which measures 50.5 Hectares (the suit land). The same shares a boundary with the land parcel **No. POKOR/KEBEN/MUGURIN/112** registered in the name of the Defendant **LEAR KABON CHELUK**.
2. It is the Plaintiffs case that the Defendant has encroached onto the suit land a fact that was confirmed by the surveyor. Attempts to resolve the dispute have yielded no fruits as the

Defendant has not been willing to co-operate to have the surveyor ascertain the boundaries.

3. The Plaintiff was therefore advised to seek redress from this court.

4. The Plaintiff therefore filed this suit seeking Judgment against the Defendant in the following terms:

**(a) A declaration that the Defendant is unlawfully entering and occupying part of the suit land.**

**(b) An order of permanent injunction restraining the Defendant whether by himself, his agents, servants, employees agents, servants or any other person whatsoever from entering, trespassing upon, taking over, excavating, damaging, constructing on, developing, marketing, offering for sale, charging or in any other manner interfering with the Plaintiff's quiet enjoyment possession and proprietorship of the suit land.**

**(c) An order requiring the Officer in charge of Station (OCS Mogotio Police Station) to assist in facilitating the eviction of the Defendant if and when required.**

**(d) General damages for trespass.**

- (e) **Massive profits.**
- (f) **Costs of the suit.**
- (g) **Interest.**
- (h) **Any other relief this court may deem fit.**

5. The Defendant filed a defence in which he has pleaded, inter alia, that the process of land demarcation was completed in the 1960 and the boundaries between the two parcels of land were fixed even before the Plaintiff was born. That the same are intact and no one has ever encroached onto the other's parcel of land.

6. The Defendant has pleaded further that this suit is time barred and that at the appropriate time, a Preliminary Objection would be raised on a point of law. That this dispute is imaginary as there has never been any dispute between the Defendant's grandfather and the Plaintiff's father and if this is indeed a boundary dispute, then this court has no jurisdiction and the suit should be struck out. Further, that the land parcel **No. POKOR/KEBEN/MURURIN/113** has since passed to 3<sup>rd</sup> parties and so the parties do not share any boundary. That the Plaintiff has no capacity to sue as he has no beneficial interest in the suit land. The suit show therefore be dismissed for want of jurisdiction.

7. Contemporaneously with the defence, the Defendant filed a Preliminary Objection dated 10<sup>th</sup> December, 2025 and raised the following issues;

**1. The Plaintiff's suit is barred by operation of the law.**

**2. The Plaintiff lacks the locus standi since the suit land is subject to succession proceedings.**

8. That Preliminary Objection is the subject of this ruling. The court directed that the same be canvassed by way of Written Submissions. Those submission have been field only by **MR SIRMA** instructed by the firm of **KIPKENEI & COMPANY ADVOCATES** for the Defendant. **MR KITOLEL** instructed by the firm of **KITOLEL KIRWA & COMPANY ADVOCATE** for the Plaintiff did not file any submissions.

9. I have considered the Preliminary Objection by the Defendant. It raises only two issues being:

**1. That the Plaintiff's suit is statute barred and;**

**2. That the Plaintiff lacks locus standi since the suit land is the subject of succession proceedings.**

10. I will consider the issues in that order:

**1. SUIT IS STATUTE BARRED**

The thrust of the Plaintiff's case is that Defendant has trespassed onto the suit land and refused to have the surveyor's fix the boundaries between their two parcels of land. Being a claim of trespass and fixing of boundaries, it is not clear in what way the Plaintiff's suit can be statute barred. And although the Defendant has cited section 7 of the Limitation of Actions Act in support of the Preliminary Objection, it is settled that a claim for trespass cannot be barred by the law of Limitation leave alone section 7 thereof.

The tort of trespass is defined in the Trespass Act to include entering, remaining, erecting structures, cultivating, grazing stock etc on private land. It is a violation of right to possession of right to possession – **M' MUKANYA V. M' MBIJIWE 1986 KLR**. In **CLERK & LINDSEL ON TORT 16<sup>TH</sup> EDITION**, it is defined thus:

**“Every contrivance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues.”**

11. In the case of **ISAACK BEN MULWA V. JONATHAN MUTUNGA MWEKE 2010 eKLR** the Court of Appeal stated thus:

**“ .... It is a well settled principle that continuous injuries to land caused by the**

**maintenance of tortious acts create separate causes of action barred only by the running of the statute of limitation against each successive acts.”**

12. The court went on to cite the authors of **WINFIELD AND JOLOWICZ ON TORT 11<sup>TH</sup> EDITION** at page 342 thus:

**“Trespass, whether by way of personal entry or by placing things on the Plaintiff’s land may be continuous and give rise to actions de die in diu so long as it lasts. Nor does a transfer of the land by the injured party prevent the transferee from suing the defendant for continuing trespass.”**

**It is obvious therefore that the tort of trespass to land is a continuing one. It cannot be barred by the statute of limitation. That ground of the Preliminary Objection will therefore be dismissed.**

**2. THE PLAINTIFF LACKS LOCUS STANDI AS THE SUIT LAND IS SUBJECT TO SUCCESSION PROCEEDINGS:**

The Plaintiff has obtained a Grant of Letters of Administration vide **ELDAMA RAVINE PRINCIPAL**

**MAGISTRATE'S COURT SUCCESSION CAUSE NO 20 OF 2020 IN RESPECT** to the Estate of the deceased. It is also common ground that the deceased is the registered proprietor of the suit land. Therefore, as the Administrator of the deceased's Estate, the Plaintiff has the locus standi to file this suit - **TROUISTIK UNION INTERNATIONAL & ANOTHER V. JANE MBEYU & ANOTHER C.A CIVIL APPEAL NO. 145 of 1990 [1993 KECA KLR]**. See also the case of **VIRGINIA EDITH WAMOI OTIENO V. JOASH OCHENG OUGO & ANOTHER 1982 - 88 I KAR**. So in terms of capacity to sue, the Plaintiff clearly has the locus standi to file this suit.

13. With regard to the objection that the suit land is also the subject matter in the **Succession Cause No. 20 of 2020** at the **ELDAMA RAVINE PRINCIPAL MAGISTRATE'S COURT**, this case has raised the issue of trespass to land and a boundary dispute. The primary duty of the Probate Court is to distribute the Estate of a deceased person. It cannot delve into issues of trespass to land or boundary disputes. Therefore, the Preliminary Objection in so far as it is hinged on the ground that this court lacks jurisdiction because the suit land is also the subject of succession proceedings is not well taken. I dismiss it.

14. Having said so, and although this is not raised in the Preliminary Objection, the other focus of the Plaintiffs case is that this is in fact a boundary dispute and the Defendant has refused to co-operate in having the same settled by the Surveyor. In paragraph 7 of this plaint, he has pleaded how he brought a surveyor to the suit land who found that indeed the Defendant is occupying half of the suit land. In paragraph 8, he adds that he reported the matter to the elders who summoned the Defendant for purposes of surveying the suit land but the defendant refused. Then in paragraph 9 of his plaint, the Plaintiff has pleaded thus:

**9: “The Plaintiff further avers that he was advised to seek help from the survey officer and the Ministry of Lands in Eldama Ravine where he went and followed all the due process; he filled the LRA 23 for fixing and ascertaining boundaries and when he served the same upon the Defendant, she was uncooperative and ultimately, he was advised by the Lands Office to seek the intervention of this honourable court to get his rights.”**

15. Further, the first remedy which the Plaintiff seeks is:

**(a) “A declaration that the Defendant is unlawfully entering and occupying part of POROR/KEBEN/MUGURIN/113 measuring 50.5 Ha or thereabouts.”**

Given the fact that the parties are neighbours, the pleadings herein clearly point to a boundary dispute. The claim of trespass is a clear manifestation of that. Section 18 (2) and (3) of the Land Registration Act directs this court of own powers to determine a dispute relating to boundaries to registered land. It reads:

**(2) “The court shall not entertain any action or other proceedings relating to a dispute as to 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 it’s boundary and silvation as may be necessary.”**

16. Although the Defendant has not cited the above provision in her Preliminary Objection, it is clear to me that

in view of the above, this court has no jurisdiction to determine this dispute which is primarily one relating to boundaries. An issue of jurisdiction is so central in proceedings and can even be raised by the court *suo-motu*. And once a court finds that it has no jurisdiction to determine any dispute before it, then it must down it's tools - **OWNERS OF THE MOTOR VESSEL ' LILLIAN S' V. CALTEX OIL KENYA LTD C.A CIVIL APPEAL NO. 50 of 1989 [1989 KECA 48 KLR].**

17. The Plaintiff ought to have exhausted the avenue set out in Section 18 of the Land Registration Act before approaching this court. This court will be guided by the decision of the Court of Appeal in the case of **SPEAKER OF THE NATIONAL ASSEMBLY V JAMES NJENGA KARUME C.A CIVIL APPLICATION NO. 92 of 1992 [1992 KECA 42 KLR].**

18. Therein, the court addressed itself as follows in paragraph

**15: "In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure shall be strictly followed."**

19. Then there is the doctrine of exhaustion which was discussed by the Supreme Court in the case of **ALBERT CHAUREMBO MUMBO & 7 OTHERS V. MAURICE MUNYAO & 148 OTHERS S.C PETITION NO. 3 of 2016 [2019 KESC 83 KLR** where the court, after citing other precedents, had this to say in paragraph 118

**18: “In the pursuit of such sound legal principles, it is our disposition that disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of superior courts is not a substitute for known legal procedures. Even where superior courts had jurisdiction to determine profound questions of law, first opportunity had to be given to relevant persons, bodies, tribunals or other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute.”**

20. The same court went on to add in paragraph 119 that:

**119: “Such a deferred jurisdiction and the postponement of judicial intervention and reliefs until the mandatory statutory or Constitutional bodies take action vests, not alone on the disinclination of the judiciary to**

**interfere with the exercise of statutory or any administrative powers, but on the face of a legal prescription that no harm can result if the decision maker acts upon a claim or grievance. Such formulation underlines the analogous cases, frequently cited for the exhaustion doctrine, in which the court refuses to enjoin an administrative official from performing his statutory duties on the ground that until he has acted, the complainant can show no more than that on apprehension that he will perform his duty wrongly, a fear that courts will not alley. Such cases may be expressed in the formula that judicial intervention is premature in the absence of administrative action.”**

21. To the Plaintiff’s credit, and as is clearly pleaded in paragraph 9 of his plaint, he is aware that this court has no jurisdiction to determine this dispute which is a boundary dispute. That is why he first approached the Lands Officer at Eldama Ravine seeking his intervention but the Defendant **“was unco-operative.”** This may be the right time to caution her that the Land Registrars have coercive powers to perform their responsibilities under the relevant law lack of co-operation notwithstanding.

22. The Plaintiff took the right step of approaching the relevant authority to determine this boundary dispute. This court must decline any invitation to intervene at this stage.
23. On the issue of costs, the Defendant is to blame for refusing to let the relevant officers from the Lands Office to perform their work. She will meet the costs of the Preliminary Objection.
24. Ultimately therefore and having considered the Defendants Preliminary Objection dated 10<sup>th</sup> December 2025, I allow it and make the following orders:

- 1. This suit is struck out.**
- 2. The Defendant shall meet the Plaintiff's cost.**

**BOAZ N. OLAO**

**JUDGE**

**17<sup>TH</sup> APRIL 2026**

**Ruling dated, signed and delivered by way of electronic mail at KABARNET on this 17<sup>th</sup> day of April 2026 with notice to the parties.**

**BOAZ N. OLAO**

**JUDGE**

**17<sup>TH</sup> APRIL 2026**

**Explanatory notice:**

This Ruling was scheduled for delivery on 20<sup>th</sup> March 2026 which was however declared a public holiday hence the change of date as I only sit in Kabarnet one week a month.

**BOAZ N. OLAO**

**JUDGE**

**17<sup>TH</sup> APRIL 2026**

ORIGINAL