



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CONSTITUTIONAL PETITION NO. 3 OF 2019

**IN THE MATTER OF VIOLATION AND INFRINGEMENT OF CONSTITUTIONAL
RIGHTS AND FUNDAMENTAL FREEDOMS**

AND

**IN THE MATTER OF ARTICLES 1 (1), (2), (3), (4) (b), 2(1), 3(1), 10 (1) (2),
22 (2) (a), 40, 47(2) (3), 65, 159(2), 162(2)(b) AND 258(2)(a)**

AND

**IN THE MATTER OF ARTICLE 40 (3) OF THE CONSTITUTION OF KENYA
ON DEPRIVATION OF PROPERTY**

AND

IN THE MATTER OF LAND REGISTRATION ACT NO. 3 OF 2012 SECTIONS 24, 25, 26 & 28

BETWEEN

ISAIAH KOBIA MWAMBIA.....PETITIONER

VERSUS

SEO & SONS LIMITED.....RESPONDENTS

RULING

1. The Respondent herein filed a Notice of Preliminary objection dated 8/7/2019 stating that;

a. This honorable court lacks jurisdiction to hear and determine this matter in so far as the petitioner's claim is founded on alleged encroachment on the parcel of land known as ISEMBE/NDOLELI/ANTUBETWE/KIONGO/1025 by virtue of the express provisions of section 18(2) of the Land Registration Act 2012 and the entire suit is misconceived in law and amounts to an abuse of court process.

b. The petitioner has vagrantly invoked the jurisdiction of this court and the cause herein is stale, bad in the eyes of the law, incompetent and invites this honorable court to usurp the powers otherwise not vested to it by any legislative enactment or at all.

2. In the case of **Mukisa Biscuits Manufacturing Company Limited -vs- West End Distributors (1969) EA 696**, it was stated thus;

“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, will dispose of the suit”

3. The effect of the case law cited above is that for one to succeed in raising a Preliminary Objection, the said Preliminary Objection must

meet the following criteria; it must be a pure point of law; it must be pleaded by one party and admitted by the other; it must be a matter of law which is capable of disposing the suit; it must not be blurred by factual details calling for evidence and finally, it must not call upon the Court to exercise discretion.

4. The respondent in their preliminary objection argued that this matter is founded on an alleged encroachment on Igembe/Ndoleli/Antubetwe/Kiongo /1025 and by the express provisions of Section 18 (2) of the Land Registration Act, 2012 the entire suit is misconceived in law and amounts to abuse of court process. To buttress this point, the respondents relied on the decision in **George Kamau Macharia v. Dexka Limited [2019] eKLR** where it was held;

“Under the Land Registration Act Cap 300 (now repealed) Section 21(4) deprived this Court the power to entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in that section. Section 18(2), the Land Registration Act, 2012 (LRA), similarly 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 as provided in that section”.

5. It was argued for the respondents that the question of jurisdiction flows from the constitution or the statutes or both, and the court cannot arrogate itself jurisdiction vested in other government departments. The respondent urged the court to strike out the Petition for the Petitioner to pursue redress under section 18 of the Land Registration Act.

6. In response to the arguments raised by the respondent, it was submitted for the petitioner that they are seeking declaratory orders pursuant to Article 40 of the constitution as well as a permanent injunction restraining the respondents from committing waste upon the suit land. Further, it was argued for the petitioner that the respondent is not even a neighbor of the petitioner, hence the authority cited is not applicable herein and the dispute at hand is not a pure boundary dispute.

7. The petitioner filed the petition herein on 12/3/2019 where he stated that he is the registered proprietor of the land known as **Igembe/Ndoleli/Antubetwe/Kiongo/1025** (the suit land). He alleged that the respondent has trespassed on the said parcel of land with earthmovers with the view of harvesting marram and sand. In doing so the respondent has deprived the petitioner his rights as enshrined in the Constitution.

8. In opposition the respondents in their grounds for opposition stated that the petition lacks merit as the respondent is not the proper party, as the construction of the Kinna-Garbatula Road was commissioned by the Government of Kenya through the Kenya Rural Road Authority.

9. From the aforementioned pleadings, it is clear that the dispute is not a boundary one. A Preliminary Objection must not be blurred by factual details calling for evidence as in the instant case. I therefore conclude that the Preliminary Objection dated 8/7/2019 lacks merits and is hereby dismissed with costs to the petitioner.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 4TH DECEMBER, 2019

IN THE PRESENCE OF:-

C/A: Kananu

All partes absent

HON. LUCY. N. MBUGUA

ELC JUDGE