



**Juma & another v Osogo & 5 others (Environment and Land Appeal E007 of 2023) [2024] KEELC 199 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 199 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL E007 OF 2023  
SO OKONG'O, J  
JANUARY 25, 2024**

**BETWEEN**

**DUNCAN OWINO JUMA ..... 1<sup>ST</sup> APPELLANT**

**SILFANUS JUMA FWAYE ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JOHN OKETCH OSOGO ..... 1<sup>ST</sup> RESPONDENT**

**MUKASA ADOYO ADOYO ..... 2<sup>ND</sup> RESPONDENT**

**PAUL ATIENO OSOGO ..... 3<sup>RD</sup> RESPONDENT**

**MICHAEL OKOTH ONDIEK ..... 4<sup>TH</sup> RESPONDENT**

**TOBIAS OCHOLA OSOGO ..... 5<sup>TH</sup> RESPONDENT**

**GEORGE OUMA OSOGO ..... 6<sup>TH</sup> RESPONDENT**

*(Being an appeal from the ruling and orders of Hon. S.O. Temu (SPM) delivered on 7th February 2023 in Nyando SPMC ELC No. E011 of 2020)*

**JUDGMENT**

**Background**

1. The Respondents filed a suit against the Appellants in the Senior Principal Magistrate's Court at Nyando namely, SPM ELC Case No. E011 of 2020 (hereinafter referred to only as "the lower court") seeking a permanent injunction restraining the Appellants by themselves or through their agents, employees, servants or assigns and or any other person acting on their behalf from continuing to trespass upon, tilling, continuing to cultivate, erecting any structures thereupon, fencing, offering for sale, taking possession of, leasing, transferring, charging, registering any charge or otherwise in any manner whatsoever interfering with all those parcels of land known as Title Nos. Kisumu/



Border/5845, 5846, 5847, 5848, 5849, 5850, 5851, 5852, 5853, 5854 and 1681(hereinafter referred to together as “the suit properties” and individually as “Plot Nos. 5845, 5846, 5847, 5848, 5849, 5850, 5851, 5852, 5853, 5854 and 1681” respectively). The Respondents also sought an order for the cancellation of the subdivision of Title No. Title No. Kisumu/Border/3875 that gave rise to the suit properties which they claimed was carried out illegally. The Respondents sought a further order compelling the 2<sup>nd</sup> Appellant to transfer to each beneficiary his/her rightful share of the suit properties. The Respondents who claimed to have a beneficial interest in the parcel of land, Title No. Title No. Kisumu/Border/3875 (Plot No. 3875) averred that on 25<sup>th</sup> August 2020, the 2<sup>nd</sup> Appellant subdivided the said parcel of land into ten portions (the suit properties) and transferred Plot No. 5848 to the 1<sup>st</sup> Appellant without the consent of the other beneficiaries of Plot No. 3875. The Respondents averred that at the time of coming to court, the suit properties were all in the names of the Appellants.

2. Together with the plaint, the Respondents filed an application for a temporary injunction pending the hearing and determination of the lower court suit. The court issued interim orders on 6<sup>th</sup> November 2020 which were extended from time to time. The Appellants entered appearance and filed defences to the Respondents’ claim through separate firms of advocates. In addition to the defence, the 2<sup>nd</sup> Appellant filed a counter-claim against the Respondents. In their defences, the Appellants admitted the jurisdiction of the court.
4. On or about 26<sup>th</sup> April 2021, the 1<sup>st</sup> Appellant and two other persons who were not parties to the suit filed a Notice of Preliminary Objection in the lower court. The 1<sup>st</sup> Appellant and the said nonparties (I will henceforth refer only to the 1<sup>st</sup> Appellant since the purported 3<sup>rd</sup> and 4<sup>th</sup> Defendants were not parties to the lower court suit) claimed that the lower court had no pecuniary jurisdiction to hear and determine the Respondents’ suit since the aggregate value of the suit properties exceeded the limit of the court’s pecuniary jurisdiction set under Section 7 of the Magistrate’s Court’s Act, 2015. The 1<sup>st</sup> Appellant’s Notice of Preliminary Objection was supported by an affidavit of the 1<sup>st</sup> Appellant’s advocate, Jasper Odhiambo Lubeto sworn on 26<sup>th</sup> April 2021 to which he annexed two valuation reports by Acumen Valuers Limited. The said valuers put the aggregate value of the suit properties at Kshs 21,050,000/-.The 1<sup>st</sup> Appellant’s advocate averred that the lower court that was presiding over the dispute had a civil case pecuniary jurisdiction of Kshs 15,000,000/-. The 1<sup>st</sup> Appellant’s advocate averred that the claim by the Respondents was beyond the pecuniary jurisdiction of the lower court. On 4<sup>th</sup> May 2021, the parties agreed to do a joint valuation of the suit properties. The joint valuation was to be conducted by the Kisumu County Land Valuer. The parties also agreed and the court made an order by consent that the valuation reports that had been filed in court by the 1<sup>st</sup> Appellant were “abandoned”.
5. The parties were unable to have a joint valuation done and the matter dragged on for over one year. On 15<sup>th</sup> July 2022, the court granted leave to the parties “to file whichever reports they desire to have the documents they desire before 14 days when direction will be taken”. On 6<sup>th</sup> October 2022, the lower court made a further order that “The parties to file the valuations they desire to rely on together with submissions to dispose the case.”
6. Both parties filed written submissions in respect of the preliminary objection. The lower court dismissed the objection in a ruling delivered on 7<sup>th</sup> February 2023. The lower court made a finding that the 1<sup>st</sup> Appellant had admitted the jurisdiction of the court in his defence. The court held that without amending his defence, the 1<sup>st</sup> Appellant could not turn around and claim that the court had no jurisdiction. The lower court made a further finding that the order made by the court on 4<sup>th</sup> May 2021 for the parties to prepare a joint valuation report was not complied with. The court also observed that the valuation reports that were filed by the 1<sup>st</sup> Appellant included properties which



were registered in the name of the 2<sup>nd</sup> Appellant who was not a party to his preliminary objection on jurisdiction having admitted the jurisdiction of the court. The court made a further observation that the 1<sup>st</sup> Appellant's valuation reports took into account developments on the suit properties which were not in existence when the suit was filed and which were carried out in contravention of the interim orders of injunction that were issued in favour of the Respondents by the court. The court noted further that the said valuation reports relied on by the 1<sup>st</sup> Appellant as a basis for his preliminary objection had been expunged by the court from the court record on 4<sup>th</sup> May 2021. The lower court held that the objection had no basis and dismissed the same with costs.

### **The appeal**

7. The Appellants were aggrieved with the decision of the lower court and filed this appeal on 22<sup>nd</sup> February 2023. In their Memorandum of Appeal, the Appellants challenged the lower court's ruling on the following grounds;
  1. That the Learned Magistrate erred in law and fact by arrogating himself jurisdiction over a matter whose value was beyond his pecuniary jurisdiction.
  2. That the Learned Magistrate erred in law and fact by not applying the correct law, tests and principles relating to pecuniary jurisdiction by holding that the earlier admission by the 2<sup>nd</sup> Appellant to jurisdiction in his pleadings automatically vested it in the trial court.
  3. That the Learned Magistrate misdirected himself in fact by finding that it was the 1<sup>st</sup> Appellant who declined to comply with court orders made on 4<sup>th</sup> May 2021 requiring the parties to conduct a joint valuation over the suit properties.
  4. That the Learned Magistrate erred in law and fact by disregarding the 1<sup>st</sup> Appellant's valuation report dated 26<sup>th</sup> January 2021 on the basis that it was done after the issuance of preservation orders on 6<sup>th</sup> November 2020.
  5. That the Learned Magistrate erred in law and fact by failing to exercise his judicial discretion suo moto to compel the Kisumu County Valuer to conduct valuation and provide a valuation report in respect of the suit properties to enable him to reach a fair determination as to whether the matter was within the trial court's pecuniary jurisdiction.
  8. The Appellants prayed that the appeal be allowed and the ruling delivered by the lower court on 7<sup>th</sup> February 2023 be set aside. The Appellants prayed in the alternative that the findings of the lower court be set aside and be replaced by appropriate orders in the circumstances of the appeal. The Appellants also prayed for the costs of the appeal and any other reliefs as the court may deem fit and just to grant in the circumstances of the appeal.

### **Analysis and determination**

9. The Appeal was argued by way of written submissions. The Appellants filed submissions dated 6<sup>th</sup> July 2023 while the Respondent filed submissions dated 5<sup>th</sup> October 2023. I have considered the pleadings that were filed in the lower court, the proceedings of the court, the ruling of the court, the memorandum of appeal, and the submissions by the advocates for the parties. In my view, all the grounds of appeal put forward by the Appellants against the ruling and order of the lower court raise only one issue for determination by the court namely, whether the lower court was right in dismissing the 1<sup>st</sup> Appellant's preliminary objection.



10. In *Phoenix of E. A. Assurance Company Limited v S.M. Thiga T/A Newspaper Service* [2019] eKLR, the Court of Appeal sated as follows:

11. In common English parlance, Jurisdiction denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae.”

12. In *Hassan Ali Jobo & Another v Suleiman Said Shabbal & 2 others* [2014] eKLR, the Supreme Court stated as follows on preliminary objections:

“To restate the relevant principle from the precedent setting case, *Mukisa Biscuit Manufacturing Co. Ltd v 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.”

13. 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.”

Order 2 Rule 4 of the *Civil Procedure Rules* provides as follows:

4.

(1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality —

(a) which he alleges makes any claim or defence of the opposite party not maintainable;

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleading.

(2) Without prejudice to subrule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence



on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient.”(emphasis added)

14. In *Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 others* [2014]eKLR, the Court of Appeal cited with approval the Malawi Supreme Court of Appeal case of *Malawi Railways Ltd v Nyasulu* [1998]MWSC 3 where the judges quoted an article by Sir Jack Jacob entitled “The present importance of pleadings” published in 1960 Current Legal problems, at P.174 where the author stated as follows:

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings ... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

15. From the definition of a preliminary objection in the authorities that I have cited, a preliminary objection is a point of law which has been pleaded or which arises by clear implication out of the pleadings which if argued as a preliminary point may dispose of the suit. This means that a preliminary objection does not require evidence to support it and it must be pleaded or must arise by implication from the pleadings. I am of the view that the point that was taken by the 1<sup>st</sup> Appellant in the lower court was improperly raised as a preliminary objection. First, the point was not pleaded. In his defence, the 1<sup>st</sup> Appellant admitted the jurisdiction of the court. The 1<sup>st</sup> Appellant’s preliminary objection was contrary to his pleadings. If the 1<sup>st</sup> Appellant learnt after filing his defence that the court had no pecuniary jurisdiction to entertain the Respondents’ claim, nothing stopped him from seeking leave to amend his defence and plead the issue. I do not think that it was open to the 1<sup>st</sup> Appellant to raise a preliminary objection that was not only not pleaded but was also contrary to his pleadings.
16. Secondly, the 1<sup>st</sup> Appellant’s preliminary objection required evidence to determine. This explains why the 1<sup>st</sup> Appellant supported it by an affidavit sworn by the 1<sup>st</sup> Appellant’s advocate. The determination of the objection required evidence of the value of the suit properties. The issue was contentious. The Respondents contested the valuation that was conducted by the 1<sup>st</sup> Appellant. First, they contended that whereas the 1<sup>st</sup> Appellant owned only one parcel of land namely, Title No. Kisumu/Boarder/5848 in respect of which he was sued, in the valuation reports submitted to the court in support of the preliminary objection, the 1<sup>st</sup> Appellant purported to have valued all the suit properties including the properties that were owned by the 2<sup>nd</sup> Appellant who had admitted the jurisdiction of the court in his defence and had raised a counter-claim against the Respondents in the same suit. The 2<sup>nd</sup> Appellant was



not a party to the preliminary objection. The other issue that was raised by the Respondents concerning the valuation reports by the 1<sup>st</sup> Appellant was that the valuation took into account developments that were not in place when the suit was filed. The Respondents contended that the developments were put up in violation of an order of a temporary injunction that was issued against the Appellants on 6<sup>th</sup> November 2020. The Respondents contended that their claim was within the jurisdiction of the court when they filed the suit. I am of the view that these issues raised by the Respondents could not be determined through a preliminary objection. Since the issue of jurisdiction can be raised at any time, the 1<sup>st</sup> Appellant could have amended his defence to plead the court's lack of jurisdiction. He could thereafter tender evidence at the trial to prove the allegation.

17. There was also the issue of whether the 1<sup>st</sup> Appellant proved that the court had no pecuniary jurisdiction to determine the Respondents' claim. Section 7 of the *Magistrate's Courts Act*, 2015 provides as follows;

“ A magistrate's court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed-

- (a) twenty million shillings, where the court is presided over by a chief magistrate;
- (b) fifteen million shillings, where the court is presided over by a senior principal magistrate;
- (c) ten million shillings, where the court is presided over by a principal magistrate;
- (d) seven million shillings, where the court is presided over by a senior resident magistrate; or
- (e) five million shillings, where the court is presided over by a resident magistrate.”

18. The lower court that was seized of the lower court suit was presided over by a Senior Principal Magistrate. The limit of the pecuniary jurisdiction of the Court in civil matters was Kshs 15,000,000/-. The burden was upon the 1<sup>st</sup> Appellant to prove that the value of the subject matter of the lower court suit was beyond the jurisdiction of the court. The 1<sup>st</sup> Appellant filed two valuation reports to prove that fact. I have already highlighted the objections that were raised by the Respondents to the said reports. That aside, as I mentioned at the beginning of this judgment, the valuation reports that had been filed by the 1<sup>st</sup> Appellant in support of his preliminary objection were abandoned by consent of the parties on 4<sup>th</sup> May 2021. The parties were ordered to file a joint valuation report which was not done. The court thereafter on 15<sup>th</sup> July 2022 ordered that the parties could file whichever reports they wished to file. None of the parties filed a valuation report after this order. At the time the preliminary objection was heard, the only valuation reports on record were the ones which had been abandoned by the parties on 4<sup>th</sup> May 2021 through a consent order. That order was neither reviewed nor set aside. The 1<sup>st</sup> Appellant could not therefore rely on the said valuation reports in support of the preliminary objection. For that reason, I am unable to fault, the lower court's finding that there was no valuation report on record to support the 1<sup>st</sup> Appellant's preliminary objection.

## Conclusion

19. For the foregoing reasons, I find no merit in the Appellants' appeal. The appeal is dismissed with costs to the Respondents.

**DELIVERED AND DATED AT KISUMU ON THIS 25TH DAY OF JANUARY 2024**

**S. OKONG'O**



## **JUDGE**

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

Mr. Lubeto for the Appellants

Mr. Abande for the Respondents

Ms. J. Omondi-Court Assistant

