



**Kariithi & another v Kaire (Environment & Land Case  
E077 of 2023) [2024] KEELC 358 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 358 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E077 OF 2023  
LN MBUGUA, J  
JANUARY 25, 2024**

**BETWEEN**

**JAMES KINYANJI KARIITHI ..... 1<sup>ST</sup> PLAINTIFF**

**ANNIE NYAMBURA MURIGI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**PETER MUROKI KAIRE ..... DEFENDANT**

**RULING**

1. Before me is a notice of motion application dated 13.9.2023 filed contemporaneously with the suit. The plaintiff seeks the following orders;
  - “1) That pending the hearing and determination of this application, an order of injunction do issue restraining the Defendant/Respondent whether by himself or his representatives, servants agents, assigns and /or anyone acting on his instructions from entering, trespassing, damaging, alienating, destroying any development thereon and/or in any manner whatsoever interfering with or otherwise dealing with the property known as Plot No. Nairobi Block117/108/3.
  2. That pending the hearing and determination of this suit, an order of injunction do issue restraining the Defendant/Respondent whether by himself or his representatives, servants agents, assigns and/or anyone acting on his instructions from entering, trespassing, damaging alienating, destroying any development thereon and/or in any manner whatsoever interfering with or otherwise dealing with the property known as Plot No. Nairobi Block117/108/3.



3. The Officer Commanding Kahawa West Police Station be directed to ensure enforcement of the orders granted by this honourable court.
  4. The cost of this application be borne by the respondent.
2. The application is premised on grounds that on or about 13<sup>th</sup> October 2012 the Applicants purchased the suit parcel of land known as Plot No. Nairobi Block 117/108/3 from one Daniel Waweru Kabiru.
  3. That the suit property was demarcated and beacons placed, however during subdivision and demarcation from the larger property, the surveyor left out a portion on the upper side as there was a river passing there thus the land where the river passed was riparian land.
  4. That the Applicants went ahead and began construction on the suit property subsequently erecting a perimeter wall that covered part of the riparian land which the Applicants covered with red soil so as to prevent the river from flowing into their house.
  5. The Applicant further avers that the Respondent who is a previous owner of an adjacent parcel land; having bought and sold the same to one Daniel Kagiri, has now come and started claiming that the boundaries of the suit property were not properly demarcated and that the boundaries of Applicant's parcel of land should be moved upwards so that the parcel starts at the river.
  6. That on or about 5.9 2023, the defendant hired goons to destroy the applicant's perimeter wall and has threatened to continue with the destructions.
  7. In opposition, the respondent filed a Preliminary Objection dated 23.10.2023 averring that the honourable court lacks jurisdiction as the dispute is a boundary one falling under the provisions of section 18 and 19 of the [Land Registration Act](#).
  8. The respondent also filed a replying affidavit dated 30.10.2023 where he avers that him and one Daniel Waweru Kabiru purchased a block of land parcel 117/108 from Kamiti farmers and subdivided the same into smaller plots. One of the resultant parcel is 117/108/3 which they sold to the plaintiff. The latter proceeded to erect a perimeter fence but in the process, he encroached on the neighbouring plot 117/108/1 belonging to Daniel Kagiri. That in an attempt to resolve the dispute, they engaged the area chief, but the applicant has not shown any good faith in trying to resolve the dispute.
  9. I have duly considered the rival arguments and submissions. The issues falling for determination are whether the dispute herein is a boundary one to be resolved under Section 18 and 19 of the [Land Registration Act](#) and whether the injunctive orders should be granted.
  10. As rightly submitted by the respondent, a Preliminary Objection consists of a pure point of law, See - [Aviation and Allied Workers Union Kenya v Kenya Airways Ltd & 3 Others \[2013\]](#) eKLR. In *Mukhisa Biscuit Manufacturing Co. Ltd West End Distributors Ltd 1969 E.A. 696*; the Court defined a preliminary objection as follows;
 

“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 the exercise of judicial discretion”.
  11. This matter is at the infancy stage and the respondent has not filed his pleadings. The nature and extent of his defence is yet to be discerned by this court. In particular, an issue has been raised by the applicant that the respondent has no legal claims over the suit property. And going by the averments set out in paragraph 5-10 of the respondent's replying affidavit, indeed his interests over the suit property are yet to be ascertained.



12. A Preliminary Objection must not be blurred by factual details calling for evidence, yet that is exactly what the respondent is inviting this court to do. This court can always refer the matter to the Land Registrar once the court is able to ascertain that the dispute deserves such a reference under Section 18 and 19 of the *Land Registration Act* without divesting itself of jurisdiction. See *Andrew Marigwa v Josephat Ondieki Kebati [2017]* eKLR. But as at now, I find that there is no sufficient material placed before this court to invoke the aforementioned provisions of law. Thus the preliminary Objection fails.
13. On the prayer for injunction, I find that at paragraph 10 of his replying affidavit, the respondent has admitted that the plaintiff had put up the perimeter wall, while at paragraph 13, he has alluded to demolitions of the said wall. As stated earlier, the interests of the respondent are yet to be ascertained, since he (respondent) admits that the encroachment was occasioned upon David Kagiri and not himself. Looking at the circumstances of this case, and being guided by the holding in *Jan Bolden Nielsen vs. Herman Philliipus Steya Also Known as Hermannus Phillipus Steyn & 2 Others (2012)* eKLR, I find that the injunctive orders sought are merited.
14. In the final analysis, the Preliminary Objection is dismissed, while the application dated 13.9,2023 is allowed. The injunctive orders shall remain in force for a period of one year. Each party shall bear their own costs for the preliminary Objection and the application.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JANUARY, 2024 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

**In the presence of:-**

**Mrs. Kimani for Plaintiff**

**Amuyunzu for Defendant**

**Court Assistant: EddeI**

