



**Twong Kenya Limited v Andolo & another (Land Case  
E009 of 2023) [2024] KEELC 5025 (KLR) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 5025 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
LAND CASE E009 OF 2023  
AE DENA, J  
MARCH 20, 2024**

**BETWEEN**

**TWONG KENYA LIMITED ..... PLAINTIFF**

**AND**

**DONALD ANDOLO ..... 1<sup>ST</sup> DEFENDANT**

**MINISTRY OF ROADS & PUBLIC WORKS COUNTY GOVERNMENT OF  
KWALE ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Plaintiff instituted this suit vide a plaint dated 4/8/2023. Accompanying the same was a Notice of Motion filed under Certificate of Urgency by A.O Aminga Advocates. The urgency cited by Dominic Ochieng Advocate, an associate in the said firm was that the Defendants herein were performing acts of encroachment and trespass unto a public road by interalia removing a permanent road beacons and had dug trenches for an intended structure thereby altering the official and gazette cadastral map and deed for Galu Kinondo Registration Section Diagram 7. That these actions were encroaching on the Plaintiff/Applicants parcel Kwale/Galu Kinondo/1974.
2. The Applicant's prayer was for a temporary mandatory injunction against the Respondents restraining them from further action on the affected parcel[s] pending the hearing and determination of this suit. On 7/8/2023, this court issued orders restraining the Defendants from removing any public road beacons placed along Nyumba Mbovu-Pine Wood Road and erecting any permanent structures or digging trenches pending the hearing and determination of this application. The notices from the Respondents were suspended and declared null and void hence quashed. The court further stopped the ongoing construction of the perimeter wall pending further orders.



3. Aggrieved by the said orders, the 1<sup>st</sup> Respondent filed a preliminary objection before court on 9/9/2023 on the point of law that the court lacks jurisdiction to entertain this suit by virtue of Section 18[2] of the [Land Registration Act](#).
4. On 9/10/2023, the court issued orders for both the preliminary objection and the application to be canvassed together by way of written submissions together. The court has perused the submissions by both parties on the preliminary objection and the application and which it has considered in this ruling.
5. It is trite that jurisdiction of a court is pivotal when it comes to determination of any matter placed before it. As was enunciated in the case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR, jurisdiction is everything, without it a court should down its tools. The 1<sup>st</sup> Respondent has questioned by way of a preliminary objection the court’s jurisdiction to determine this suit. I have considered the same and find it has met the threshold of what amounts to a proper preliminary objection as was stated in the Supreme Court in [Hassan Ali Jobo & Another v Suleiman Said Shabbal & 2 Others](#) which cited the leading decision on Preliminary Objections, [Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd](#). (1969) EA 696, where the Court held as follows: -

“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”.
6. The preliminary objection herein is premised upon the provisions of Section 18 of the [Land Registration Act](#) No. 3 of 2012 which provides as follows: -
  18.
    - (1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.
    - (2) The court shall not entertain any action or other proceedings relating to a dispute as to the 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 its boundaries and situation as may be necessary;

Provided that where all the boundaries are defined under section 19(3), the determination of the position of any uncertain boundary shall be done as stipulated in the [Survey Act](#).
7. Referring to paragraphs 4 and 5 of the Plaint, The Plaintiff has submitted that it has been indicated that the 1<sup>st</sup> Defendant is the registered proprietor of Kwale/Galu Kinondo/568 whereas the Plaintiff is the registered proprietor of Kwale/Galu Kinondo/1974. That the two properties are separated by a public road known as Nyumba Mbovu Pine Wood Road. That official beacons are already in place indicating the length and width of the road and from the contents of the Plaint, it can be deduced that the two parcels have known boundaries. That this information discloses that the boundaries to the two properties have already been established.
8. That the issue of boundaries is therefore not in dispute but the infringement by the Respondents in making developments on the said road that have touched on the Plaintiff’s parcel. The 1<sup>st</sup> Defendant



has on the other hand submitted that the dispute is not one of ownership but the extend of each of the party's property in terms of size and their respective boundaries in respect to the encroachment on the public road.

9. From my reading of the Complaint and the Notice of Motion herein, it is clear to the court that the activities by the 1<sup>st</sup> Respondent and supported by the 2<sup>nd</sup> Respondent have caused an encroachment into the Plaintiffs parcel necessitating this suit. The Respondents have on the other hand claimed that the activities are valid and do not encroach on the road and which is a public road. It is my finding that the issue of ownership in terms of the extent to which the plaintiffs parcel has either encroached or not encroached on the road comes into play.
10. This can only be established by a survey determining the extent of the Plaintiff's property and that of the 1<sup>st</sup> Defendant. The issue of a boundary is evident, and it is thus clear that the parties ought to have given the Land Registrar the chance to address the encroachment issue herein in line with Section 18 of the aforementioned *Land Registration Act*. The Court in *Hon. Henry Kosgey v Brian Cuthbert & Another* (2019) eKLR stated that the jurisdiction of the Court in determining boundary disputes should be considered in view of Section 18 of the *Land Registration Act*.  
11 Section 18(2) of the *Land Registration Act*, 2012, provides as hereunder;
  18. Boundaries (1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.
    - (2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.
11. At the same time provisions of Section 19 of the *Land Registration Act* outline with precision the powers of the Land Registrar to deal with a boundary dispute as follows;
  - 19.(1) if the Registrar considers it desirable to indicate on a field plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.
    - (2) The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.
    - (3) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section.
11. I note that the parties have not tendered any evidence indicating that the dispute was brought before the Land Registrar before being escalated to this court. However, I note that the 1<sup>st</sup> Defendant has put up a perimeter wall which is the bone of contention in this suit as it is alleged that the perimeter wall has encroached on the public land and led to the destruction of the beacons earlier put. The Plaintiff states that upon serving the 2<sup>nd</sup> Respondent with a notice for removal of obstructions on the right of way, he was informed that It was him who had encroached on the public road.



12. I find that with the above facts, the jurisdiction of this court comes into play as the alleged encroachment once established will be an infringement of the Plaintiffs right to use and ownership of property. In the interest of justice, the orders issued on 7/8/2023 will however be in place until a determination on the boundary is made. It is my finding that the Plaintiff has established a prima facie case by proving ownership of his parcel and the fact that the 1<sup>st</sup> Respondent has indeed put up a perimeter wall that has according to the Plaintiff encroached on the public land and affected the Plaintiffs who is being informed that it is him who has encroached on the road.
13. In the event that the orders granted had not been sought, the Respondents activities will definitely continue, the eventuality is that the Plaintiff's acreage might be reduced to accommodate the public road reserve and hence the second aspect of substantial loss has been met. The balance of convenience automatically tilts in favour of the Plaintiff. In the interest of justice, the orders issued on 7/8/2023 will however be in place until a determination on the boundary is made and further directions of this court.
14. In the circumstances, I further hold that the preliminary objection partly succeeds and I uphold the same to the extent that parties shall submit themselves to the jurisdiction of the Land Registrar for a determination of the boundaries to their respective properties and that of the public road.

It is so ordered.

**RULING DATED SIGNED AND DELIVERED THIS 20<sup>TH</sup> DAY OF MARCH 2024.**

**A.E DENA**

**JUDGE**

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

Mr. Otieno for Plaintiff/Applicant

Mr. Ngare for the 1<sup>st</sup> Defendant/Respondent

Mr. Daniel Disii - Court Assistant

