



REPUBLIC OF KENYA



KENYA LAW
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Kapoya & 15 others v Kasio & another (Environment and Land Appeal E027 of 2023) [2025] KEELC 208 (KLR) (30 January 2025) (Ruling)

Neutral citation: [2025] KEELC 208 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL E027 OF 2023
LC KOMINGOI, J
JANUARY 30, 2025

BETWEEN

SIMON KAPOYA & 15 OTHERS APPELLANT

AND

JOSEPH KASIO 1ST RESPONDENT

DISTRICT LAND REGISTRAR, KAJIADO & 4 OTHERS 2ND RESPONDENT

RULING

1. Coming up for determination is a Preliminary Objection dated 3rd June 2024 by the 1st Respondent against the Appeal dated 28th November 2023 on the grounds that:
 - i. The Appeal is fatally defective and bad in law as it offends provisions of Section 75 of the Civil Procedure Act and Order 43 Rules 1& 2 of the Civil Procedure Rules;
 - ii. The Appeal has been filed out of time and it offends Regulation 40(6) of the Land Registration (General) Regulations and an abuse to the Court process and should be dismissed with costs.
2. The application was canvassed by way of written submissions.

The 1st Respondent's Submissions

3. On whether this Preliminary Objection raised points of law, counsel submitted that it was trite that a Preliminary Objection should be on points of law arising from the pleadings citing *Two thirds Investment Ltd & 9 others vs Katana Said Kalama & 3 others* [2018] eKLR. That this Appeal which was filed out of time and without leave of court should be struck out adding that the issue of time was a question of law which was within the threshold for determining Preliminary Objections. While taking into consideration that striking out pleadings was draconian, counsel made reference to the case



of Kivanga Estates Ltd vs National Bank of Kenya Ltd [2017] eKLR which held that it was equally unfair to drag a person to the seat of justice when the case is a nonstarter.

4. On whether this Court had jurisdiction to determine the application, counsel submitted that the Appeal offended provisions of Order 43 Rules 1 and 2 of the Civil Procedure Rules because an Appeal from an order/ ruling of the Land Registrar was not one of orders laid out. Similarly, this Appeal was filed out of time and not within the 30 days period as espoused under Regulations 40 (6) of the Land Registration (General) Regulations adding that this notwithstanding, the Appellant did not seek leave of court to appeal out of time. This application should thus be allowed with costs to the 1st Respondent as per Section 27 of the *Civil Procedure Act*.

The Appellants' submissions

5. Counsel for the Appellant submitted that this Court should be guided by administering justice without undue regard to technicalities as guided by Article 159(2)(d) of *the Constitution* and Section 3A of the *Civil Procedure Act* and should not strike out the Appeal. Counsel went on to submit that the boundary determination conducted on 13th July 2023 and subsequent ruling was res judicata since the same issue was determined on 12th July 2011. As such, this Appeal was not based on the Ruling which was res judicata but on the process and as such the Appeal was not incompetent and the court should grant the prayers sought in the application.

Analysis and determination

6. I have considered the Preliminary Objection, the grounds, the rival submissions, the relevant authorities and statutes cited and find that the issues for determination are:
 - i. Whether the 1st Respondent's Preliminary Objection is merited.
 - ii. Who should bear the costs of the application?
7. The 1st Respondent has objected to this Appeal on grounds that it was filed out of time contrary to Regulation 40(6) of the Land Registration (General) Regulations. The Appellants have contested this objection asking the Court to disregard undue procedural technicalities adding that the Appeal was based on the fact that the Ruling was res judicata which was a procedural issue.
8. It is trite law that a Preliminary Objection should be on a pure point of law which can be discerned and determined on the face of the pleadings as was held in the locus classicus case of Mukisa Biscuits Manufacturing Company Ltd v West End Distributors [1969] EA 696. This holding was buttressed in Kenya National Commission on Human Rights Vs Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] eKLR where the Supreme Court held:

(78) ...“Thus a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”

(16) It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.



9. The Memorandum of Appeal in the Court file is dated 28th November 2023 and was filed on 4th December 2023. The Memorandum reads:

“... The Appellants being aggrieved by the Ruling of the District Land Registrar at Kajiado (T.H. Haithar) delivered on 13th July 2023 wishes to Appeal against the whole of the said decision on the following grounds:

- a. That the District Land Registrar erred in law by failing to appreciate that the issue of boundary dispute on Kajiado/ Kitengela/23(4057-4060) is res judicata as the same had already been heard and determined by Hon. Kaberia Nkunja SRM on 28th April, 2011 in L.D. T Suit No.2 of 2008, Joseph L. Kasio -vs Lentei Kaponyi & 15 Others.
- b. That the District Land Registrar erred in failing to make a finding of fact that the Surveyor’s Report conducted on 12th July, 2011 and tabled before Court showing that all the beacons and in particular beacon K-22 were well placed on the ground is in consonance with the true position and the Same matter was thus concluded twelve (12) years ago.

Reasons wherefore the Appellants prays that:

- a. The said Ruling be set aside and the Honourable Court be pleased to uphold the Ruling of the Senior Resident Magistrate Hon. Kaberia Nkunja SRM in L.D. T Suit No. 2 of 2008, Joseph L. Kasio & 4 Others -vs-Lantei Kaponyi & 15 Others.
- b. Cost of this Appeal be borne by the Respondents”.

10. It is not in dispute that a long time has lapsed since the Land Registrar rendered his decision on the 13th June 2023.

11. I have gone through the Survey Reports of 2011 and 2023 respectively. It appears as there is still an issue with one beacon on the disputed boundary.

This issue needs to be sorted out once and for all.

12. It is the Appellant’s case that the issue was sorted out in the ruling dated 12th July 2011 by Honourable Kaberia N. (SRM).

It is not clear what led to another exercise which culminated in the ruling of the Land Registrar dated 13th July 2023; twelve (12) years later.

13. I am of the view that the Appellants ought to be given a chance to ventilate their dissatisfaction with the decision of the Land Registrar.

14. Article 159(2) (d) of *the Constitution* implores courts not to dwell on technicalities but to render substantive justice.

15. All parties ought to be given a chance to ventilate on the issue of the one beacon, once and for all.

16. I find no merit in the Preliminary Objection and the same is dismissed. The costs do abide the outcome of the main suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 30TH JANUARY 2025.



L. KOMINGOI

JUDGE.

In the presence of:

Ms. Irura for Mr. Gathaara for the Appellant.

Mr. Abiero for the 1st Respondent.

N/A for the 2nd Respondent.

Court Assistant – Mutisya.

