



REPUBLIC OF KENYA



**Sagalla Ranchers Limited v Makalo & 97 others (Environment & Land Case E005 of 2023)
[2024] KEELC 3872 (KLR) (Environment and Land) (16 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 3872 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT & LAND CASE E005 OF 2023**

EK WABWOTO, J

MAY 16, 2024

BETWEEN

THE SAGALLA RANCHERS LIMITED PLAINTIFF

AND

AMOS MAKALO & 97 OTHERS DEFENDANT

RULING

1. This Ruling is in respect to the Plaintiff's application dated 13th December 2023 seeking temporary injunctive reliefs against the Defendants pending the hearing and determination of the application and the Defendants preliminary objection dated 17th January 2024.
2. The application was opposed by the Defendants who filed a Notice of Preliminary Objection dated 17th January 2024. The Preliminary Objection was raised on the following grounds:-
 1. The court lacks jurisdiction to hear the suit as it offends the express provisions of sections 18 and 19 of the *Land Registration Act* No. 3 of 2012 for reasons that:
 - a. The subject of the suit is a boundary issue and/or dispute which falls in the first instance within the jurisdiction of the Land Registrar.
 - b. Further it is an established principal of law that where an alternative remedy and especially where parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order would be granted by courts and plaintiff has not established the existence of any exceptional circumstances.
 2. That the suit is fatally defective, misconceived and mischievous or otherwise an abuse of the court process and therefore unsustainable in the obtaining circumstances.



3. The 1st Defendant also filed a Replying Affidavit sworn by Amos Makalo on 16th January 2024.
4. Pursuant to the directions issued by this court it was directed that the application and the Preliminary Objection be canvassed together subsequent of which the court would deliver its ruling.
5. The Plaintiff averred that the Defendants have illegally trespassed on L.R No. 12277/8 and L.R No. 12277/9 in which it is the absolute proprietor. It was also averred that the Defendants are continuously engaging in illegal activities such as cutting down trees, logging, burning charcoal and harvesting sand and cultivation of crops. The Plaintiff also averred that it will be greatly prejudiced if the orders sought are not granted.
6. The 1st Defendant in opposing the application averred that he has not engaged in any illegal activities and that the dispute herein is about the exact boundaries of the suit land. It was also averred that the Plaintiff had filed a previous suit Mombasa ELC No. 181 of 2021 Sagalla Ranchers Limited =Versus= Saumu Mwanganjuri & 6 Others which was struck out. It was further averred that in the absence of the clear boundaries that have not been confirmed, the Plaintiff cannot claim encroachment. The court was urged to dismiss the application.
7. The court has considered the application together with the Preliminary Objection and has outlined the following two issues for determination:-
 - i. Whether the court lacks jurisdiction to hear the suit by dint of Section 18 and 19 of the [Land Regulation Act](#) No. 3 of 2012.
 - ii. If the answer to the above is negative, whether the Plaintiff has made a case for grant of the reliefs sought.
8. It is trite law that preliminary objections should be raised on a pure point of law. This point was stressed by Sir Charles Newbold P in the celebrated case of *Mukisa Biscuits Manufacturing Co. Ltd v Westend Distributors Limited* [1969] EA. 696 when he stated that; -

“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 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues. This improper practice should stop.”
9. Further Ojwang J. (as he then was) as he then was in the case of [Oraro v Mbaja \[2005\]](#) I KLR held that;-

“I think the principle is abundantly clear, a “Preliminary Objection” correctly understood, is now well defined as, and declared to be, 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 processes of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principles a true Preliminary Objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary pointAnything that purports to be a Preliminary Objection must not deal with disputed facts and must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence”



10. The Plaintiff pleads at paragraph 4 of its plaint that the Defendants have without any consent trespassed into its property and have remained there cutting trees, logging trees, burning charcoal, cultivating crops, harvesting sand among other activities. As a consequence of the said actions, the Plaintiff seeks a permanent injunction, eviction order, damages for trespass and compensatory damages for injury to Plaintiff's trees.
11. Having perused the plaint filed herein and as pleaded by the Plaintiff, it is evident that the Plaintiff has not made any reference to a boundary dispute. In the circumstances it would not be prudent for the court to assume that the dispute herein is based entirely on a boundary dispute. The court cannot pronounce itself summarily at this moment. As has been rightly stated in the Oraro vs Mbaja Case (*supra*), a preliminary objection must not be blurred with factual details liable to be contested. It is therefore my finding that the preliminary objection herein doesn't meet the threshold set in the Mukisa Biscuit's case (*supra*) and as such the said Preliminary Objection is found to be unmerited.
12. In respect to the orders sought of an injunction pending the hearing and determination of the application. The principles upon which this court exercises its discretion in applications for a temporary injunction are now well settled. In *Giella v Cassman Brown & Co. Ltd.* [1973] E.A 358, it was held that an applicant for a temporary injunction must show a prima facie case with a probability of success and such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience. In *Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014]* eKLR the Court of Appeal adopted the definition of a prima facie case that was given in the case of *Mrao Limited v First American Bank of Kenya Limited & 2 Others [2003]* KLR 125 and went further to state as follows:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. ...All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed.”
13. The court has carefully perused the affidavit sworn by Raphael Mbinga on behalf of the Plaintiff, save for attaching the photos of the suit property, the Plaintiff has not demonstrated if the activities referred to the application are being undertaken by the Defendants and in view of the foregoing this court finds that no prima facie case has been established by the Plaintiff to warrant the grant of the reliefs sought in the application. As such the said application is found to be unmerited and the orders sought therein are declined.
14. In conclusion, the Plaintiff's application dated 13th December 2023 and Defendant's Preliminary Objection dated 17th January 2024 are hereby disposed as follows:-
 - i. The application dated 13th December 2023 is hereby dismissed.
 - ii. The Preliminary Objection dated 17th January 2024 is unmerited and is dismissed.



iii. Each party to bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 16TH DAY OF MAY 2024.

E. K. WABWOTO

JUDGE

In the presence of:-

Court Assistants: Mary Ngoira and Norah Chao.

Ms. Chepchumba for Plaintiff.

Mr. Nyange and Mr. Mutinda for Defendants.

