



**Association for Physically Disabled of Kenya. (APDK) v Muteru (Environment & Land Miscellaneous Case E056 of 2023) [2024] KEELC 3821 (KLR) (15 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 3821 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND MISCELLANEOUS CASE E056 OF 2023**

**SM KIBUNJA, J**

**MAY 15, 2024**

**BETWEEN**

**THE ASSOCIATION FOR PHYSICALLY DISABLED OF KENYA.  
(APDK) ..... APPLICANT**

**AND**

**DOUGLAS MWANGI MUTERU ..... RESPONDENT**

***(PRELIMINARY OBJECTION DATED THE 8TH DECEMBER 2023)***

**RULING**

1. The respondent filed the notice of preliminary objection dated December 8, 2023 raising the following grounds:
  - a. There are no pleadings or proceedings known in law by which a notice of motion can originate a suit.
  - b. The respondent has not been served with any originating pleadings or proceedings.
  - c. The entire application is an affront to and abuse to section 18, 20, 21 of the [Land Registration Act](#) No. 3 of 2012, section 19 of the [Civil Procedure Act](#), Order 40 Rules 1 of the [Civil Procedure Rules](#) (Cap 21) Laws of Kenya.
  - d. The Applicant's claim is against the doctrine of exhaustion of rights and remedies as conferred by the [Land Registration Act](#) No. 3 of 2012.
  - e. There is no suit in court, the application is fatally defective and incurably incompetent.
2. The court ordered that the preliminary objection be canvassed through written submissions. That respondent filed their submissions dated December 7, 2024, in which counsel inter alia submitted that there is no suit between the parties, upon which the application could be anchored. That Order 40



Rule 1 of the [Civil Procedure Rules](#) provides that an injunction order can only issue in a suit. That the import of section 19 of the [Civil Procedure Act](#) and Order 3 Rule 1 (1) of the [Civil Procedure Rules](#) is that “a suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed.” The counsel cited the case of [Geofferey Ndungu Theuri vs Law Society of Kenya](#) (1988) eKLR where the court held that

“an applicant is not entitled under Order 30 of the [Civil Procedure Rules](#) to seek or obtain an order for injunction relief against another party without filing a suit.”

Counsel further submitted that the court does not have jurisdiction to handle this matter in the first instance. That under section 18 of the [Land Registration Act](#), the dispute over the boundary can only be determined by the Land Registrar.

3. The following are the issues for determination by the court:
  - a. Whether the preliminary objection raises any points of law that if upheld would determine the matter.
  - b. What orders to issue.
  - c. Who pays the costs?
4. The court has carefully considered the grounds on the preliminary objection, submissions by counsel, the record and come to the following findings:

- a. What constitutes a preliminary objection was well settled in the case of *Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors* (1969) EA 696 where the court observed thus:

“---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 the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case Sir Charles Newbold, P. stated:

“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 the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

- b. The applicant commenced this proceeding through the notice of motion dated the November 10, 2023 seeking for *inter alia* injunction order restraining the respondent from bringing down the perimeter wall erected along the boundary of their respective parcels, pending the hearing and determination of this application. The respondent has opposed the application through their replying affidavit sworn on the December 8, 2023. The respondent further filed the preliminary objection of the same date, December 8, 2023, *inter alia* raising the ground that the application is defective as there exists no suit upon which the application could be predicated; that the application has been brought contrary to the doctrine of exhaustion and therefore, the court is without jurisdiction.



- c. In the celebrated case of *Owners of the Motor Vessel Lillian S vs Caltex Kenya Limited*. [1989] KLR 1 the Court held:

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

The respondent claims that the issue before the court is on boundary dispute between two neighbours. The applicant is the registered owner of the parcel of land known as LR 118/I/Mn Cr. No. 1770, while the respondent is the registered owner of LR 120/1/Mn. Section 18 (2) of the *Land Registration Act* No. 3 of 2012 states as follows:

“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.”

It is noteworthy that the boundary dispute between the parties has been dealt with as is provided in sub section 3 where it states:

“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* (Cap. 299).

The boundary having been determined through the regional surveyor’s report dated November 3, 2023, the party or parties were at liberty to move to court through a suit to protect their interests. It is upon such suit that an application for injunction or conservatory order may be predicated upon. No suit known in law has been filed in this matter.

- d. Order 40 Rule 1 of the *Civil Procedure Rules* provides that temporary injunctions can only be issued in a suit which under Order 3 Rule 1 is commenced through a plaintiff. In the case of Joseph *Kibowen Chemior v William C. Kisera* [2013] eKLR the court extensively discussed filing of suits as follows:

“The word "suit" has several meanings. *Black's Law Dictionary* defines "suit" as any proceedings by a party or parties against another in a court of law

- (7) "suit of a civil nature" is defined to be a civil action.
- (8) "A civil action" is an action brought to enforce, redress, or protect a private or civil right.
- (9) Section 2 of the *Civil Procedure Act*, defines "suit" as all civil proceedings commenced in any manner "prescribed" under Section 2 means prescribed by rules.

"Rules" means rules and forms made by the Rules Committee to regulate the procedure of courts.



- (12) "pleadings" includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant.

Under Section 19 of the [Civil Procedure Act](#), every suit shall be instituted in such manner as may be prescribed by rules. It will be observed that Section 19 does not pretend that the [Civil Procedure Rules](#) have a monopoly on how suits should be instituted. It provides that suits may be instituted in the manner prescribed by rules. There could be rules in other statutes on how Proceedings may be commenced. For example the [Probate & Administration Rules](#) under the [Succession Act](#), (14) prescribe how matters touching on succession of estates of deceased persons need to be instituted."

The foregoing leads the court to make a finding that where a person is commencing a civil suit, to enforce a civil claim, one needs to follow prescribed rules.

- e. The applicant herein appear to have been dissatisfied with the decision of the regional surveyor over their boundary dispute, and therefore sought for an injunction through the application dated November 10, 2023, which was filed without there being a suit.
  - f. That even if there was a suit upon which the application could have been based, the prayer for injunction was phrased to be "pending the hearing and determination of this application", and therefore could not have been granted to last beyond today as this ruling will effectively decide the notice of motion. There will be nothing remaining to proceed to further hearing after this ruling is delivered save for taxation of costs.
  - g. The court therefore grants the respondent the costs as under section 27 of the [Civil Procedure Act](#), costs follow the events unless for good cause otherwise ordered. I find no reasonable basis to deviate from that edict in this matter.
5. Having come to the above conclusions, the court finds and orders as follows:
- a. That the application dated the November 10, 2023 is defective and an abuse of the court process as it is not predicated on any existing suit.
  - b. That the respondent's preliminary objection dated December 8, 2023 is upheld, and the application dated the November 10, 2023 is hereby struck out.
  - c. That the applicant will pay the respondent's costs.

Orders accordingly.

**DATED AND VIRTUALLY DELIVERED THIS 15<sup>TH</sup> DAY OF MAY 2024.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA**

In the presence of:

Applicant : M/s Wawira

Respondent : Mr. Maithya.

Leakey – Court Assistant.

