



**Mumbo v Ochieng & another (Environment and Land Appeal
E012 of 2023) [2024] KEELC 4885 (KLR) (20 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4885 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E012 OF 2023**

**E ASATI, J
JUNE 20, 2024**

BETWEEN

CHARLES OTIENO MUMBO APPELLANT

AND

NEREAH OCHIENG 1ST RESPONDENT

APHLINE OCHIENG 2ND RESPONDENT

(Being an Appeal from the Ruling by Honourable L.N. Kiniale (Senior Principal Magistrate) in Nyando SPM ELC NO.E060 of 2022: Charles Otieno Mumbo -vs- Nereah Ochieng and Aphline Ochieng delivered on the 10th day of August, 2023)

JUDGMENT

1. This is an appeal from the ruling dated 10th August 2023 by the trial court in Nyando SPM ELC NO. E060 OF 2022. The ruling was in respect of a preliminary objection raised by the Defendants (Respondents herein) vide a Notice of Preliminary Objection dated 14th February, 2023. The Preliminary Objection was based on the grounds that the trial court lacked jurisdiction to hear and determine the suit as the suit contravened the provisions of Section 18 (2) of the Land Registration Act No.3 of 2012.
2. The record of appeal shows that the preliminary objection was heard by the trial court which, vide the ruling dated 10th August, 2023, found that the preliminary objection had merit and upheld it, dismissed and struck out the suit for want of jurisdiction and awarded costs to the Respondents.
3. Aggrieved by the ruling, the Appellant filed the present appeal seeking for orders that;
 - i. the appeal be allowed,



- ii. the orders of the lower court striking out the suit be set aside and the suit be reinstated for hearing,
 - iii. the appellant be awarded costs of the appeal and
 - iv. any other order in the interest of justice.
4. The grounds of appeal are that: -
- a. The learned Magistrate erred in law and in fact in holding that the matter is a boundary dispute under Section 18 of the Land Registration Act No.3 of 2012.
 - b. The learned trial Magistrate erred in law by failing to appreciate that the matter as per the pleadings was an issue of trespass as opposed to a boundary dispute.
 - c. The learned trial Magistrate erred in law and in fact by upholding the Preliminary Objection that did not raise a pure point of law but mixed point of law and fact.
 - d. The learned trial Magistrate erred in law by making an extraneous assumption that the Appellant and the Respondents were neighbours and the only dispute between them would be a boundary dispute.
 - e. The learned trial Magistrate erred in law by considering and taking into account disputed factual issues in reaching her conclusion that the matter before her was in the nature of a boundary dispute.
 - f. The learned trial Magistrate erred in law and fact by inferring and holding that the Appellant's dispute was one involving land parcel number Kisumu/Kochieng/4455 as opposed to Kisumu/Kochieng/4435.
 - g. The learned Magistrate erred in law and fact by reaching a conclusion that parcel number Kisumu/Kochieng/4445 having not been in the map presented by the Respondents, the same automatically classified the dispute as one in the nature of a boundary.
 - h. The learned trial Magistrate erred in law in allowing the Respondents' preliminary objection on account of non-existence of land parcel Kisumu/kochieng/4445 which neither the Appellant nor the Respondent made any reference to.
 - i. The learned trial Magistrate erred in law and fact by failing to consider and/or stating to have not considered the submissions presented before her by Counsel for the Appellant even though the same were duly filed within the timeframe provided.
 - j. The learned trial Magistrate erred in law by dismissing the preliminary objection raised without giving effect to the argument presented.
 - k. The learned trial Magistrate erred in law and in fact in failing to consider submissions and arguments of counsel for the Appellant and in failing to consider and apply case law cited which are precedents binding upon the court hence arrived at a wrong decision.
 - l. The learned trial Magistrate erred in law by failing to appreciate the import of judicial decisions and statutory provisions that were cited before her in opposition to the preliminary objection.
 - m. The learned trial Magistrate erred in law and fact in holding that the Honourable court has no jurisdiction in this matter.



- n. The learned trial magistrate erred in law by upholding a Preliminary Objection that raised points of law and fact and not pure point of law.
5. Directions were taken that the appeal be argued by way of written submissions. Written submissions dated 15th March, 2024 were filed by the firm of Gachara Adhiambo & Co. Advocates on behalf of the Appellant. Counsel framed 2 issues for determination namely;
 - a. whether or not the preliminary objection raised pure points of law.
 - b. whether the trial court had jurisdiction to hear and determine the suit.

The same issues were framed by Counsel for the Respondents vide the written submissions dated 2nd April, 2024 filed on behalf of the Respondents by the firm of Geoffrey O. Okoth & Co. Advocates. I will therefore adopt the said issues as the issues for determination herein.

Analysis and Determination

6. This This being a first appeal, the court reminds itself of the duty to re-examine and analyze the evidence placed before the trial court with a view to arrive at its own independent conclusion. See section 78 of the [Civil Procedure Act](#) and *Selle & another vs Associated Motor Boat Company Ltd & Another* (1968) IEA 123 where it was held that a court handling a first appeal is not necessarily bound to accept the findings of fact and law by the court below but has a duty to re-examine the evidence placed before the trial court.
7. The first issue for determination is whether or not the preliminary objection raised pure points of law. It was submitted on behalf of the Appellant that a Notice of Preliminary Objection ought to raise pure points of law that would not task the court to go into the facts of the case. That the points of law ought to be raised when the facts pleaded are not contested. That in the present case, the Respondents averred that the issue involves a boundary while the Appellant's position was that the dispute was on trespass. Counsel relied on the case of *Mukisa Biscuits Manufacturing Company Ltd –vs- West End Distributors Ltd* (1969) and *Oraro –vs- Mbajja* (2005)eKLR to support his submissions. That there are issues that would have to be interrogated by the court and/or are disputed by the parties namely; do the Respondents own the land parcel that is adjacent and/or share a boundary with the Appellant's parcel in dispute, what is the parcel number for the Respondents' land that borders the Appellant's, is the conflict over an encroachment or trespass, does the dispute involve boundaries that have been determined or not? That the trial court allowed the preliminary objection yet it was based on contested facts and not points of law.
8. It was submitted on this issue on behalf of the Respondents that a reading of the Notice of Preliminary Objection and the Respondents' submissions dated 22nd March 2023 show that the objection arose from the clear implications of the Appellant's pleadings. That the Appellant's suit revolves around a boundary dispute and that this may be seen from the Appellant's allegation that the Respondents had encroached and implanted themselves on a portion of the suit property. That the prayers sought in the pleadings pointed to a land boundary dispute. Counsel submitted further that the Respondents did not raise any actual issues that required an entertainment or determination and the preliminary objection did not require any adduction of evidence for authentication. That the Preliminary objection was anchored on section 18 (2) of the [Land Registration Act](#) by clear implication of the Appellant's pleadings.
9. I have keenly considered the submissions on this point and read the Notice of Preliminary objection, the pleadings and the ruling by the trial court. As held in the case of *Mukisa Biscuits* cited by both parties for a preliminary objection to succeed it must be based on pure points of law, must arise from



the pleadings, may dispose of the suit if argued as a pure point of law and must be argued on the assumption that all facts pleaded by the opposite party are correct; it cannot succeed if any fact has to be ascertained through production of evidence; or if what is sought is the exercise of the court's discretion and must not raise substantive issues from the pleadings which must be determined by the court upon consideration of the evidence. The preliminary objection herein was based on the provisions of section 18(2) of the [Land Registration Act](#). It has been submitted that the same was based on the pleadings in the plaint.

10. A copy of the plaint is on pages 24 – 27 of the record of appeal. The appellant pleaded in paragraph 3 thereof that he was the registered owner of land parcel No. Kisumu/Kochieng/4435 measuring 6.29 hectares and in paragraph 4 thereof that sometime in the year 2016 the Respondents erected structures on the suit land without the appellant's authorization and forcefully implanted themselves on the suit land, that they have persisted with the trespass and encroachment. The appellant then sought for an order of injunction, damages for trespass and an order compelling the Respondents to demolish the structures on the suit land.

11. The Defence filed by the Respondents is on page 41 of the record of appeal. The Respondents denied all the allegations in the plaint and pleaded in paragraph 6 thereof that the plaint was premature and bad in law and totally defective.

None of the parties raised the issue of a boundary dispute in the pleadings. The Respondents only denied trespassing or encroaching onto the suit land and put the appellant to strict proof.

12. In the premises, my finding is that although the preliminary objection was expressed to have been raised pursuant to the provisions of section 18(2) of the [Land Registration Act](#), the same was not supported by the pleadings that were so far before the trial court. The preliminary objection failed the test in the Mukisa Biscuits case and ought to have been disallowed.

13. The next issue framed by the parties for determination herein is whether the court had jurisdiction to hear and determine the suit.

It was submitted on behalf of the Respondent that the section 18(2) of the [Land Registration Act](#) deprives the court of first instance the jurisdiction to hear and determine boundary disputes. That the Act provides in mandatory terms that such dispute should first be submitted to the Land Registrar unless the boundaries have been determined in accordance with the Act. That it was not indicated anywhere in the Appellant's pleadings that he had raised the matter with the Land Registrar for determination of the dispute prior to him filing the present claim as required by section 19 of the [Land Registration Act](#).

14. That there is not a single document filed by the Appellant to the effect that the Land Registrar dealt with the dispute first. Counsel relied on the case of [Willis Ochola Ndege –vs- Mary Ndege \[2016\]](#) eKLR where it was held that;

“where there is clear procedure for the redress of a particular grievance prescribed by the authorities or an Act of Parliament, that procedure should be strictly followed”.

Counsel submitted that as held in the case of the owners of the Motor Vessel “Lilian S” –vs- Caltex Oil (Kenya) Ltd (1989) KLR 1 jurisdiction is everything and without it, a court has no power to make one more step irrespective of the nature or strength of the evidence in the parties' possession.

Counsel prayed that the appeal be dismissed with costs.



15. It was submitted on behalf of the Appellant that the Respondent's assertion that by virtue of being neighbors the only dispute that can be regarding land between the appellant and the Respondents boundary dispute is totally flawed.

Counsel relied on the case of Nelly Atieno Oluoch –vs- Damaris Nyawalo & 2 Others [2021]eKLR, Geoffrey Mungai Njenga & Another –vs- Registrar of Titles & Another [2021]eKLR, Jaames Achieng Osawa (Suing as Administratrix of the estate of Serfine Owiti Wandu) –vs- Nura Ramadhan [2021]eKLR.

Counsel submitted that the trial court was not barred by any provision of law from entertaining a suit based on trespass, land use and damages for trespass. That the dispute between the Appellant and the Respondent was not in the nature of a boundary dispute and that the trial court made its finding based on contested allegations of law. Counsel prayed that the ruling of the trial court be set aside.

16. I have considered the rival submissions on this issue. I have already found that the issue of boundary dispute was not apparent from the pleadings. The Appellant pleaded that the Respondents had trespassed onto his land, (the suit land herein) and erected structures thereon and sought the court's assistance to stop the trespass and remove the Respondents from the land. The Respondent's simply denied the Appellant's claim. Where a boundary dispute is demonstrated, the correct position of law contained in section 18(2) is as submitted by the Respondents.

The court will not have jurisdiction until the boundary dispute is processed as provided for under the Land Registration Act. However, my finding in respect of this case is that no boundary dispute was demonstrated. As such, there was nothing, as submitted by the Appellant that barred the trial court from entertaining the matter. It was not demonstrated that the dispute before the trial court fell within the purview of section 18 of the Land Registration Act. The dispute was within the jurisdiction of the trial court as conferred upon it by the Magistrates' Courts Act, 2015.

17. In view of the foregoing, I find that the ruling by the trial court that it had no jurisdiction to entertain the matter and the consequent orders dismissing and/or striking out the suit were erroneous.

18. The upshot is that this court finds that the appeal has merit. The appeal is hereby allowed as follows: -

- i. The ruling of the trial court dated 10th August, 2023 is hereby set aside allowing the preliminary objection and dismissing and/or striking out the suit is hereby set aside and substituted with an order disallowing the preliminary objection.
- ii. The suit in the lower court is hereby reinstated to hearing and determination on merits.
- iii. Costs of the appeal to the Appellant.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 20TH DAY OF JUNE, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

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JUDGE.

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR



In the presence of:

Maureen - Court Assistant.

No appearance for the Appellant.

Mukhongo for the Respondents.

