



**Wesonga v Mangoli & 5 others (Environment & Land Case
E010 of 2024) [2024] KEELC 4794 (KLR) (20 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4794 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE E010 OF 2024**

EC CHERONO, J

JUNE 20, 2024

BETWEEN

MARGARET WESONGA PLAINTIFF

AND

SAKHASIA MANGOLI 1ST DEFENDANT

WILLIAM SHAKHASIA 2ND DEFENDANT

JOSEPH WERE 3RD DEFENDANT

K.P.L.C 4TH DEFENDANT

THE LAND SURVEYOR BUNGOMA COUNTY 5TH DEFENDANT

THE LAND REGISTRAR BUNGOMA COUNTY 6TH DEFENDANT

RULING

1. By a Notice of Motion dated the 14th April, 2023 brought under Section 13(1), (2), (7) of the *Environment & Land Court Act*, 2011, Section 25 & 26 of the *Land Registration Act*, 2012, Article 40 & 64 of *the Constitution* of Kenya, 2010, the Applicant seeks the following orders:
 - a. Spent
 - b. Spent
 - c. That pending the hearing and final determination of this suit, an order of interlocutory injunction is hereby issued wholly restraining the 1st, 2nd, 3rd and 4th defendant/respondents their agents and, employees, or any other person acting on their directions from further entering, accessing, dealing in, trespassing into, invading and breaking into and or while thereon evicting the plaintiffs workers or demolishing the perimeter fences or in any other way



interfering with the plaintiff's quiet possession of the suit property known as Title No. West Bukusu/ North Myanga/600 situated at Bumula Subcounty within Bungoma County.

- d. The Officer commanding station Bumula Police Station to ensure compliance with the orders of this honourable court.
 - e. That this Honourable Court grants any other additional orders that it deems fit in the circumstances to protect the plaintiff and secure the interest of justice.
 - f. That the costs of this application be provided for.
2. The application is premised on grounds shown on the face of the application and the supporting affidavit of Margaret wesonga -the applicant herein sworn on 1st April, 2024.
 3. The applicant's case is that she is registered as proprietor of all that Parcel of land known as Title No. W. Bukusu/ N. Mayanga/600(the 'suit property') which she holds in trust for the beneficiaries of the estate of Raphael Wesonga(deceased) in which she is the administrator. She stated that the 1st respondent is the owner of all that parcel of land known as Title No. W. Bukusu/ N. Mayanga/599, the 2nd respondent is the owner of all that parcel of land known as Title No. W. Bukusu/ N. Mayanga/601, the 3rd respondent is the owner of all that Parcel of land known as Title No. W. Bukusu/ North Mayanga/1884 & 1816 which border the suit property.
 4. She deposed that in 2020, the 1st defendant encroached onto the road reserve between the suit property and his land while the 2nd and 3rd Defendants encroached into the suit land leading to a dispute that escalated to the area sub-chief. It is the applicant's contention that the sub-chief wrote a letter towards the settlement of the dispute. It was the plaintiff's further contention that she later escalated the dispute to the 6th respondent vide a notice of complaint dated 11th September, 2020 and a meeting was convened for 29th September, 2020. On the said date, and upon hearing the parties involved, the 5th and 6th respondents reinstated the road reserve and re-established the boundary between them and a report was prepared dated 30th November, 2020.
 5. The applicant further stated that sometime in October 2023, she visited the suit land when she noted that the 1st and 2nd defendants had over ran the road reserve between land parcel No. W. Bukusu/ N. Mayanga/599 and 601 and erected a fence in the suit land purporting the same to be a demarcation between land Parcel No. W. Bukusu/ N. Mayanga/599 and 601. She stated that this very road reserve was the subject of a dispute already resolved by the 5th and 6th respondents. The applicant stated that the 1st to 4th defendants have been grazing their cattle and planting crops on the suit property and that sometime in February, 2024 they dug holes and fixed electric poles without her consent. She stated that the recurring boundary dispute has informed this suit and urged the court to grant the orders sought.
 6. The 1st and 2nd defendant entered appearance and filed their replying affidavit dated 7th May, 2024 where they stated that this application is an abuse of the court process and that the entire suit was defective as this court does not have the jurisdiction to entertain it. It was deposed that, this being a boundary dispute, the same is a preserve of the Land Registrar and any resolution done by the surveyor in the absence of the Land registrar is null and void. It was averred that the meeting of 29th September, 2020 was presided over by two surveyors namely Emmanuel Barasa Nasongo and Maryline Wanyonyi but not the Land Registrar. It was their argument that pursuant to the registry index diagram No. 12 of W. Bukusu/N. Mayanga, there is no access road between land known as Title No. W. Bukusu/ N. Mayanga/600 and 599.
 7. The 1st and 2nd respondents equally filed a Notice of Preliminary Objection challenging the jurisdiction of this court to hear and determine this suit.



8. The applicant filed a further affidavit sworn on.15th, My, 2024 where it was stated that the issue of whether there is a boundary between land known as Title No. W. Bukusu/ N. Mayanga/599 and 600 is a matter of fact that can only be determined upon full hearing. It was further stated that the letter convening the meeting of 29th September, 2020 was from the land registrar Bungoma and indeed the County Land Registrar in the company of the county land registrar visited the dispute boundary area and reported on their findings and recommendations.
9. Directions were taken to canvass the application by way of written submissions. The applicant filed his submissions dated 23rd May, 2024. It was her submission that this court had both original and unfettered jurisdiction in all matters pertaining to the environment, land and land use within the republic of Kenya and therefore, this court cannot be lacking in jurisdiction in any manner. Reliance was placed in the case of *Owiti v Aridi & Another* [2024] KEELC 610(KLR) and *Menkar Limited v Ratilal Ghela Samat Shah & 2 Others* [2019] eKLR. The applicant equally submitted that she had met the requirements for the issuance of a temporary injunction against the 1st – 4th respondents as per the case of *Nguruman Limited v Jan Bonde Nielsen 7 2 Others* [2014] eKLR.
10. At the time of preparing this ruling, the respondents had not filed their submissions.

Legal Analysis And Determination

11. I have considered with anxious care the pleadings including the Notice of Motion application by the Applicant dated 14th April,2024, the notice of preliminary objection, the written submissions on the subject matter by the applicant, the cited authorities and the relevant provisions of the law.
12. From the materials placed before me, it is my view that the issues that commend for determination in the current application are as follows;
 - a. Whether the Court has Jurisdiction to entertain not only the subject Application, but also the entire suit.
 - b. Whether the applicant has made a case for the orders sought
 - c. Who bears the costs of the application.
13. It is important that I first begin by dealing with the issue raised as a Preliminary Objection. According to the Black's Law Dictionary, a Preliminary Objection is defined as follows:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”
14. The above legal preposition has been made graphically clear in the locus classicus case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd.* [1969] E.A. 696. Where Lord Charles Newbold P. held that a proper preliminary objection constitutes a pure points of law. The Learned Judge then held that:-“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. A preliminary Objection is in the nature of what used to be a demurer 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 in 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 the issue. The improper practice should stop”



15. The issue seeks as to determine whether this Court has jurisdiction the application under review. The of jurisdiction was also discussed in the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1. The 1st and 2nd respondent in this case argue that this court lacks jurisdiction to hear and determine this application and suit since this is a boundary dispute which is a preserve of the land Registrar. It is further their contention that the meeting of 29th September, 2020 was attended by surveyors only and the land Registrar did not visit the suit land to resolve the issue. The applicant on the other hand states that the letter convening the meeting emanated from the land Registrar and that the resultant report was ratified by the land Registrar and further that this suit is not only seeking the resolution of the boundary dispute but raises other issues that this court ought to consider.
16. Before answering the foregoing question, it is imperative to take note of the Provisions of Section 18 of the *Land Registration Act*, 2012, which 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.
17. From the foregoing provisions, it becomes apparent that this court is denied and/or deprived of jurisdiction, on matters touching on determination of boundaries before the intervention and determination of the subject boundary by the designated officer.
18. Under Section 19 of the *Land Registration Act*, 2012, the duty to fix boundaries to registered land is vested in the Land Registrar. It provides that:
- “ 19.
- (1) If the Registrar considers it desirable to indicate on a filed 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”.

19. The 1st and 2nd respondent’s argument is that the land registrar was not physically present at the time of the boundary resolution meeting. However, my understanding of the above provisions of the law is that where parties have a title and the boundaries have already been defined/fixed as can be seen in the registry index diagram number 12 of West Bukusu/Myanga produced by the respondent marked WSM-1a and the cadastral map marked MW2 by the applicant; all that was required was for the land surveyor to establish and reinstate any displaced boundaries. The land Registrar only comes in where boundaries have not been defined. I associate myself with the findings in the case of [Fredrick Ngaya Thuo v. Peter Mungai Njuho](#) [2017] eKLR, where the trial court was faced with a similar issue and stated thus;

“It is not in doubt that the two parcels of land are registered and each piece has its own distinct title deed with measurements. There is also a surveyor’s report dated 12th April 2017, which shows that L.K. Ngetich, the County Surveyor, Kiambu went to the ground to re-state the boundary between Kikuyu/Kikuyu Block 1/819 and

820. From the above letter, it shows that the boundary for the two parcels of land had been fixed. Section 18 (2) of the [Land Registration Act](#) applies where the boundaries have not been fixed. However, in this instant case, the respective parcels of land have their boundaries clearly demarcated and fixed as per the letter of L.K Ngetich, the County Surveyor. The Registrar would have jurisdiction where the boundaries have not been fixed. In the instant case, the boundaries have been fixed and therefore the Court has jurisdiction.”
Emphasis added.

20. Further, I agree with the applicant herein that the way the prayers are couched, no specific prayer for determination of a boundary dispute has been sought, even if it would perhaps become necessary to involve a land Registrar to produce documents regarding those parcels of land that would point out the beacons so as to establish those claims. I do not think that the jurisdiction of the ELC is deprived especially where the issues in dispute are intertwined with others. I say so because the material before the court does not demonstrate that this is purely a boundary dispute. See [Menkar Limited v Ratilal Ghela Samat Shah & 2 Others](#) [2019] eKLR which is a binding Court of Appeal decision.
21. From the foregoing therefore, I find the 1st and 2nd respondents’ Preliminary objection devoid of merit and proceed to dismiss the same.
22. Turning to the orders sought in the Notice of Motion Application, the applicant prays for temporary injunctive and security orders. To be able to attract an Order of temporary injunction, the Plaintiff/Applicant must establish the principles set out in the case of [Giella v Cassman Brown](#) [1973] EA 358 as well as the case of [Nguruman v Jan Bonde Nielsen & 2 Others CA](#) No. 77 of 2012 [2014] eKLR where the Court of Appeal held that;

in an interlocutory injunction application the Applicant has to satisfy the triple requirements to a) establishes his case only at a prima facie level, b) demonstrates irreparable injury if a temporary injunction is not granted and c) ally any doubts as to b, by showing that the balance of convenience is in his favour.

These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states



are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”.

23. Consequently, the applicant ought to, first, establish a prima facie case. The applicants submitted that they have established a prima facie case and relied on the judicial decision of *Mrao Ltd v First American Bank of Kenya Ltd* [2003] EKLR in which the Court of Appeal gave a determination on a prima facie case. The court stated that:

“... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

24. Nevertheless, it is important to note that a prima facie case, must be one that establishes some semblance of triable issues, for which a court of law is obliged to carry out and/or investigate the infringement complained about, with a view to determining the rights of the Parties. In support of their application, the applicant has attached a certificate of search to the suit property where a registered owner together with others who are beneficiaries of the estate of Raphael Wesonga.

25. Secondly, The Plaintiff has to demonstrate that irreparable injury will be occasioned to them if an order of a temporary injunction is not granted. The judicial decision of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR provides an explanation for what is meant by irreparable injury and it states;

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.

26. The applicant stated that the respondents have erected a fence in the suit property, are grazing their cattle thereon and have planted eucalyptus trees and sweet potatoes denying her and the other beneficiaries the use of the land and hindering the sub-division process in compliance with the orders of the succession court.

27. Thirdly, where the court is in doubt, the Plaintiffs have to demonstrate that the balance of convenience tilts in their favour. In the case of *Paul Gitonga Wanjau v Gatbuthis Tea Factor Company Ltd & 2 others* [2016] eKLR, the court dealing with the issue of balance of convenience expressed itself thus:-

“Where any doubt exists as to the Applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies.”



28. The decision of *Amir Suleiman v Amboseli Resort Limited* [2004] eKLR where the learned judge offered further elaboration on what is meant by “balance of convenience” and stated;
- “The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice.”
29. Bearing this in mind, I am convinced that there is a lower risk in granting orders of temporary injunction than not granting them, as I wait to hear the suit on its merits. I am convinced that if orders of temporary injunction are not granted in this suit, the suit property might be in danger of being dealt in the manner set out in the application and apprehended by the Applicant.
30. In view of the foregoing, I find that the Applicants have established the conditions for the grant of the temporary injunction orders. The order for security as sought is also allowed for purposes of ensuring peace prevails as the orders are implemented.
31. On the issue of costs; section 27 of the *Civil Procedure Act* provides that costs shall follow the event. The successful party shall ordinarily have costs.
32. Consequently, I issue the following consequential orders;
- a. Pending the hearing and final determination of this suit, an order of injunction be and is hereby issued restraining the 1st, 2nd, 3rd and 4th defendant/respondents their agents and, employees, or any other person acting on their directions from further entering, accessing, dealing in, trespassing into, invading and breaking into and or while thereon evicting the plaintiffs workers or demolishing the perimeter fences or in any other way interfering with the plaintiff’s quiet possession of the suit property known as Title No. West Bukusu/ North Myanga/600 situated at Bumula Subcounty within Bungoma County.
 - b. The Officer commanding station Bumula Police Station to ensure compliance with the orders of this honourable court.
 - c. Costs of the application shall be in the cause.
33. It is so ordered.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 20TH DAY OF JUNE, 2024.

HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. Nakhone for the Applicant/plaintiff

2. Mr. Oira H/B for Wamalwa Simiyu for the Respondents/Defendants

3. Bett C/A

