



REPUBLIC OF KENYA



Karura Umoja Investment Company Limited v Mbiyu (Environment & Land Case 518 of 2017) [2024] KEELC 4623 (KLR) (10 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4623 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 518 OF 2017**

**BM EBOSO, J
JUNE 10, 2024**

BETWEEN

KARURA UMOJA INVESTMENT COMPANY LIMITED PLAINTIFF

AND

ELIZABETH WAMAITHA MBIYU DEFENDANT

RULING

1. The plaintiff initiated this suit against the defendant through a plaint dated 9/5/2017. The plaintiff's case is that it is the registered proprietor of land parcel number IR No 115835 LR 10821/8, located in Thika Municipality, measuring approximately 12.05 hectares [hereinafter referred to as ["the suit land"]]. The plaintiff claims that in April 2017, the defendant "invaded or encroached" on the suit land and commenced construction of a perimeter fence on plot numbers 366 and 364 located within the suit land. The plaintiff adds that the defendant's actions are not only "fraudulent but also injurious" to its shareholders. The plaintiff seeks the following reliefs against the defendant:
 - (i) an order that the defendant be evicted and permanently restrained from invading, constructing on or in any other manner interfering with the plots; and
 - (ii) costs of the suit and interest thereon.
2. The defendant entered appearance and filed a defence dated 12/6/2017. The defendant's case is that her husband, one Gerald Wanjohi Ndirangu, is a shareholder in the plaintiff company. She adds that her husband is the owner of plot number 362 which is a portion of the suit land, having purchased it from one John Mwaniki at a consideration of Kshs 210,000 vide an agreement for sale dated 13/7/1999. She contends that they jointly took possession of plot number 362 and lived on the building erected on the plot for one year before moving to Nairobi and leaving the building under the custody of their friends, Duncan Maina and Wambui, who were a couple. She adds that in 2007, upon the death of Duncan Maina and upon Wambui subsequently moving out of the said building, the plaintiff approached



her husband and requested to rent out two rooms in the building. The defendant contends that the plaintiff breached the tenancy agreement by failing to pay the agreed monthly rent of Kshs 1,000 thereby compelling the defendant's husband to evict the plaintiff in August, 2011 with the help of the Area Chief, one Muchiri Muiruri. The defendant adds that the plaintiff's suit is an attempt to defraud them of their plot.

3. Subsequent to filing the defence, the defendant brought a notice of preliminary objection dated 18/10/2023, seeking an order striking out this suit on the ground that this Court lacks jurisdiction to adjudicate the suit given that the issue for determination in the suit relates to a boundary dispute. The preliminary objection is the subject of this ruling. The preliminary objection was canvassed through oral submissions in the virtual court on 22/2/2024.
4. The case of the defendant is that it is clear from the plaint that the suit relates to a boundary dispute. The defendant contends that this Court lacks jurisdiction to entertain the suit. It is the case of the defendant that Section 18 of the *Land Registration Act* ousts the jurisdiction of this Court. She adds that the dispute in the suit ought to have been referred to and disposed by the Land Registrar.
5. The plaintiff/respondent opposed the preliminary objection through oral submissions tendered in the virtual court on 22/2/2024. The case of the plaintiff is that it is the owner of the suit property which has not been formally surveyed. However, there exists an informal sub-division scheme. The plaintiff contends that the defendant is a trespasser. The plaintiff further contends that the issue for determination before the court is not a boundary dispute. It adds that the issue raised in the preliminary objection does not meet the threshold of a preliminary objection because the Court will be required to ascertain certain facts before making a determination.
6. I have considered the objection and the oral submissions tendered. I have also considered the relevant legal frameworks and jurisprudence. The two questions which fall for determination in this ruling are: (i) Whether the issue raised in the preliminary objection satisfies the threshold of a preliminary objection; and (ii) Whether the dispute in this suit is one that is subject to the provisions of Section 18 of the *Land Registration Act*. I will dispose the two issues sequentially in the above order.
7. The question as to what qualifies to be canvassed as a preliminary objection was defined in the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributor Ltd* [1969] E.A 696, by Law JA as follows:

“So far as I am aware, 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.”
8. On his part, Newbold, President, defined a preliminary objection in the above case as follows:

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 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 the issue. The improper practice should stop”
9. The gist of the point which the defendant canvassed as a preliminary objection is that the dispute in this suit is a boundary dispute, hence the jurisdiction of the court has been ousted by the provisions of Section 18 of the *Land Registration Act*.



10. Section 18 of the [Land Registration Act](#) provides as follows:

“ 18

- (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.
- (3) 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).

11. A reading of the above framework reveals that, the jurisdiction of the courts are ousted by the existence of the following two key elements: (i) the fact that the land subject matter of the dispute has been registered; and (ii) the absence of a note or an entry in the land register indicating that the boundaries of the parcel have been determined and fixed by the Land Registrar. The framework presupposes that a party alleging absence of jurisdiction on part of the court has an obligation to place before the court evidence showing that the land subject matter of the dispute has been registered and that the relevant land register does not have an entry denoting a determination of the boundaries of the said land. Demonstration of the above elements requires evidence of registration and evidence of all the obtaining entries or notes in the relevant land register. The above evidence has not been placed before this court by either of the two parties.
12. Consequently, it is the finding of this court that to demonstrate the above elements, the objector is expected to place before the court a formal application supported with an affidavit exhibiting the above evidence. It therefore follows that, in the circumstances of this case, the point which the defendant canvassed cannot be raised as a preliminary objection. Put differently, the issue raised in the preliminary objection does not satisfy the threshold of a preliminary objection. It is a point which require proof by way of documentary evidence.
13. In the absence of a proper platform in the form of a formal application anchored on an affidavit, the merits of the point will not be considered. The preliminary objection was inappropriately raised and stands to be struck out. The defendant will, however, be at liberty to canvass the point on the platform of a formal application. Consequently, this court will refrain from making a determination on the second issue at this point.
14. In the end, the preliminary objection dated 18/10/2023 is struck out on the ground that the point raised through the preliminary objection cannot be effectually canvassed through a preliminary objection. The defendant shall bear costs of the preliminary objection.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 10TH DAY OF JUNE
2024**

B M EBOSO

JUDGE

Court Assistant:

