



Purkoret Holdings Limited v Ondari (Suing as the Legal Representative of the Estate of Mary Nyangiri Ondari) & 3 others (Environment and Land Appeal E007 of 2023) [2024] KEELC 5509 (KLR) (25 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5509 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT AND LAND APPEAL E007 OF 2023
CG MBOGO, J
JULY 25, 2024
SUING AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF MARY NYANGIRI ONDARI**

BETWEEN

PURKORET HOLDINGS LIMITED APPELLANT

AND

JUDY KEMUNTO ONDARI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MARY NYANGIRI ONDARI) 1ST RESPONDENT

DISTRICT LAND SURVEYOR NAROK 2ND RESPONDENT

DISTRICT LAND REGISTRAR NAROK 3RD RESPONDENT

HON. ATTORNEY GENERAL 4TH RESPONDENT

(Being an appeal from the ruling of the Chief Magistrates Court at Narok delivered by Hon. S. Mungai on 6th September, 2023 in Narok CMELC No. E072 of 2022)

JUDGMENT

1. The appellant herein, being aggrieved by the ruling of Hon. S. Mungai delivered on 6th September, 2023 in CMELC no. E072 of 2022, has appealed against the ruling vide the memorandum of appeal dated 5th October, 2023 on the following grounds: -
 1. That the learned trial magistrate erred by dismissing the appellant's notice of preliminary objection that was backed with sufficient legal provisions and established judicial precedents yet it was clear that the only inevitable order deserving in the circumstances of the case was the one of upholding the appellant's notice of preliminary objection.



2. That the learned trial magistrate erred in misconstruing the appellant's notice of preliminary objection and treating it as an issue of joinder or misjoinder of the parties yet it was clear from the pleadings of both the appellant and the 1st respondent that any question touching on the ownership of the property and or execution of the decree in the matter Narok ELC Case 20 of 2017 (Formerly Narok HCCC No. 308 of 2011); Purkoret Holdings Limited versus Njogu & 2 Others ought to be ventilated in the aforesaid matter and not through a separate suit pursuant to the provisions of Section 34 of the Civil Procedure Act, Chapter 21 Laws of Kenya.
 3. That the learned trial magistrate erred in dismissing the appellant's notice of preliminary objection by failing to appreciate that the law applicable when the suit Narok ELC Case 20 of 2017 (Formerly Narok HCCC No. 308 of 2011); Purkoret Holdings Limited versus Njogu & 2 Others was(sic) initiated was not Land Act since by that time the Land Act had not been enacted/ amended and there were no equivalent/ similar provisions of Section 152A-152I of the Land Act in the Registered Land Act when the aforesaid suit Narok ELC Case 20 of 2017 (Formerly Narok HCCC No. 308 of 2011); Purkoret Holdings Limited versus Njogu & 2 Others was instituted.
 4. That the learned trial magistrate erred by dismissing the appellant's notice of preliminary objection without giving any justification of departing from the legal/statutory and judicial precedents cited by the appellant thus brought the hallowed principle of stare decisis in our common law jurisdiction to disarray.
 5. That the learned trial magistrate erred both in law and in fact by disregarding the written submissions filed by the appellant; failing to appreciate the law and judicial precedents and hence coming to the wrong conclusion on the appellant's notice of preliminary objection noting the circumstances of this case.
2. The appellant prays for the following orders: -
 - a. That this appeal be allowed and the lower court's ruling delivered on 6th September, 2023 be set aside in entirety and substitute thereat with an order allowing or upholding the appellant's notice of preliminary objection dated 3rd January, 2023 in the trial court.
 - b. Costs in this court and the trial court be paid by the respondents.
 3. The grounds of appeal were canvassed by way of written submissions. The appellant filed its written submissions dated 25th June, 2024, where it raised one issue for determination which is whether the trial court was right in dismissing the appellant's notice of preliminary objection or not.
 4. On this issue, the appellant submitted that the trial court did not have direct jurisdiction to grant an eviction order as provided under Section 152B, 152E and 152F of the Land Act, as the said legal provision provides an elaborate process that ought to be followed when one intends to evict another from a private land. The appellant relied on the cases of Mukisa Biscuit Manufacturing Co. Ltd versus West End Distributors Ltd (1969) EA 696, David Nyekorach Matsanga & Another versus Philip Waki & 3 Others [2017] eKLR and Renom Agency Limited versus Muthoga Gaturu & Company Advocates & 3 Others [2016] eKLR.
 5. The appellant submitted that the 1st respondent failed to follow the procedure of getting an eviction order from the court by inter alia failing to issue and serve a notice as contemplated by Section 152E of the Land Act. The appellant further submitted that it could not have sought for an eviction order in the matter Narok ELC Case No. 20 of 2017, Purkoret Holdings Limited versus Njogu & 2 Others, for the reason that by the time the suit was filed in the year 2011, there were no similar provisions like



Section 152E of the Land Act. Further, it was submitted that the trial court does not have jurisdiction to grant a direct eviction order as prayed in prayer (c) of the plaint for the reason that the 1st respondent has failed to comply with the mandatory procedure provided in law when one intends to evict a person from private land.

6. The appellant submitted that the trial court does not have jurisdiction to grant the 1st respondent an order compelling the 2nd and 3rd respondents to carry out survey works as prayed in prayer (b) of the plaint. Further, it was submitted that in seeking this prayer, it implies that the 1st respondent does not know where his properties are situated on the ground. It was further submitted that the reading of Sections 18 and 19 of the Land Registration Act ousts the jurisdiction of the trial court to entertain matters pertaining to survey and boundary works. Reliance was placed in the cases of *Azzuri Limited versus Pink Properties Limited* [2018] eKLR, *Estate Sonrisa Ltd & Another versus Samuel Kamau Macharia & 2 Others* [2020] eKLR, *George Kamau Macharia & Dexha Limited* [2019] eKLR and *Willis Ochola versus Mary Ndege* [2016] eKLR.
7. With regard to the assumption that what is pleaded in the plaint is true when considering a preliminary objection, the appellant submitted that the 1st respondent admits in her pleadings that they were evicted from Cis-Mara/Oleleshwa/17392 pursuant to a judgment delivered by this court in ELC Case No. 20 of 2017. Further, it was submitted that it is not disputed that the said property emanates from Cis-Mara/ Oleleshwa/ 249, registered in the name of Simintei Ole Sadera, and subdivided to Cis-Mara/ Oleleshwa/ 4015 and 4016 which were later transferred to his wife Natana Enole Sadera. The appellant submitted that the 1st respondent has not indicated if, and when the boundary dispute between the two land parcels were ever resolved. Further, it was also submitted that as per the finding of the Surveyor's report dated 25th March, 2012, it was recommended that the matter be treated as a land claim as opposed to a boundary dispute, which this court relied upon in arriving at its decision in ELC Case No. 20 of 2017.
8. The appellant submitted that after this court had issued its orders in the matter ELC Case No. 20 of 2017, it was improper for the 1st respondent to purport to file this suit in the trial court, and obtain orders parallel to those issued by this court. Further, it was submitted that as provided under Section 34 of the Civil Procedure Act, any issue of execution of the said judgment ought to be raised in ELC Case No. 20 of 2017 and not through filing a separate suit. That if at all, the 1st respondent was offended by the execution of the judgment, the proper forum to address her grievance would be to seek to be enjoined or file objection proceedings in ELC Case No. 20 of 2017.
9. Further, the appellant submitted that if the trial court proceeds to hear the matter and arrive at a different conclusion, there would be conflict, and the parties as well as the court would not be in a position to reconcile two parallel decisions.
10. The 1st respondent filed her written submissions dated 5th July, 2024 where she raised four issues for determination as listed below: -
 1. Whether the trial court has direct jurisdiction to grant an eviction order against the appellant.
 2. Whether the trial court has jurisdiction to grant the 1st respondent an order compelling the 2nd and 3rd respondents to carry out survey work as prayed in prayer b in the plaint.
 3. Whether the 1st respondent should have sought to be enjoined in ELC Case No. 20 of 2017 since the execution of the said judgment dated 19th May, 2022 is what aggrieved her as opposed to filing a separate suit as she has done presently.



4. Whether the trial court lacks jurisdiction to hear and determine the 1st respondent's suit and the notice of motion dated 12th October, 2022 as it offends the mandatory provisions of Section 34 of the *Civil Procedure Act*.
11. On the first issue, the 1st respondent submitted that in its preliminary objection, the appellant introduced the provisions of Section 152E of the *Land Act*, and that in construing the said legal provisions, it is clear they refer to the procedural requirements anticipated in law before a legal owner of property embarks on evicting an unlawful occupier. She submitted that Section 152E of the *Land Act* will come into operation once the rights of the parties to the current suit have been determined by the trial court, and that the argument is premature at this stage. She submitted that Section 152E will be invoked at the point of execution of the judgment and decree of the trial court. Reliance was placed in the cases *Atik Mohamed Omar Atik & 3 Others versus Joseph Katana & Another* [2019] eKLR and *Solome Naliaka Wabwile versus Alfred Okumu Musinaka* [2022] eKLR.
12. On the second issue, the 1st respondent submitted that Section 19 (2) of the *Land Registration Act* is clear that the 3rd respondent has an obligation to inform persons of the adjoining parcels of land before he can conduct an exercise aimed at ascertaining and fixing the boundaries of a certain parcel of land upon application by a party. That in the present case, the 3rd respondent never issued any valid notice to her father to attend the boundary verification exercises despite the fact that it paid several visits on land parcel no. CisMara/ Oleleshwa/ 4015, 17388,17389 and 17390. She submitted that owing to this critical oversight by the 3rd respondent, the boundary verification exercises conducted by the 2nd and 3rd respondents was done in their absence despite requiring all neighbours to be notified.
13. The 1st respondent further submitted that pursuant to Section 18 (2) of the *Land Registration Act*, this court has jurisdiction to entertain the current suit, and make such orders as are just in defining land parcel no. CisMara/ Oleleshwa/ 117388, 17389, 17390. Further, she submitted that the boundaries of the appellant's parcel of land were clearly defined by the 2nd and 3rd respondents but they never made any confirmation to the effect that the 1st respondent's parcel of land had occasioned any encroachment on their land. She submitted that at the time of making any findings in ELC Case No. 20 of 2017, there never existed any boundary dispute between the proprietor of parcel CisMara/ Oleleshwa/ 4015 and 267. Further, she went on to submit that there is no outstanding boundary dispute between the appellant and the proprietor of CisMara/Oleleshwa/4015 as the same would have hindered any mutations being registered and subsequent issuance of any certificate of title.
14. While relying on the cases of *Fredrick Otieno Obonyo versus Gilbert Otieno Nyanjom & Another* [2018] eKLR, and *Shadrack Korir versus Felix Kipkemboi Simei & 2 Others* [2020] eKLR, the 1st respondent submitted that she has every legal right to approach this court seeking for orders directed to the 2nd and 3rd respondents to conduct a boundary verification exercise since its boundaries have already been determined.
15. On the third issue, the 1st respondent submitted that she was not a party to ELC Case No. 20 of 2017, and thus was not accorded any opportunity to be heard on merit in the suit. Further, it was submitted that it defeats logic why the appellant chose to execute its judgment against the 1st respondent whom it never even issued with a valid legal notice of eviction but proceeded to trespass, and fully occupy his properties with impunity occasioning enormous loss. It was also submitted that it was prudent for the appellant to enjoin them if it deemed it necessary in order to determine the dispute substantively when it formed the opinion that the 1st respondent had encroached into its property CisMara/ Oleleshwa/ 267. The 1st respondent relied on the cases of *Lilian Wairimu Ngatho & Another versus Moki Savings*



Co-operative Society Limited & Another [2014] eKLR and Kenya Power & Lighting Company Limited, Civil Application No. Nai 174 of 2005 (UR).

16. On the fourth issue, the 1st respondent submitted that Section 34 of the Civil Procedure Act which applies to parties who were in the same suit and not the present case. Reliance was placed in the case of Nyanza Sugar co. Limited versus Alfred Sagwa Mdeiii t/a Pave Auctioneer [2010] eKLR.
17. I have considered the grounds of appeal, and the written submissions filed by the appellant and the 1st respondent. In my view, the issue for determination is whether the appeal has merit.
18. This is a first appeal and the law is that this court is entitled to revisit the evidence on record, evaluate it and arrive at its own conclusion. Often times, an appellate court will not interfere with the findings of fact by the trial court unless they were based on no evidence at all, or were arrived at on a misapprehension of it or the trial court is shown to have acted on wrong principles in arriving at those findings as it was held in Mwanasokoni versus Kenya Bus Service Ltd 1982 – 88 I KAR 278.
19. The 1st respondent filed a plaint dated 12th October, 2022 seeking the following orders: -
 - a. An order of injunction against the 1st defendant by themselves, their servants and/or agents from entering, disposing off or in any way interfering with land parcel no CisMara/Oleleshwa/17392.
 - b. An order of mandatory injunction compelling the 2nd and 3rd defendants to conduct such survey works responsible in defining and designating the boundaries or limits land area and affixing such survey mark as are accurate in defining land parcel no. CisMara/Oleleshwa/17392.
 - c. An order of eviction against the 1st defendant on land parcel no. CisMara/ Oleleshwa/ 17392.
 - d. An award of special damages of KES 13,000,000 for loss and damage occasioned by the 1st defendant as a result of illegal demolitions on the plaintiff's late father's property CisMara/Oleleshwa/ 17392.
 - e. An award of special damages for loss of rental income of KES 60,000 per month as a result of illegal demolitions occasioned by the 1st defendant on the plaintiff's late father's property on land parcel no. CisMara/ Oleleshwa/ 17392.
 - f. An award of general damages for trespass by the 1st defendant.
 - g. An award of exemplary damages for psychological harm occasioned by the 1st defendant's act of violation of the plaintiff and her family's constitutional right to property owing to the sudden illegal demolitions.
 - h. Costs and interest of this suit.
 - i. Any other relief that this honourable court may deem fit.
20. The plaint was accompanied by the relevant supporting documents as well as an application for injunction dated 12th October, 2022 filed under a certificate of urgency. The appellant herein filed a memorandum of appearance dated 24th October, 2022 and subsequently filed a notice of preliminary objection dated 3rd January, 2023.
21. The appellant filed its statement of defence dated 3rd January, 2023 together with the said notice of preliminary objection dated 3rd January, 2023 challenging the plaint and the notice of motion dated 12th October, 2022 on the following grounds: -



1. That this honourable court does not have direct jurisdiction to grant an eviction order and granting the same shall amount to violations of Sections 152A-152F of the Land Act and the 1st defendant shall be relying on the decision of Speaker of National Assembly versus Njenga Karume (2008) 1KLR and the decision of Peter Muturi Njuguna versus Kenya Wildlife Service Nakuru Civil Appeal No. 260 of 2013 [2017] eKLR where the Court of Appeal held that courts have no direct jurisdiction in such matters and that the procedure set out in the Act must be followed. The court stated:

“From the foregoing, it is abundantly clear to us that where there is specific procedure as to the redress of grievances, the same ought to be strictly followed.”

2. That this honourable court does not have direct jurisdiction to compel the 2nd and 3rd defendants to conduct survey work relating to defining and designation of boundaries and granting the same shall amount to violations of Sections 18-19 of the Land Registration Act, and the 1st defendant shall be relying on the decision of Diana Kethi Kilonzo versus IEBC & 2 Others, Constitutional Petition No. 359 of 2013 where it was held that:

“We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities.”

3. That this honourable court does not have direct jurisdiction to hear and determine the plaintiff's suit and the notice of motion application dated 12th October, 2022 and proceeding to hear the same is an illegality as it violates mandatory provisions of Section 34 of the Civil Procedure Act which provides that:

34. Question to be determined by court executing decree

1. All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

Accordingly any question touching on the ownership of the property and or execution of the decree in the matter Narok ELC Case 20 of 2017 (Formerly Nakuru HCCC No. 308 of 2011); Purkoret Holdings Limited v Njogu & 2 Others ought to be ventilated in the aforesaid matter and not through a separate suit.

4. That the applicants present application and the suit is procedurally fatal, illegal, misconceived, bad in law, untenable and an abuse of this honourable court's process, thus the same should be struck out with costs to the 1st defendant/ respondent.

22. The notice of preliminary objection was canvassed by way of written submissions, and a ruling delivered in respect to the preliminary objection on 6th September, 2023. Aggrieved by the said ruling, the appellant filed the instant appeal.



23. A Preliminary Objection was described in the Mukisa Biscuits Manufacturing Co. Ltd versus West End Distributors Ltd (1969) EA 696 to mean: -

Per law, JA

“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. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

Further Sir Charles Newbold, P 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 the facts pleaded by the other side are correct. It cannot be raised if any fact had 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”.

24. A preliminary objection cannot be raised if any facts have to be ascertained from elsewhere or the court is called upon to exercise judicial discretion. In the case of Quick Enterprises Ltd versus Kenya Railways Corporation, Kisumu HCCC No.22 of 1999, the court held that:

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

25. In applying the principles cited in the above authorities, the trial court needed to confine itself to the pleadings and in doing so, determine issues which raise pure points of law and refrain from exercising discretion. Having looked at the preliminary objection dated 3rd January, 2023, grounds 1 and 2 are issues which in my opinion are disputed as it can be seen from the plaint and the appellant’s statement of defence. Also, and upon conclusion of the matter if at all, these are issues which the court would have had the chance to properly address itself on the same in its judgment. In other words, the said grounds 1 and 2 contain issues based on facts and which would require evidence to ascertain the same.

26. However, the trial court seemed to have failed to pronounce itself on ground 3. The trial court in its ruling made general observations to an extent of dealing with issues not raised or submitted by the parties.

27. Paragraph 18 of the ruling observed as follows: -

“The applicant has admitted that the respondent is not party in the matter which is now pending before the Court of Appeal. Its argument that she ought to advance her interest in the other matter cannot hold sway considering the fact that the matter has already been heard and determined. In the case of Mayfair Holdings Ltd vs Municipal Council of Kisumu [2020] eKLR where the application was made after judgment had been entered the court held that a joinder can only be made during the pendency of a suit. The argument by the applicant has therefore been overtaken by events.”

28. Bearing in mind that a preliminary objection determines facts that are not disputed by either party, it is my finding that the court ought to have pronounced itself ground 3 of the preliminary objection.



29. Section 34 of the *Civil Procedure Act* provides,

“

- “(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.
- (2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.
- (3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.

Explanation.—For the purposes of this section, a plaintiff whose suit has been dismissed, and a defendant against whom a suit has been dismissed, are parties to the suit.”

30. Bearing in mind that for successful determination of a preliminary objection, the same ought to stem from the pleadings and contain undisputed fact. In determining ground 3 of the objection, my attention was drawn to the pleadings in the plaint and the appellant’s statement of defence.

31. Paragraph 15 of the plaint dated 12th October, 2022 reads: -

“However despite the 1st defendant’s failure to enjoin the plaintiff’s late father in ELC Suit No. 20 of 2017 it proceeded to instruct its auctioneers to execute the decree of the court on the ground wherein the said auctioneers known as SENAME AUCTIONEERS proceeded to take over the plaintiff’s property and completely demolished a permanent house that had rental units in it before proceeding to fence it off claiming its part of land parcel no. CisMara/Oleleshwa/ 267 which belongs to the 1st defendant.”

32. Paragraph 10 of the appellant’s statement of defence dated 3rd January, 2023 which reads as follows: -

“Further to paragraph 3,4,5,6,7,8 and 9 above and in response to paragraph 15,16,18,19,20,21,22,23,24 and 25 of the plaint; the 1st defendant states that after it obtained judgment in its favour and after complying with the legal procedure including but not limited to serving of the Notice of Entry of Judgment and the Decree on the Defendant and the defendant’s servants, agents and or employees in the matter Narok ELC Case 20 of 2017 (Formerly Nakuru HCCC No. 308 of 2011); Purkoret Holdings Limited V Njogu & 2 Others, some of the parties vacated the 1st defendant’s property land parcel Title Number Cis-Mara/Oleleshwa/267 and some declined to vacate necessitating the 1st defendant to move the court in Narok ELC Case 20 of 2017 (Formerly Nakuru HCCC No. 308 of 2011); Purkoret Holdings Limited V Njogu & 2 Others which issued an order on 14th July, 2022 directing and or ordering Senema Auctioneers to implement the court’s decree issued on 30th May, 2022 and the court further directed that the Officer Commanding Narok Police Station to provide security and ensure that its decree is complied with. If any person was evicted, it was pursuant to the orders of the court which are still in force to date and if any person had a problem in the manner in which the court decree/order was executed, he needs to move the court that issued the decree and not this honourable court.”



33. The paragraphs cited above contained facts which were pleaded by the 1st respondent and admitted rightly so by the appellant which facts were not disputed. The trial court needed to address the issue of a party who has been affected by the execution processes and who was not a party to the suit in ELC Case No. 20 of 2017. In this case, and looking at the provisions of Section 34 of the Civil Procedure Act, the 1st respondent ought to have filed objection proceedings before the court where the decree emanated from. This would have been possible by filing an application seeking to come on record after judgment had been delivered on the interest that the said execution affects their land. This court would then in the objection proceedings proceed to determine whether the execution in terms of boundary, touched or affected their parcel of land.
34. Arising from the above, I find merit in the memorandum of appeal dated 5th October, 2023, in the following terms;
- i. That the appeal is hereby be allowed and the ruling delivered on 6th September, 2023 is hereby be set aside.
 - ii. The notice of preliminary objection dated 3rd January, 2023 is upheld and succeeds on ground 3.
 - iii. Costs of the appeal is awarded to the appellant.

Orders accordingly.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 25TH DAY OF JULY, 2024.

HON. MBOGO C.G.

JUDGE

25/07/2024.

In the presence of: -

Mr. Meyoke Pere – C.A

