



REPUBLIC OF KENYA



**SBI International Holdings v Ochieng & another; Obado (Third party) (Environment and Land Appeal E076 of 2021) [2024] KEELC 6183 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6183 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL E076 OF 2021  
E ASATI, J  
SEPTEMBER 26, 2024**

**BETWEEN**

**SBI INTERNATIONAL HOLDINGS ..... APPELLANT**

**AND**

**GERESON ODONGO OCHIENG ..... 1<sup>ST</sup> RESPONDENT**

**GRACE AKINYI OCHIENG ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**EDWIN OBADO ..... THIRD PARTY**

*(Being an Appeal arising from the ruling in Kisumu CM  
EL Case No. 353 of 2018 delivered on 27th May 2021)*

**JUDGMENT**

**Introduction**

1. Vide the Memorandum of Appeal dated 18<sup>th</sup> October, 2021 the Appellant SBI International Holdings, appealed to this court against the Ruling dated 27<sup>th</sup> May, 2021 in respect of the Appellant's Notice of Motion application dated 14<sup>th</sup> February, 2020 in Kisumu CMC Environment & Land Case No.353 of 2018 (the suit).
2. A brief background of the appeal as can be gathered from the record of appeal is that the Appellant is the Defendant in the suit. The Respondents vide the plaint dated 12<sup>th</sup> June, 2018, sued the Appellant claiming that the Appellant had encroached onto their land parcel No. Kisumu/Kogony/6298 carried out excavation thereon thereby rendering a portion of the said land unusable and unsuitable for home or economic use. The Plaintiffs sought for an order of permanent injunction, a declaration, damages and costs.



3. The record shows that in the pendency of the suit, the Appellant filed an application dated 14<sup>th</sup> February, 2019 seeking that the amended plaint dated 21<sup>st</sup> November, 2019 be struck out for want of jurisdiction. The application was heard before the trial court and by its ruling dated 27<sup>th</sup> May, 2021, the court found that the application lacked merit and dismissed it with costs to the Respondents.
4. Aggrieved by the ruling, the Appellant preferred the present appeal on the grounds that: -
  - a. the learned Magistrate erred in law and in fact and ended up misdirecting himself by holding that the Defendant/Applicant's application dated 14<sup>th</sup> February, 2020 lacks merit and further directing that the application be dismissed with costs.
  - b. the learned Magistrate misconstrued the law and its application to the facts of the case and thereby ended up misdirecting himself by dismissing with costs the Defendant's application dated 14<sup>th</sup> February, 2020.
  - c. the learned Magistrate erred in law and fact and misinterpreted the application of law as espoused in section 18(2) of the Land Registration Act Chapter 300 of the Laws of Kenya to the facts as presented in the Defendant/Applicant's application dated 14<sup>th</sup> February, 2020.
  - d. the learned Magistrate erred in law and in fact by failing to strike out the Plaintiff's suit as directed by the mandatory provisions of section 18(2) of the Land Registration Act Chapter 300 of the Laws of Kenya and instead took into consideration, the inferior provisions of Order 2 Rule 15(1) of the Civil Procedure Rules to infer jurisdiction to handle the matter.
  - e. the learned Magistrate erred in law and fact by inferring that it has the jurisdiction to adequately and conclusively adjudicate over the suit filed herein by the Respondents contrary to the mandatory provisions of Section 18(2) of the Land Registration Act Cap 300 of the Laws of Kenya that bars any court from entertaining a suit over disputes on boundaries.
  - f. the learned Magistrate erred in law and fact by taking into consideration extraneous matters not before him and ended up misdirecting himself and ultimately made the wrong conclusion based on the facts and the law presented and unjustifiably dismissed the Defendant/Applicant's application.
  - g. the learned Magistrate erred in law and in fact and failed to take an inference that the entire suit was over the extent of the boundaries of the parcels of land and further failed to take judicial notice that there were existing court orders served upon the County Surveyor to delineate the boundaries of the two parcels of land which is yet to be acted upon and therefore misdirected himself by dismissing the Defendant's application.
  - h. the learned Magistrate erred in law and in fact by making a finding that the dispute herein ought not to have been referred to the Land Registrar for resolution and instead assumed jurisdiction of the Land Registrar contrary to the mandatory provisions of section 18(2) of the Land Registration Act Chapter 300 of the Laws of Kenya.
  - i. the learned Magistrate misdirected himself by not appreciating the fact that the Land Registrar was better placed to adjudicate over the matter in the first instance as he/she handled the dispute and make a sound determination on the boundaries.
  - j. the learned Magistrate wholly erred in law and fact in arriving at the said decision.
16. The Appellant herein seeks that the appeal be allowed, the ruling dated 27<sup>th</sup> May, 2020 be set aside and in its place an order be issued dismissing the suit No. Kisumu CMC Environment & Land Case



No.343 of 2018 between the parties herein. The Appellant also seeks for costs of the appeal and costs of the suit.

### **Submissions**

17. This being a first appeal, this court reminds itself of the duty to re-examine and re-analyze the evidence placed before the trial court with a view to arrive at independent conclusion and thus determine whether the findings of the trial court are consistent with the evidence and the applicable law. In *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR the court held that:  
  
“ this being a first appeal, it is trite law that this court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”
18. The appeal was argued by way of written submissions pursuant to the direction given on 16<sup>th</sup> October, 2023.
19. Written submissions dated 14<sup>th</sup> February, 2023 were filed by the firm of Prof. Albert Mumma & Company Advocates on behalf of the Appellant.
20. Written submissions dated 5<sup>th</sup> March, 2023 were filed by the firm of Staussi, Asunah & Oluoch Advocates on behalf of the Respondents.

### **Issues for Determination**

21. From the grounds of appeal, the submissions filed by Counsel and the record of appeal generally, one sole issue arises for determination namely; whether or not the dispute before trial court as contained in the amended plaint was a boundary dispute as envisaged by section 18 of the *Land Registration Act*.

### **Analysis and Determination**

22. This being a first appeal, the court reminds itself of the duty to re-examine and re-analyze the material placed before the trial court with a view to arrive at independent conclusion and thus determine whether the findings of the trial court are consistent with the evidence and the applicable law. In *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR the court held that:  
  
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23. The Respondents filed amended plaint dated 21<sup>st</sup> November, 2019. Part of the Appellant’s response to the amended plaint was the application dated 14<sup>th</sup> February 2020 seeking that the amended plaint be struck out for want of jurisdiction.
24. The grounds of the application were, inter alia, that in so far as the claim is founded on alleged encroachment on land parcel known as Kisumu/Kogony/6298 the court lacks jurisdiction to hear and



- determine the claim by virtue of the express provisions of section 18(2) of the *Land Registration Act* No.3 of 2012 and that the entire suit was misconceived in law and amounts to an abuse of the court process.
25. That the dispute as described is a boundary dispute which ought to be resolved by the relevant Land Registrar as provided for in section 9(1), (2) and (3) of the *Land Registration Act* No.3 of 2012.
  26. The application was supported by contents of the Supporting Affidavit in which it was averred on behalf of the Appellant that parcel No. Kisumu/Kogony/6298 was an amalgamation of several pieces of land out of a sub-division of original parcel No.5573 which is fishy and does not appear in the RIM (Registry Index Map). That no beacon had been exhibited to court to prove that the Applicant was working outside the boundaries of Kisumu/Kogony/2187 or encroached in anyway on the parcel of land.
  27. The record of appeal shows that the Honourable trial Magistrate considered the application and held that having revisited the pleadings in the file and familiarized himself with the reliefs sought by the Plaintiff and that in the manner the reliefs are coached, he was left with no doubt that they do not presuppose a dispute of ownership over two registered owners and or two registered parcels. That the complaint was about excavation by a lessee on the Plaintiff's parcel of land.
  28. The court then proceeded to find that the application lacked merit and dismissed it with costs to the Plaintiff.
  29. The Appellant faults the trial court for the finding and decision. It has been submitted on behalf of the Appellant that the Appellant had filed the application dated 14<sup>th</sup> February, 2020 because the substratum of the suit before the lower court as filed is against and in total disregard of the mandatory provisions of section 18(2) of the *Land Registration Act* which is a jurisdictional point of law. That the application was informed by the fact that the Respondents never approached the Land Registrar for determination of the boundaries so as to establish whether there was encroachment of land before proceeding to court.
  30. Secondly, that the Respondent had been compensated by the National Land Commission hence had no basis for filing the suit in court.
  31. Relying on sections 18 and 19 of the *Land Registration Act*, Counsel for the Appellant submitted that from the amended Plaint and accompanying documents, it was evident that the issue related to a boundary dispute as opposed to one founded on trespass. That the Appellant was working on land parcel number Kisumu/Kogony/2178 which it leased from the 3<sup>rd</sup> party.
  32. Counsel submitted that throughout the preliminary stages of the hearing the question that arose for determination was whether there was an encroachment and if so, by how many metres which has to be established by the Land Registrar by auditing the boundaries of both parcels. Counsel relied on the case of *Azzuri Limited –vs- Pink Properties Limited* [2018]eKLR and the case of *George Kamau Macharia –vs- Dexka Limited* (019)eKLR. Counsel submitted that the law gives the Registrar the mandate to resolve boundary disputes of land with general boundaries. That even if the court will hear the suit, it will still require the input of the Land Registrar.



33. Counsel further relied on the case of Willis Ocholla –vs- Mary Ndege (2016)eKLR where it was held that;
- “in terms of section 18(2) of the [Land Registration Act](#), proprietors of registered land with a boundary dispute are obligated to first seek redress or solution from the Land Registrar before moving or escalating the dispute to court”
34. To show that the trial court erred in law and facts by dismissing the Applicant’s application dated 14<sup>th</sup> February, 2020 and that the trial court misconstrued the law as espoused in section 18(2) of the [Land Registration Act](#).
35. On whether or not the appeal should be allowed, Counsel submitted that the Chief Magistrate’s court lacked jurisdiction. That the Respondent invoked the trial court’s jurisdiction prematurely since the dispute ought to have been determined by Land Registrar first. Counsel relied on the case of Speaker of the National Assembly –vs- Shikara Limited & Another [2015] eKLR where it was held that;
- “.....where there is clear procedure for the redress of any particular grievances prescribed by [the Constitution](#) or an Act of Parliament, that procedure should be strictly followed.....”.
36. Counsel submitted that the trial Magistrate erred in law and in fact by holding that the Appellant’s application lacked merit. Counsel prayed that the appeal be allowed.
37. On behalf of the Respondent, it was submitted that the issue before court is not about disputed ownership but illegal encroachment and excavation by the Defendant/Appellant on the Plaintiffs/ Respondents’ land.
38. That the Plaintiff produced a survey report and title deed to support their position. That the court gave an order for a surveyor to confirm the extent of the excavation and/or encroachment. That the appellant has not shown evidence that the Respondents were compensated for the encroachment.
39. On jurisdiction of the court viz a viz the power of the Land Registrar, Counsel relied on the provisions of section 18(2) and the case of Owners of the Motor Vessel “Lillians” –vs- Caltex Kenya Limited (189)KLR and submitted that the trial court has jurisdiction to hear and determine the matter since it is not a boundary dispute.
40. In distinguishing between an act of trespass and a boundary dispute, counsel submitted that the court is only prohibited from entertaining a boundary dispute where the boundary has not been fixed. That even if there was to be a boundary dispute, then it could only be between the Plaintiff and the 3<sup>rd</sup> Party and not the Appellant herein. Counsel relied on the cases of Azzuri Limited –vs- Pink Properties Limited [2018]eKLR and Ali Mohamed Salim –vs- Fausal Hassan Ali [2014]eKLR and the provisions of section 26 of the [Land Registration Act](#) to submit that the registration and proprietorship of the Plaintiffs/Respondents is not disputed and thus the Plaintiffs remain the rightful, absolute and indefeasible owners of the suit property having been issued with title deed and the boundary features clearly outlined therein by the Land Registrar and are thus entitled to protection of the law.
41. Counsel further submitted that the Plaintiff’s case was based on encroachment and/or trespass. That the dispute does not fall under section 18(2) of the [Land Registration Act](#). That a survey done by the County Surveyor as ordered by the court revealed that the dispute was not a boundary dispute. Relying on the case of Telkom Kenya Limited –vs- County Government of Muranga (2019) eKLR and the provisions of Section 3(i) of the [Trespass Act](#), Counsel submitted that trespass is an intrusion by a person into the land of another who is in possession and ownership. That further the Surveyor’s



report showed that the effects of the quarrying activities have substantially affected the suit property to the tune of 0.5 of an acre and has negatively impacted on the remaining portion.

42. Counsel submitted further that the appellant's application before the trial court was not based on a point of law but one that needed both parties to adduce evidence. That the application was an afterthought and a delaying tactic as the suit had been filed 2 years earlier. Counsel urged the court to dismiss the application.
43. I have carefully read the amended plaint and the appellant's statement of defence dated 16<sup>th</sup> July 2018. There is no contest on ownership of the suit land. Although the appellant stated in paragraph 20 of the defence that there was a caution lodged to question on the land by one Marsha Lulu Odhiambo claiming ownership, it was not denied that the suit land was registered in the name of the Respondents. The pleadings, in my view do not reveal a boundary dispute but a claim based on the tort of trespass and or intrusion to land. There is no complaint by the Plaintiff or the 3rd Party who are the registered and/ or beneficial owners of the subject parcels of land on the position of any boundary.
44. The matter before the trial court was a preliminary objection raising the issue of jurisdiction as a bar to further proceedings in the case. Though couched as an application it was a preliminary objection hence subject to the threshold that a preliminary objection must satisfy in order to succeed. The threshold of a preliminary objection as set in the case of *Mukisa Biscuit Manufacturing Co. Ltd – vs- West End Distributors Ltd* [1969] E.A 696 that;

“...a Preliminary Objection consists 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 disposed of the suit.

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

The court further held 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 has to be ascertained or if what is sought is the exercise of judicial discretion.”

45. Hence a preliminary objection must be based on pure points of law, must arise from the pleadings, may dispose of the suit if argued as a preliminary point and must be argued on the assumption that all facts pleaded by the opposite party are correct; it cannot succeed if any facts has to be ascertained; or if what is sought is the exercise of the court's discretion.
46. In the present case the appellant has submitted that the suit land is an amalgamation of several portions of land which does not show on the Registry Index Map, that the amalgamation was fishy and that no beacon certificate was exhibited. These are matters of evidence that can only be adduced and interrogated during a hearing of the case. The prayers in the amended plaint do not include fixing of boundaries or contest on the position of any boundary. The plaint seeks for injunction, declaration and damages.
47. I find that the trial court properly assessed the material placed before it made the correct findings and decision which I find no reason to interfere with. The upshot I find no merit in the appeal which I hereby dismiss. Costs to the Respondents.



Orders accordingly.

**JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 26<sup>TH</sup> DAY OF SEPTEMBER, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

**E. ASATI,**

**JUDGE.**

In the presence of:

Maureen: Court Assistant.

Kimathi h/b for Kamande for the appellant.

Asunah for the Respondents.

