



**Ingati v Andai (Environment and Land Appeal E005 of 2023)  
[2024] KEELC 6035 (KLR) (23 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6035 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT AND LAND APPEAL E005 OF 2023  
DO OHUNGO, J  
SEPTEMBER 23, 2024**

**BETWEEN**

**HABAKKUK AKANGA INGATI ..... APPELLANT**

**AND**

**FRANCIS AGGREY ANDAI ..... RESPONDENT**

*(Being an appeal from the ruling and order of the Chief Magistrate's  
Court at Kakamega (Hon. D Alego, Senior Principal Magistrate)  
delivered on 23rd January 2023 in Kakamega MCELC No. E086 of 2022)*

**JUDGMENT**

1. The background of this appeal is that the Appellant moved the Subordinate Court through Plaintiff dated 27<sup>th</sup> April 2022 wherein he averred that he was the registered proprietor of land parcel number Butsotso/Indangalasia/2883 while the Respondent was the registered proprietor of land parcel number Butsotso/Indangalasia/2882 and that the two parcels border each other. He further averred that the Respondent had encroached on land parcel number Butsotso/Indangalasia/2883.
2. The Appellant therefore prayed for judgment against the Respondent for:
  - a. An order to restore the boundary in respect of Land Parcel no. Butsotso/Indangalasia/2883 and 2882
  - b. An order of permanent injunction against the defendant, his family, agents of any other person claiming on his behalf restraining them from interfering with the Plaintiff's peaceful occupation/use of Land Parcel No. Butsotso/Indangalasia/2883.
  - c. Costs of the suit.
  - d. Special damages of Kshs.16,300/=.



3. Upon being served, the Respondent reacted by filing a Statement of Defence wherein he averred, inter alia, that the Subordinate Court lacked jurisdiction in view of Section 18 (2) of the [Land Registration Act](#). He further gave notice of intention to raise a preliminary objection to that effect.
4. True to his promise, the Respondent filed Notice of Preliminary Objection dated 4<sup>th</sup> July 2022. The objection was pleaded thus:

Take Notice that ... the defendant herein shall raise a preliminary objection on the following grounds;

1. That this Honourable Court lacks jurisdiction to hear and determine the instant suit as it offends the express provisions of section 18 of the [Land Registration Act](#) No. 3 of 2012 for reasons that;
    - a) The subject matter of the suit relates to a boundary issue which falls within the jurisdiction of the Land Registrar.
  2. That the suit is fatally defective, misconceived and mischievous or otherwise an abuse of the court process and therefore is unsustainable in the prevailing circumstances."
5. Upon considering the preliminary objection, the Subordinate Court (Hon. D Alego, Senior Principal Magistrate) scheduled delivery of ruling thereon on 9<sup>th</sup> January 2023. Ultimately, she delivered an undated ruling. The parties in this appeal agree that the ruling was delivered on 23<sup>rd</sup> January 2023. I will go by that date. The Learned Magistrate upheld the preliminary objection.
  6. Aggrieved by the outcome, the Appellant filed this appeal on 13<sup>th</sup> February 2023, through Memorandum of Appeal dated 8<sup>th</sup> February 2023. The following are the grounds of appeal as listed on the face of the Memorandum of Appeal:
    1. That the learned trial Magistrate erred in law and fact in allowing the Preliminary Objection dated the 4.7.2022 when the same was unmerited.
    2. That the learned trial magistrate erred in law and fact by making a finding that this matter is a boundary dispute which is to be handled by the Land Registrar without considering the fact that the Land Registrar had already made a finding that this was not a boundary dispute but a claim for trees issue and referred the parties to the forest department.
    3. That the learned trial magistrate erred in law and fact by making a finding that this matter be handled by the Land Registrar who does not have the jurisdiction to handle a suit for trespass and does not have the authority to grant an order of permanent injunction that was prayed for by both the Appellant and the Respondent in the plaint and Defence respectively. In the circumstances it is only the trial Magistrate who can hear and determine a suit for trespass and who can issue injunction orders.
    4. That the learned trial magistrate erred in law and fact by failing to consider the evidence on record and more specifically the pleadings of the Appellant and his submissions.
    5. That the learned trial magistrate erred in law and fact by failing to give reasons for her findings.
    6. That the learned trial magistrate's ruling has resulted into a miscarriage of justice as the appellant has been condemned unheard and he stands to suffer irreparably.



7. Based on those grounds, the Appellant prayed that the appeal be allowed, the ruling be set aside and that the case be heard and determined on merit. He further prayed for costs of this appeal and any other order that this Court deems fit to grant.
8. The appeal was canvassed through written submissions. The Appellant combined grounds 1, 2, 3, and 4 together and paragraphs 7, 8 and 10 of the Plaint and argued that the Land Registrar had fulfilled his mandate under Section 18 of the *Land Registration Act* by going to the ground and preparing a report dated 27<sup>th</sup> January 2022. He further argued that the preliminary objection required the determination of facts and that the reliefs that both parties sought could only be granted by the Subordinate Court upon hearing them. He relied on the case of *Hudson Kulundu & 2 others v Martha Chibetti & another* [2020] eKLR in support of those arguments.
9. The Appellant went on to argue that the Learned Magistrate neither formulated any issues for determination nor gave reasons for her decision, contrary to Order 21 rule 4 of the Civil Procedure Rules and that as a result, an injustice was visited upon him. He prayed that the appeal be allowed with costs.
10. On his part, the Respondent argued that a cursory look at the Appellant's pleadings, especially paragraph 10 of the Plaint and prayer (a) thereof, reveal that his main contention was a boundary dispute and that his grievance lay in the first instance with the Land Registrar in terms of Sections 18 and 19 of the *Land Registration Act*. That the Appellant is not being driven from the seat of justice but being redirected to an avenue that was available to him and that where the law provides for an avenue of redress before moving the Court, such an avenue ought to be taken before approaching the Court, pursuant to the doctrine of exhaustion. He relied on the cases of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR and *Michael Maluti & 5 Others v Julius Mbau Nzyuko & 2 Others* [2019] eKLR in support of those arguments and urged the Court to dismiss the appeal with costs.
11. This is a first appeal. Consequently, this court has an obligation to re-consider and re-evaluate Notice of Preliminary Objection dated 4<sup>th</sup> July 2022, the pleadings, and the material on record and to determine whether the conclusions reached by the Learned Magistrate are to stand or not and to give reasons either way. See *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1968) EA 123 and *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR.
12. I have considered the grounds of appeal, the pleadings, and the parties' submissions. The issues that arise for determination are whether there was a valid preliminary objection and whether the Subordinate Court had jurisdiction.
13. The law relating to preliminary objections is well settled. A preliminary objection must be on a pure point of law. It helps if the point of law is precisely, briefly and clearly defined in the notice of preliminary objection. In *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, the locus classicus on preliminary objections in this region, Law JA stated:

So far as I'm 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.



14. Further, in *Oraro v Mbaja* [2005] eKLR, Ojwang J (as he then was) stated:

I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. I am in agreement with learned counsel, Mr. Ougo, that “where a Court needs to investigate facts, a matter cannot be raised as a preliminary point.”

15. The upshot of the foregoing is that a valid preliminary objection must raise a pure point of law which is argued on the assumption that all the facts pleaded by the party against whom it is raised are correct. A preliminary objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The preliminary objection raised by the Respondent was therefore to be determined based squarely on the pleadings and facts placed before the court by the Appellant in his plaint as well as his bundle of documents.

16. Since any issue that requires proof through evidence cannot be a valid preliminary objection, it follows that ground 2 of the Notice of Preliminary Objection dated 4<sup>th</sup> July 2022, which asserted that the suit was “fatally defective, misconceived and mischievous or otherwise an abuse of the court process and therefore is unsustainable in the prevailing circumstances” was not a valid preliminary objection since its determination required evidence to establish the misconception, mischief or abuse of the court process.

17. On the other hand, ground 1 raised a pure point of law which could be determined by exclusively examining the Appellant’s plaint, statements and bundle of documents. It was therefore a valid preliminary objection.

18. Jurisdiction is an issue that pervades all litigation. It is the entry point in any matter that a court of law is called upon to determine and is the very life and soul of any judicial proceedings. Without jurisdiction, the proceedings come to a certain end and the court cannot take any further step. See *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR.

19. The Supreme Court restated the centrality of jurisdiction in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR thus:

A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. ...

20. It is against that backdrop that the Subordinate Court was required to establish whether Section 18 of the *Land Registration Act* deprived it of jurisdiction to hear and determine the case that the parties had placed before it. The said section provides:

(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)."

21. A perusal of paragraphs 5 to 8 of the Appellant's Plaintiff reveal that his complaint was that the Respondent encroached on his land parcel number Butso/Indangalasia/2883 sometime in the year 2021 and attempted to harvest trees therein. Arising from the ensuing dispute, the Appellant engaged the services of a private surveyor who prepared a report dated 13<sup>th</sup> January 2022. According to the Appellant, the private surveyor concluded that the Respondent encroached on Butso/Indangalasia/2883. Needless to emphasise, those are contentions that are yet to be established through trial. Nevertheless, it is manifest that the parties had a boundary dispute. One cannot talk of encroachment if there was no boundary dispute. Further, prayer (a) in the Plaintiff which sought restoration of the boundary is clear testimony of a boundary dispute. Even the prayer for a permanent injunction to restrain the Respondent from interfering with Appellant's occupation of Butso/Indangalasia/2883 would be meaningless in the absence of a clearly defined boundary.
22. Whereas the dispute between the parties may also include entitlement to trees planted along the boundary, resolution of the dispute depends on the boundary being clearly defined. While it may not conclusively resolve the dispute, a determination of which parcel the trees are standing on will be useful.
23. A perusal of the Appellant's witness statement reveals that he stated therein that he made a report to the Land Registrar who went to the ground on 8<sup>th</sup> December 2021. Among the documents that the Appellant included in his bundle is a report dated 27<sup>th</sup> January 2022, signed by the Land Registrar Kakamega. It is stated in the report that the Land Registrar who went to the ground on 8<sup>th</sup> December 2021 in the company of a surveyor and in the presence of parties following a report of a boundary dispute. In his findings, the Land Registrar stated that the boundaries of the two parcels were intact and that the dispute between the parties was not a boundary dispute but a dispute concerning trees planted along the boundary.
24. The question that arises is whether the boundaries between the two parcels have been determined in accordance with Sections 18 and 19 of the *Land Registration Act*. If the answer is in the affirmative, then the Subordinate Court had jurisdiction. If negative, then the Subordinate Court lacked jurisdiction.
25. The manner of determining or fixing boundaries is provided by Section 19 of the *Land Registration Act* as follows:
  - (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. [Emphasis added]
26. The report by the Land Registrar does not state whether he ascertained and fix the boundaries. Pursuant to Section 19 (2) of the Act, the Land Registrar was required to cause to be defined through survey, the precise position of the boundaries, to file a plan containing the particulars and to make a note in the register that the boundaries had been fixed. The Appellant did not avail anything to show that the Land Registrar complied with Section 19 (2) of the Act. No survey plan or an entry in the register were availed to demonstrate that the boundary had been fixed. The role and mandate of the Land Registrar under Sections 18 and 19 of the Land Registration Act is very specific. It stretches beyond merely visiting the ground and preparing a report.
27. In the result, I find that that the Subordinate Court lacked jurisdiction to hear and determine the matter in view of the provisions of Section 18 of the Land Registration Act. Consequently, this appeal is without merit.
28. The foregoing notwithstanding, the Appellant has a valid complaint regarding the manner in which the ruling was rendered. The Learned Magistrate neither formulated any issues for determination nor gave reasons for her decision. Courts in our jurisdiction are accountable to litigants and the public at large. Judicial Officers must always bear in mind that justice seekers have a right to know why and how the court resolved their disputes. That is the very minimum required by Articles 10, 48 and 50 of the Constitution.
29. In view of the foregoing discourse, I dismiss this appeal with costs to the Respondent.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 23RD DAY OF SEPTEMBER 2024.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

No appearance for the Appellant

Mr Akwala holding brief for Mr Abok for the Respondent

Court Assistant: M Nguayai

