



**Mwambela v Mohamed & 2 others (Environment & Land Case
E011 of 2023) [2024] KEELC 6053 (KLR) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6053 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE E011 OF 2023**

**AE DENA, J
SEPTEMBER 19, 2024**

BETWEEN

MICELLE SAMBA MWAMBELA PLAINTIFF

AND

MOHAMED ALI MOHAMED 1ST DEFENDANT

MICHELLE DAVIS MOHAMED 2ND DEFENDANT

MALIK MUSIN MOHAMED 3RD DEFENDANT

RULING

1. The firm of Mogaka Omwenga & Mabeya Advocates filed the Complaint dated 4th August 2023 on behalf of the Plaintiff. The Plaintiff claims she is the registered owner of Plot Number Kwale/Ngombeni S.S 707 while the Defendants are the registered owners of Plot Number Kwale/Ngombeni S.S 705. That the Defendants have trespassed into the Plaintiff's property without her consent. The Plaintiff seeks inter alia a declaration she is the registered legal owner of Plot Number Kwale/Ngombeni S.S 707 (suit property) and eviction of the Defendants.
2. Together with the Complaint, the Plaintiff filed a Notice of Motion dated 4th August 2023 seeking temporary injunction against the Defendants from accessing the suit property or interfering with the Plaintiff's peaceful possession.
3. In response the Defendants through MCM Advocates LLP filed a preliminary objection dated 12th October 2023 on the grounds that the suit should be struck out for want of pecuniary jurisdiction. It is averred that the suit property being below the value of Kshs.20 million should have been filed in the Magistrates Court. That the dispute is a boundary dispute which ought to be determined by the Land Registrar pursuant to the provisions of section 18(2) of the Land Registration Act. The suit is termed incompetent and abuse of the court process and ought to be struck out.



Submissions

4. The preliminary objection was canvassed by way of written submissions. The plaintiffs' submissions are dated 7th March 2024. The Defendants submissions are dated 29th February 2024.
5. It is submitted on behalf of the Defendants that from the Plaint filed herein, the issue for determination is whether the property that has been occupied by the Defendants is actually within the boundaries that they should be occupying or if they had indeed encroached on the Plaintiffs property. Referring to Section 18 (2) of the [Land Registration Act](#), it is submitted that investigations into encroachment into boundaries of other peoples is a duty of the Land Registrar thus ousting the jurisdiction of the ELC. That the boundaries are yet to be determined rendering the suit premature. Reliance is placed on [Nelly Atieno Oluoch v. Damaris A. Nyawalo & 2 Others](#) (2021) eKLR.
6. It is further submitted that the value of the suit properties is Kshs. 3,000,000/= when this court can only handle suits of value from Kshs. 20,000,000/- considering the different caps to the value of suits. The pecuniary jurisdiction of the various lower courts were given. The case of *Macfoy v. United Africa Co. Ltd* (1961) All ER,1169 is cited to buttress that nothing comes out of a nullity. It is prayed that the suit is dismissed with costs to the Defendants.
7. It is submitted on behalf of the Plaintiff that under Section 13 of the [Environment and Land Court Act](#), this court has original and appellate jurisdiction to hear and determine all disputes under Article 162(2) of the [Constitution](#). That pecuniary jurisdiction is subject to the overall jurisdiction of the court. That the value of the property is not pleaded and can only be ascertained through valuation. That there being no defence on record the facts in the Plaint are deemed to be correct. That the court has to look at the evidence on record to determine whether the suit is an abuse of the court process. Consequently, the objection is not properly raised and must be dismissed. Reliance is placed on *Mukisa Biscuits Manufacturing Co. Ltd...v...West End Distributors Ltd* (1969) EA 696.

Determination

8. The main issues for determination is whether the Preliminary Objection is properly raised and if yes whether it is should be upheld by striking out the suit.
9. What is a proper preliminary objection? This is answered by the court in [Nitin Properties Ltd V Singh Kalsi & Another](#) [1995] eKLR the court as follows:

" ...A Preliminary Objection 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..."
10. Further in *ukisa Biscuits Manufacturing Co. Ltd...v...West End Distributors Ltd* (1969) EA 696 a preliminary objection is stated to mean: -“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.”
11. While jurisdiction is one of the grounds upon which a preliminary objection may be raised, in the present case the same is on the basis that the suit property is below the monetary value of Kshs.20 million and ought to have been filed before the Magistrates court. Indeed, this is the maximum pecuniary jurisdiction for the said court. I have perused the Plaint and I must confirm that the value



of the suit property has not been disclosed in the pleadings. This fact is not pleaded. The court cannot make assumption that the value of the suit property is below its pecuniary jurisdiction. Having not been pleaded it goes without say it must be ascertained and this can only be through a valuation report. This would amount to interrogation of facts. The preliminary objection cannot therefore be deemed as properly raised on this point.

12. Suffice it to say that in my view the Magistrates Courts Act does not oust the jurisdiction of this court to hear and determine cases filed before it whose value is below Kshs 20 million. I respectfully agree with Plaintiffs submission that this court has jurisdiction contemplated in the Constitution and the ELC Act even if the value of the same is less than Kshs 20 million. The ELC Court has original jurisdiction though it is always in order for cases to be filed in the lowest court taking into account pecuniary jurisdiction. The court will always transfer a suit in this regard to the lower court but not to strike out a suit as invited by the Defendants. The Court of Appeal has in numerous cases expressed that striking out pleadings should be the last resort. In this regard the Respondent referred this court to the cases of *Cooperative Bank Ltd v. George Fredrick Wekesa* (Civil appeal No. 54 of 1999) and *Yaya Tower Ltd v Trade Bank Ltd* (In Liquidation) Civil Appeal No. 35 of 2000 both echoing this position.
13. I will proceed to address the objection raised pursuant to the provisions of section 18 (1) of the Land Registration Act. It is contended that the dispute pitting the Plaintiff and the Defendants is a boundary dispute which falls under the jurisdiction of the Land Registrar. I have keenly looked at the Plaintiff herein including the reliefs sought. It is clear therefrom the Plaintiffs claim is based on the Defendants alleged trespass onto the suit property. I will not over emphasize this point.
14. Based on the foregoing analysis it is this court finding that the preliminary objection has not been properly raised and also lacks merit. I will echo the words of Sir Charles Newbold, JA in *Mukisa Biscuits Manufacturing Co. Ltd...v...West End Distributors Ltd*

" The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop."

15. The preliminary objection is hereby dismissed with costs to the Plaintiffs.

RULING DATED, SIGNED AND DELIVERED THIS 19TH DAY OF SEPTEMBER ,2024.

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A.E DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

No appearance for the Plaintiffs

Mrs. Ng'ang'a for the Defendants

MS Asmaa Maftah Court Assistant.

