



**Banja v Oloo & 7 others (Civil Suit E007 of 2023)  
[2024] KEELC 5933 (KLR) (18 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 5933 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
CIVIL SUIT E007 OF 2023  
GMA ONGONDO, J  
SEPTEMBER 18, 2024**

**BETWEEN**

**GEORGE OSEWE WA BANJA ..... APPLICANT**

**AND**

**HON. DAVID ODHIAMBO OLOO ..... 1<sup>ST</sup> RESPONDENT**

**MAGDALENE ODHIAMBO OREGO ..... 2<sup>ND</sup> RESPONDENT**

**JOSEPH BABU OTENGA ..... 3<sup>RD</sup> RESPONDENT**

**PAUL OUMA AUMA ..... 4<sup>TH</sup> RESPONDENT**

**KENNEDY OTIENO ODOYO ..... 5<sup>TH</sup> RESPONDENT**

**DANIEL OKECH ODOYO ..... 6<sup>TH</sup> RESPONDENT**

**DANIEL ODONGO OPANDA ..... 7<sup>TH</sup> RESPONDENT**

**HON. ATTORNEY GENERAL ..... 8<sup>TH</sup> RESPONDENT**

**RULING**

1. The instant ruling is in respect of a Notice of Preliminary Objection dated 4<sup>th</sup> December 2023 and lodged in court on 11<sup>th</sup> December 2023 by the 1<sup>st</sup> to 7<sup>th</sup> respondents through Wilberforce Akello and Company Advocates and which is based on six grounds thus:
  - a. That this court lacks jurisdiction to hear and determine the application and the suit and ought to dismiss the same with costs.
  - b. That the application is bad in law for misjoinder of parties as it discloses no cause of action against the said respondents herein.



- c. That the suit and the application thereof offend the provisions of Statute of Limitation Act and ought to be struck out in limine.
  - d. That the plaintiff's application and suit offend the provisions of Civil Procedure Rules and the *Oaths and Statutory Declarations Act*.
  - e. That the prayers sought by the applicant/plaintiff as to the stoppage of the road works are mischievous and overtaken by events, as the road has been in existence since time immemorial.
  - f. That the applicant's application is devoid of merit as it discloses no threat the applicants are facing if the orders sought are not granted.
2. The applicant through Gichina Macharia Matotse and Company Advocates, opposed the preliminary objection by way of a replying affidavit sworn on 17<sup>th</sup> January 2024. He deposed, inter alia, that the Preliminary Objection does not raise any pure matter of law. That this court has jurisdiction to hear and determine the matter, by dint of the provisions of Article 162 (2) (b) of *the Constitution* of Kenya as well as Sections 4 and 13(1) of the Environment Land Court Act. That the boundary disputes raised in the cause began in 2018 hence, the matter is not time barred. That the suit discloses a cause of action against all the respondents. That thus, the Preliminary Objection ought to be struck out with costs to the Plaintiff.
  3. On 5<sup>th</sup> December 2023, this court ordered and directed that the Preliminary Objection be heard by way of written submissions in the spirit of Article 159 (2)(b) of *the Constitution* of Kenya, 2010.
  4. Notably, none of the parties filed any submissions herein.
  5. It must be noted that by a plaint dated 15<sup>th</sup> June 2023 and filed herein on 26<sup>th</sup> June 2024, the plaintiff/applicant, George Osewe wa Banja, through Gichina Macharia Matotse and Company Advocates, sought the orders infra;
    - a. That a permanent injunction be issued against the defendants, their agents, employees, personnel and anyone acting on their behalf or under their directions, preventing/stopping them from accessing, trespassing, constructing a road, putting up structures, executing any works, encroaching, damaging and/or cutting down trees on the property known as Kanyamwa/Kochieng/Komungu/Kakaeta/1558 (the suit land herein).
    - b. The court be pleased to order that the defendants be evicted from the suit land.
    - c. Any such further and/or other relief that this honourable court may deem fit and just to grant in the interest of justice and that may become apparent and necessary in the course of these proceedings.
    - d. General damages
    - e. Special damages amounting to the sum of kshs.600,000/-
    - f. Interest on (d) and (e) above
    - g. The costs of this suit be borne by the defendants.
  6. The plaintiff averred that he is the registered owner of the suit land, having purchased the same in the year 2015. That the defendants have wrongfully and unlawfully trespassed and/or encroached onto the suit land and destroyed his gate, fence, trees and fruit trees.



7. Together with the plaint, the plaintiff lodged an application by way of a notice of motion of even date seeking the following orders:
  - a. Spent
  - b. Spent
  - c. Spent
  - d. That the respondents (their agents, employees, personnel and anyone acting on their behalf or under their directions) be restrained from accessing, trespassing, constructing a road, putting up structures, executing any works, encroaching, damaging and/or cutting down trees on the suit land and further from harassing the applicant in regard to the suit land pending the hearing of the main suit.
  - e. That this honourable court be pleased to order that there be no construction of any temporary or permanent road or any manner whatsoever upon the suit land pending the hearing of the main suit.
  - f. That OCS, Ndhiwa Police Station be hereby ordered to enforce the compliance with prayer 2 to 5.
  - g. That this honourable court be pleased to issue any other just and equitable order the court may deem just to grant.
  - h. That the defendants be ordered to bear the costs of the application jointly and severally.
8. Notably, none of the defendants has filed a statement of defence in opposition to the suit.
9. It must be noted that a Preliminary Objection ought to be on a point of law; see *Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors (1969) EA 696* where the Court of Appeal pronounced itself on what constitutes a preliminary objection as follows:

“...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 a contract giving rise to the suit to refer the dispute to arbitration...” (Emphasis added).
10. I have considered the preliminary objection and the reply thereto. Therefore, the issues that arise for determination are:
  - a. Whether this court has jurisdiction to hear and determine the suit together with the application.
  - b. Whether the application is bad in law for misjoinder of parties as it discloses no cause of action against the respondents herein.
  - c. Is the Preliminary Objection merited?
  - d. Who bears the costs of the Preliminary Objection?
11. On the first issue, Article 162 (2) (b) of *the Constitution* of Kenya, 2010 anchors the jurisdiction of this court. The same is operationalized by Section 13 (1) of the *Environment and Land Court Act*, 2015 (2012) and other relevant statutes.



12. The Court of Appeal at Nairobi in *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others* [2013] eKLR, stated the following in respect to jurisdiction:

“So central and determinative is the question of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceeding is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain.”

13. In view of the foregoing, it is my considered view that the contested issues in the present suit and application as indicated in paragraphs 5 to 7 hereinabove, are well within the confines of the jurisdiction of this court as encapsulated under Section 13 of the *Environment and Land Court Act*, 2015 (2011).

14. Turning to the second issue, I note that the applicant has detailed among others, various acts of trespass and/or encroachment on the suit land allegedly perpetuated by each of the defendants. Therefore, it is my considered view that counsel’s assertion that the application is bad in law for misjoinder of parties and that it discloses no cause of action against the said respondents herein, is not factual.

15. Regarding grounds 3 and 4 of the Preliminary Objection, this court finds that the same are vague since counsel omitted to specify the particular provisions under the *Limitation of Actions Act*, the Civil Procedure Rules and the *Oaths and Statutory Declarations Act*, which are contravened by both the application and the suit herein. To that end, I associate myself with the holding in *Susan Wairimu Ndiangui -vs-Pauline W. Thuo & Another* [2005] eKLR, that:

“A preliminary objection should not be drawn in a manner that is vague and non-disclosing of the point of law or issue that is intended to be raised. It should clearly inform both the court and the other party or parties in sufficient details what to expect.”

16. I further note that counsel has raised issues in the Preliminary Objection, especially on grounds 5 and 6, which require ascertainment of facts. On that score, I subscribe to the holding in the case of *Mukisa Biscuit Manufacturing Co. Ltd (supra)*, that a Preliminary Objection should only raise pure points of law. That it cannot be raised if any fact has to be ascertained or if what is sought is an exercise of judicial discretion.

17. Afortiori, it is the finding of this court that the Preliminary Objection dated 4<sup>th</sup> December 2023 and lodged herein on 11<sup>th</sup> December 2023 is devoid of merit. The same is hereby dismissed with costs to the applicant/plaintiff.

18. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 18<sup>TH</sup> DAY OF SEPTEMBER 2024.**

**G. M. A ONGONDO**

**JUDGE**

**Present**

1. Ms. Mukundi holding brief for Mr. Macharia, Learned Counsel for the plaintiff/respondent

2. Mr. Abel Otieno holding brief for Mr. Akello, Learned Counsel for the 1<sup>st</sup> to 7<sup>th</sup> defendants



3. Luanga, Court Assistant

