



REPUBLIC OF KENYA



KENYA LAW
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**Mutia v Nduvi & 2 others (Environment & Land Case E005 of 2023)
[2024] KEELC 5928 (KLR) (18 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 5928 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E005 OF 2023
TW MURIGI, J
SEPTEMBER 18, 2024**

BETWEEN

PATRICK MULWA MUTIA PLAINTIFF

AND

ISAAC MULI NDUVI 1ST DEFENDANT

NORMAN MBAI 2ND DEFENDANT

AGATHA WAYUA MWILU 3RD DEFENDANT

RULING

1. This ruling is in respect of the Notice of Preliminary Objection dated 16th March 2023 raised by the Defendants on the following grounds:-
 1. This court lacks jurisdiction to hear the suit as it offends the express provisions of Sections 18 and 19 of the *Land Registration Act* No 3 of 2012 for the reason that:- a) The subject of the application is a boundary issue which falls within the jurisdiction of the Land Registrar.
 2. The suit against the Defendants ought to be struck out since it is fatally defective, misconceived and mischievous or otherwise an abuse of the court process and therefore is unsustainable in the obtaining circumstances.
 3. The costs of this application to be borne by the Plaintiff.
2. The Plaintiff filed a replying affidavit on 16th May 2023 in opposition to the Preliminary objection. He averred that the boundaries between the parcels of land belonging to the parties herein were established by the Land Registrar in accordance with the provisions of Sections 18 and 19 of the *Land Registration Act*.



3. He further averred that his land was excised out of the larger Makueni/Kako/17 in the year 2021. That the 1st Defendant purchased his land from the 2nd Defendant while the 2nd and 3rd Defendants parcels of land were as a result of subdivision arising out of a Grant of Letters of Administration of the Estate of Mwilu Mutiso. He argued that for the purposes of effecting the registrations, the land Registrar fixed the boundaries in the Registry index map for purposes of issuing title. In this regard he annexed a copy of the RIM to his replying affidavit.
4. He further averred that the subject matter of the suit herein is dispossession of the suit property arising from the Defendant encroaching into public land thereby pushing the road reserve to his land. He insisted that the Defendants were aware of the existing boundaries of their respective parcels of land but had chosen to ignore the same.
5. He further averred that the 1st Defendant has constructed permanent structures on his land and on the road reserve. He urged the court to dismiss the preliminary objection with costs.
6. The preliminary objection was canvassed by way of written submissions.

The Defendants Submissions

7. The Defendants submissions were filed on 29th November 2023.
8. Counsel relied on the definition of a preliminary objection set out in the case of *Mukisa Biscuits Manufacturing Limited v West End Limited*.
9. Counsel submitted that the Plaintiff has invoked the jurisdiction of this court prematurely since he has not adduced any evidence to show that the boundary dispute between the two parcels of land has been conclusively determined by the Land Registrar before seeking redress from the court. To buttress this point, Counsel relied on the case of *Reuben Kioko Mutyaene v Hellen Kunga Miriti & 6 others; Ntalala Eric Mutura & another (Interested Parties)* [2021] eKLR where the court stated as follows:- “It is the Land Registration Act that makes provisions relating to the determination of boundaries. Those provisions are found in Sections 16 to 19. For this dispute, the registrar is empowered after giving notice to all affected, in this case, the 1st appellant and 1st Respondent , indeed as well as any owner whose land adjoins the boundary in question, and with the assistance of the surveyor to ascertain and fix the disputed boundaries.....”
10. Counsel further relied on the case of *Cornelius Sylvano Muchilwa & 3 others v Kenya National Highway Authority* (2019) eKLR where the court stated as follows:- “....That the court is satisfied that the Defendant’s notice of preliminary objection raises a pure point of law on whether or not this court has jurisdiction to deal and determine with the suit primarily based on boundary dispute, where the land registrar has not made a resolution as the first arbiter under Section 18 of the Land Registration Act...” Counsel further submitted that the report dated 9/11/2021 was prepared by the County Surveyor and not by the Land Registrar as required by the law. Counsel contended that the orders sought by the Plaintiff clearly show that the issue for determination before the court is a boundary dispute.
11. Concluding his submissions, Counsel urged the court to uphold the preliminary objection and strike out the suit with costs.



The Plaintiff's Submissions

12. The Plaintiff filed his submissions dated 24th April 2024. On his behalf, Counsel submitted that the jurisdiction of this court stems from Article 162 (2) (b) of the Constitution and Section 13 of the Environment and Land Court Act.
13. Counsel relied on the definition of a general boundary set out in the case of Azzuri Limited v Pink Properties Limited [2017] eKLR on the paper “The Role of the Registry Index Map (RIM) in Land Management in Kenya” by Peter K. Wanyoike as follows:-

“A boundary of which the precise line is undetermined in relation to the physical features which demarcate it....However, it is clear on the ground where the parcel is situated and where the boundaries are, for they are clearly visible and unmistakable physical features, though they do not indicate the exact location of the line within the breadth which such physical features necessary process”.
14. Counsel further relied on the case of Owiti v Aridi & another [2024] eKLR where the court had this to say:-

“I agree with the Respondents that where a boundary is fixed under Section 19(3) of the Act, the land registrar is supposed to make a note in the register to that effect. I wish to say however that the fixing of the boundary is not an event. It is a process....The suit properties having been survey and boundary beacons fixed on the ground, there is nothing more that the land registrar is supposed to do in the exercise of his powers under sections 18(3) and 19(2) of the Act. It is therefore my finding that the suit properties had fixed boundaries and as such the lower court erred in its finding that it had no jurisdiction to determine the lower court suit.”
15. Counsel submitted that the boundary between the Plaintiff and the Defendants parcels of land is a fixed boundary. Counsel further submitted that boundary beacons had been installed on the Plaintiff's parcel of land and hence the classification of the same as a general boundary was inaccurate.
16. Counsel contended that the Defendants are inviting this court to review their Defence by asserting that the matter before the court relates to a general boundary issue. It was argued that the invitation to consider the Defence automatically nullifies the preliminary objection as the Defendants want the court to lock out the Plaintiff on the basis of uncorroborated assertions.
17. Counsel submitted that there was no harm in hearing the Plaintiff's case on merit since the issue in question is a fixed boundary and the factual issues around it water down the preliminary objection.
18. Counsel further submitted that the Plaintiff has sought for an order of adoption of a surveyor's report, orders of eviction and a permanent injunction which cannot be issued by the Land Registrar. It was argued that ordering that the matter to revert to the Land Registrar will lengthen the dispensation of justice.
19. Concluding his submissions, Counsel submitted that the preliminary objection is untenable and therefore ought to be dismissed with costs.



Analysis And Determination

20. Having considered the preliminary objection in light of the pleadings and the rival submissions, the only issue that arises for determination is whether this court has jurisdiction to hear and determine this suit.
21. The law on preliminary objections is well settled. A preliminary objection must be on a pure point of law. In *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors Ltd* [1969] EA 696, Law JA stated as follows:-

“So far as I’m aware, a preliminary objection consists of point of law which have 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 submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
22. Further on Sir Charles Newbold JA stated;

“The first matter relates to the increasing practice of raising points which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a 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.”
23. In *Oraro v Mbaja* [2005] eKLR Ojwang J (as he then was) described it as follows;

“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 process of evidence. An assertion which claims to be a Preliminary Objection and yet it hears 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.”
24. For a preliminary objection to be valid, it must be on a point of law and must be founded on facts that are not in dispute. It should not be proved through facts or evidence or deal with disputed facts.
25. The Defendants’ preliminary objection is based on the grounds that the Court lacks jurisdiction to hear and determine this suit dispute as it relates to a boundary dispute.

This court is called upon to determine whether it has jurisdiction to hear and determine this suit. It is trite law that jurisdiction is everything and without it the court cannot take one more step in the case.
26. The issue of jurisdiction is a pure point of law which can determine the matter without having to consider the merits of the case. This Court is therefore satisfied that the Defendant’s Preliminary Objection is based on a pure point of law.



27. The locus classicus on jurisdiction is the celebrated case of *Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited* [1989] eKLR where the Court held as follows:-

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings...”

28. Similarly, the Supreme Court in the case of *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR pronounced itself 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. Where the *Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation....”

29. A court derives its jurisdiction from the *Constitution* or legislation or from both. The jurisdiction of this court is derived from Article 162(2)(b) of the *Constitution* and Section 13 of the *Environment and Land Court Act*. Article 162(2) (b) of the *Constitution* provides that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land.

30. To give effect to Article 162 (2) (b) of the *Constitution*, Parliament enacted the Environment & Land Court Act. Section 13(1) and (2) of the said Act provides as follows:-

“ 13. Jurisdiction of the Court

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the *Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the *Constitution*, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, chose in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.”

31. The Defendants contended that the suit herein offends the provisions of Sections 18 and 19 of the *Land Registration Act* as the dispute falls within the jurisdiction of the Land Registrar.

32. Section 18 of the *Land Registration Act* provides as follows:-



- (1) 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 field 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.

It is clear from this provision that that disputes relating to boundaries should be determined by the land Registrar unless the boundaries are fixed.

33. Section 19 of the [Land Registration Act](#) provides as follows:-

Fixed boundaries

- (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 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.

34. The Plaintiff instituted this suit against the Defendants vide the Complaint dated 10/02/2023 seeking the following orders:-

- a. An order of adopting the Surveyor's report dated 10th November 2021.
- b. An order of a permanent injunction restraining the Defendant from encroaching or in any other manner interfering with the Plaintiff's land parcel number Makueni/Kako/2131 and the public road reserve.
- c. An order of eviction against the Defendants compelling them to remove the offending structures that have encroached into the Plaintiff's parcel of land number Makueni/Kako/2131 and the public road adjacent to it.
- d. Costs of this suit.

35. In paragraphs 8 of the Complaint, the Plaintiff pleaded as follows:-

“On or about 9th November 2021, a survey was conducted by the District Surveyor in the presence of all parties to this suit to determine the boundaries for the above parcels of land. From the survey, the Surveyor did find that there was indeed encroachment by the Defendant into the suit property which encroachment also further pushes the road into the Plaintiff's parcel of land. The surveyor issued a report confirming that the current boundaries as established by the defendant's were a deviation from the existing and original map and boundaries and thus illegal an unwarranted encroachment into the Plaintiff's land



and also a public land. that the Defendants unlawfully encroached into his land and a public road that is adjacent to his land thereby interfering with his quiet possession of the suit property”.

36. Paragraphs 10-12 of the Plaintiff shows that Plaintiff's claim is based on the alleged encroachment on his land by the Defendants.
37. The 1st, 2nd and 3rd Defendants pleaded in paragraph 11 of their defence that the court should not be dragged into resolving boundary disputes since it falls under the purview of the Land Registrar. At paragraph 12 of the defence, the Defendants pleaded that the Plaintiff ought to have approached the office of the Land Registrar and lodge a boundary dispute complaint.
38. The Plaintiff produced the Surveyor's report dated 9th November 2021. The report is in regards to boundary re-establishment on P/No Makueni/Kako/2129 v 393/825/824/833/2004/2003/2001/1992.
39. In the report, the District Surveyor stated as follows in part:-

“After rigorous measurement from different reference points, it was found out that there was an encroachment shaded on the tracing diagram attached.”
40. The issue for determination is whether the Land Registrar has fixed the boundaries between the parcels of land belonging to the Plaintiff and the Defendants herein. Section 19(3) of the [Land Registration Act](#) provides that boundaries shall be deemed to have been fixed as follows:- “Where the dimensions and boundaries of a parcel of land 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.”
41. For this court to find that the boundaries have been fixed, the Plaintiff ought to have availed evidence of a plan verified by the office responsible for land with a note made in the Land Register that the boundaries have been fixed. The survey report relied upon by the Plaintiff found that there was encroachment on the Plaintiff's land. No evidence was adduced to show that the same was noted in the register and therefore the boundaries cannot be said to have been fixed.
42. Section 18(2) of the [Land Registration Act](#) is couched in mandatory terms. Disputes relating to boundaries that are not fixed should be determined by the Land Registrar.
43. In the case of [Azzuri Limited v Pink Properties Limited](#) [2018] eKLR, the Court of Appeal stated that:-

“This means that under the aforesaid provisions, boundary disputes pertaining to lands falling within the general boundary areas must be referred to the Land Registrar for resolution”.
44. From the foregoing it is clear that there exists a boundary dispute between the parcels of land belonging to the parties herein. It is clear that Section 18(2) of the [Land Registration Act](#) prohibits courts from entertaining proceedings related to boundary disputes.
45. It is also clear that the Plaintiff has invoked the jurisdiction of this court prematurely as he ought to have had the dispute heard by the Land Registrar before approaching this court. In the case of [Speaker of National Assembly v Karume](#) [1992] KLR the court held that “Where there is a clear procedure for redress of any particular grievance prescribed by the [Constitution](#) or an Act of Parliament, that procedure should be strictly followed”.



- 46. In the end I find that this court has no jurisdiction to hear and determine this suit as it relates to a boundary dispute.
- 47. Accordingly, the preliminary objection is upheld and the suit is hereby struck out with costs to the Defendants.

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HON. T. MURIGI
JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 18TH DAY OF SEPTEMBER, 2024.

In the presence of:
Muthui for the Plaintiff.
Kithuka for the Defendants.
Court assistant Stephen

