



**Bett & another v Ngeny & 3 others (Environment and Land Appeal
E007 of 2022) [2024] KEELC 13249 (KLR) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13249 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT AND LAND APPEAL E007 OF 2022
MN MWANYALE, J
NOVEMBER 14, 2024**

BETWEEN

MUSA KIMELI BETT 1ST APPELLANT

GODFREY KIPRONO BUNGEI 2ND APPELLANT

AND

NELLY JESANG NGENY 1ST RESPONDENT

TIMOTHY KIBET LAGAT 2ND RESPONDENT

THE LAND REGISTRAR, NANDI COUNTY 3RD RESPONDENT

THE COUNTY SURVEYOR, NANDI COUNTY 4TH RESPONDENT

JUDGMENT

Background

1. Dissatisfied with the Ruling of Honourable D. A. Ocharo – PM delivered on 24/08/2022 in Kapsabet Chief Magistrates Environment and Land Court No. E50/2021 between Musa Kimeli Bett and another vs Nelly Jesang Ngeny & 3 Others, the Appellants Musa Kimeli Bett and Geoffrey Kiprono Bungei the original Plaintiffs before the Chief Magistrates Court, penned 6 Grounds of Appeal in their Memorandum of Appeal dated 13th September 2022 and prayed for;
 - i. That the Appeal be allowed and an order be made setting aside the Subordinate’s Court decision/Order striking out the Appellants suit against the Respondents and substitute the same with an order dismissing the 3rd and 4th Respondents Preliminary Objection with costs.
 - ii. The Court to Direct the Appellants case against the Respondents be reinstated and the matter be ordered to proceed on its merits to hearing, and pursuant to Section 1A, 1B, 3, 3A, and 78 (1) e of the *Civil Procedure Act* Chapter 21 Laws of Kenya alongside Section 19 (1) of the



Environment and Land Court Act and in view of the character of the dispute it be ordered and directed that there be a hearing of the suit before the Chief Magistrates Court at Kapsabet on priority basis and the joint Lands Registrar report and the Surveyor as envisioned be availed at the trial accordingly.

2. The Grounds of Appeal in support of the above prayers are as follows; -
 - i. That the Learned Trial Magistrate erred in law and fact in completely misapprehending the principles governing and/or what constitutes a preliminary objection thereby arriving at an erroneous decision with the regard to the Preliminary Objection raised by the 3rd and 4th Respondents.
 - ii. That the Learned Trial Magistrate erred in law and fact in entertaining and/or delving into issues of facts while deciding on the preliminary objection raised by the 3rd and 4th Respondents.
 - iii. That the Learned Trial Magistrate erred in law and in fact in striking out the Appellants suit against the 1st and 2nd Respondents, when the 1st and 2nd Respondent had not raised any objection to the same and never filed and/or participated in the preliminary objection to the suit filed by the 3rd and 4th Respondents.
 - iv. That there was failure by the Learned Trial Magistrate to exercise jurisdiction conferred by Section 9 of the Magistrates Court Act 2016, thus arrived at a decision that is clearly wrong.
 - v. That the intentions of Parliament vis a vis the provisions at Section 26(3) and 4 of the Environment and Land Court Act 2011 and Section 9 (a) of the Magistrates Court Act, 2015 clearly conferring jurisdiction on Magistrates Court on boundaries is not ambiguous and the Learned Magistrate failed to take into consideration the same and as the decision is based on Section 18 of the Land Registration Act, is clearly wrong, he in doing so arrived at a wrong conclusion.
 - vi. That the Trial Magistrate in the exercise of his discretion misdirected himself in the preliminary objection and as a result arrived at a wrong decision and from the case as a whole, the Trial Magistrate was clearly wrong in the exercise of the discretion and that as a result there has been a misjustice.
3. During the pendency of the Appeal, the 1st and 2nd Respondents look out A Notice of Motion seeking temporary injunction against the 1st and 2nd Appellants over NANDI/KOYO/489.
4. On 20/3/2024, the said Notice of Motion was compromised by consent of the parties whereat the status quo with regard to the existing boundaries was to be maintained and none of the parties was to undertake cultivation pending the determination of the Appeal.
5. The Appellant was to file the Record of Appeal so as to fast track the hearing of the Appeal and when he did so, the record was not complete and leave was granted for the Appellant to file a supplementary record of appeal.
6. In the meantime, the Court file in the subordinate Court was availed and the Appeal was admitted upon filing of the supplementary record of Appeal and parties directed to file their respective submissions on the main Appeal.

Appellants Submissions: -

7. The Appellants have submitted on the duty of a first Appellate Court as was stated in the case of *Selle vs Associated Motor Boat & Company* (1968) A. E. 123.



8. The Appellants submit that the Learned Magistrate had jurisdiction to hear and determine the dispute before Court and he fell in error by upholding the Preliminary Objection, The Appellant submits that the Preliminary Objection was made up of factual issues which ought to have been tested by way of evidence hence outside the ambit of what a preliminary objection is and the Appellant placed reliance in the case of *BWM vs JMC* as well as *Oraro vs Mbaja* (2005) KLR 141.
9. That the Magistrate fell in error for refusing to exercise jurisdiction conferred by Section 9 of the Magistrates Court Act which conferred the Court to deal with land matters. On the strength of the above, the Appellants submit for the Appeal to be allowed.
10. On their part the 1st and 2nd Respondents submit that under Section 18 (2) of the *Land Registration Act*, boundary disputes are first to be determine by the Land Registrar and Courts jurisdiction have been outrightly been ousted.
11. They place reliance on the decision in the case of *S. K. Macharia vs KCB & another* (2012) eKLR as well as the case of *Owners of Motor Vessels "Lilian's" vs Caltex Oil Limited*, underscoring the fact that the 3rd and 4th Defendants submits that there was a proper Preliminary Objection based on Sections 18 and 19 of the Lands Registrations Act, which Sections ousted the Courts jurisdiction.
12. The 3rd and 4th Respondent further submit that under paragraphs 6 to 13 of the plaint before the Subordinate Court, the cause of action was boundary dispute between the Appellants and the 1st and 2nd Respondents and prayer c of the plaint the Plaintiff sought the 3rd and 4th Respondents jointly and severally to survey, identify fix and re- establish the boundary between the parcels number Nandi/Koyo/731 and Nandi/Koyo/932.
13. The 1st and 2nd Respondents further place reliance on the decision in the case of *Willis Ocholla vs Mary Ndege* 2016 (eKLR) on the import of Section 18 (2) of the *Land Registration Act*.
14. The 3rd and 4th Respondents submitted on two issues, namely whether there was a proper Preliminary Objection before the subordinate Court; and whether the preliminary objection was merited.
15. Placing reliance on the definition of a Preliminary Objection as defined in the *Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd* (1969) E. A. 696.
16. That the cause of action as pleaded thus disclosed a boundary dispute which ousted the jurisdiction of the Court under Section 18 (2) of the *Land Registration Act*, hence the preliminary objection was merited so submits the 3rd and 4th Respondents.
17. It is common ground between the Appellants and the Respondents that the Appeal subject of this judgment related to a Ruling in respect of a preliminary objection raised by the 3rd and 4th Respondents in relation to the Subordinates Court jurisdiction.
18. Having analyzed the record of appeal, the rival submissions of the parties to the appeal and considered the law, three issues for determination arise.
19. The first issue is a jurisdictional issue which the parties did not frame and/or submit on but which the Court considers as an important one thus the issues for determination are as follows;-
 - i. Whether there is a proper appeal before Court
 - ii. Whether the appeal is merited
 - iii. What reliefs ought to issue and
 - iv. Who bears the costs of the appeal?



Analysis and Determination: -

20. Whereas there is a right of appeal on Judgments and decrees of Court, a party seeking to appeal against an order and/or ruling either has an automatic right of appeal or has to seek leave to appeal as the case may be and as governed by Section 75 of the *Civil Procedure Act* and Order 43 Rule 1 of the Civil Procedure Rules.
21. In this case, the Ruling and the resultant order and definitely not a judgment and/or a decree and would require no leave to appeal if the same related to the orders and/rules under Order 43 Rule 1, but having been made pursuant to a preliminary objection, which is not founded on Rules under Order 43 Rule 1, it follows that leave under Order 43 (Rule 2 and 3) ought to have been sought before the Appeal was filed as the Preliminary Objection was not founded on any of the Orders/Rules to which appeals would lie as a matter of right under Order 43 Rule 1. The Preliminary Objection herein was founded on the issues of Court lacking jurisdiction.
22. It thus follows that the Appellant ought to have sought for leave to Appeal in accordance with Order 43 (2) (3). The Court had perused the record and the Appellant did not seek for leave to appeal. It follows therefrom that here is no competent appeal for the Court to consider. In arriving at this conclusion, I am persuaded by the decision in the case of J.A.S Kumenda and another vs Governor County Government of Kisii & 5 others (2018) eKLR, where the Court observed as follows; -

“14..... In the present matter the ruling/order sought to be appealed arose from a Preliminary Objection raised by the Respondents/Applicants that the Court dismissed. The dismissal of a Preliminary Objection does not constitute an order falling under Section 75 (1) of the Act against which an appeal would lie as of right and neither would it fall under the orders which an Appeal would lie as of right under Order 43 (1) of the Civil Procedure Rules.....”
23. Thus, the appeal before Court is incompetent for want of leave to appeal.
24. Having reached this conclusion, the Court shall not consider the other issues for determinations.
25. The result is that the Appeal herein is struck out for being incompetent and the interim orders issued herein are vacated.
26. The Court notes that the Plaintiffs suit having been struck out by the Subordinate Court and the Appeal equally struck out, the boundaries of NANDI/KOYO/731 and NANDI/KOYO/932 shall remain as they are until they are fixed and/or determined by the Land Registrar.
27. The Appeal is hereby struck out with cost to the Respondents.

JUDGMENT DELIVERED AND DATED AT KAPSABET THIS 14TH DAY OF NOVEMBER, 2024.

HON. M. N. MWANYALE,

JUDGE

In the presence of;

1. Mr. Sagasi holding brief for Mr. Choge for the Appellant
2. Mr. Tallam for the 1st and 2nd Respondent
3. Mr. Kwame for the 3rd and 4th Respondent

