



**Abello & another v Ongoro (Environment and Land Appeal E020 of 2023) [2024] KEELC 7443 (KLR) (7 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 7443 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL E020 OF 2023**

**E ASATI, J**

**NOVEMBER 7, 2024**

**BETWEEN**

**GRACE AWINO ABELLO ..... 1<sup>ST</sup> APPELLANT**

**PHILIP ABELLO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**DORAH KEMUNTO ONGORO ..... RESPONDENT**

*(Being an appeal from the ruling dated 27/9/2023  
in WINAM PMC E & L CASE NO. E001 OF 2023)*

**JUDGMENT**

1. Vide the Memorandum of Appeal dated 6<sup>th</sup> October, 2023, the Appellants herein appealed to this court against the ruling of the trial court dated 27<sup>th</sup> September, 2023 in Winam E & L Case No. E001 of 2023. The grounds of appeal are that;
  - a. the learned trial Magistrate erred in fact and in law in dismissing the Appellants’ Preliminary Objection contrary to the express provisions of section 18(2) of the Land Registration Act No.3 of 2012 Laws of Kenya.
  - b. the learned trial Magistrate erred in fact and in law by failing to appreciate the facts of the case as per the pleadings of both parties and failing to invoke the applicable laws to the facts.
  - c. the learned trial Magistrate erred in law by dismissing the Appellants’ preliminary objection yet the court lacks jurisdiction to preside over the matter.
  - d. the learned trial Magistrate erred in law and fact by failing to take into consideration the Appellants’ written submissions in support of the Preliminary Objection and instead based its



ruling solely on the Respondent's submissions on the Preliminary Objection thus coming to a wrong conclusion.

- e. The learned trial Magistrate erred in law and fact in writing a ruling which is at variance with the pleadings and contrary to the applicable principles as established by precedent and relevant statutory provisions of law.
2. The Appellant prayed for orders that the appeal be allowed, the ruling be set aside and the suit be dismissed and costs of the appeal be provided for.
3. A brief background to the appeal as can be gathered from the record of appeal is that the Appellants are the Defendants in an ongoing case namely; Winam PMC E&L CASE NO. E001 OF 2023. In the pendency of the suit, the Appellants filed a preliminary objection vide the Notice of Preliminary Objection dated 9<sup>th</sup> February, 2023 on a point of law on the ground that the court lacked the jurisdiction to hear and determine the Plaintiff's suit together with the application therein dated 3<sup>rd</sup> January, 2023 as the entire suit contravened the provisions of section 18(2) of the Land Registration Act No.3 of 2012 Laws of Kenya.
4. The Preliminary Objection was argued by way of written submissions before the trial court. The trial court, vide the ruling delivered on 27<sup>th</sup> September, 2023, found that the preliminary objection was devoid of merit and dismissed it with no orders as to costs.
5. Dissatisfied with the ruling, the Appellants filed the appeal herein. The appeal was argued by way of written submissions.
6. It was submitted on behalf of the Appellants that the preliminary objection arose by clear implication out of the Respondent's pleadings. That the Respondent's suit revolves around a boundary dispute. That the allegations and the prayers in the suit point to a boundary dispute. Relying on the case of George Oraro -vs- Barak Mbaja (2005)KLR, Counsel submitted that the Preliminary Objection did not raise any factual issues that required ascertainment or determination, neither did the Appellants' preliminary objection require the adduction of evidence for authentication. That the Appellants raised the Preliminary Objection anchored on section 18(2) of the Land Registration Act as applicable to the Respondent's own pleadings.
7. It was submitted further that section 18(2) deprives the court of first instance the jurisdiction to hear and determine land boundary disputes and that the Act provides in mandatory terms that such disputes should first be submitted to the Land Registrar unless the boundaries have been determined according to the Act. That it was not pleaded that the dispute had been raised with the Land Registrar before filing the suit.
8. That the suit was prematurely filed. That the Respondent ought to have complied with the mandatory provisions of the section 18(2) before invoking the jurisdiction of the court.
9. Counsel relied on the authority of Speaker of the National Assembly -v-s James Njenga Karume [1992]eKLR where it was held that;

“where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”
10. Counsel further relied on the case of Azzuri Limited -vs- Pink Properties Limited [2018]eKLR where it was held, inter alia, that filing of such suit before referring the dispute to the Land Registrar was contra-statute. Counsel prayed that the appeal be allowed.



11. On behalf of the Respondent, it was submitted that the dispute before court was one of trespass and not a boundary dispute. That the boundaries of the suit land were already marked. Counsel relied on the case of Attorney General & Another -vs- Andrew Maina Githinji & Another (2016)eKLR where it was held that;

“the test to be applied in determining whether the Appellants’ preliminary objection met the threshold or not is what Sir Charles Newbold set out above in the Mukisa case (Supra) that first that the preliminary objection raises a pure point of law, second, that there is demonstration that all facts pleaded by them are correct and third, that there is no fact that need to be ascertained.”

12. Counsel urge the court to find that the dispute was not on boundary but trespass.

### **Analysis and Determination**

13. The substantive issue raised by the grounds of appeal is whether or not the trial court erred in dismissing the preliminary objection. The Counsel submitted that the preliminary objection before the trial court arose from the pleadings filed by the Respondent.

14. I have read the plaint, I see that the dispute involves two parcels of land that neighbour each other namely; the Respondent’s land parcel number Kisumu/Kasule/4859 and the Appellants’ parcel number Kisumu/Kasule/7645. This is pleaded in paragraph 3 of the plaint. Although the Respondent pleaded in paragraph 5 of the plaint that the two parcels of land have had distinct demarcations, there is no pleading to the effect that the boundary between the two parcels of land had ever been fixed by the Land Registry in accordance with the provisions of the [Land Registration Act](#).

15. Jurisdiction of the court is ousted by section 18(2) of the Act where which provides that

“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.”

16. The Respondent’s position is that the claim is one of trespass and not a boundary dispute. However, her complaint as contained in paragraph 7 of the plaint, was that the 1<sup>st</sup> Appellant had authorized her son, the 2<sup>nd</sup> Appellant, to erect structures and posts in the Plaintiff’s parcel of land by destroying the pre-existing boundary, an act that amounted to trespass to land.

17. My understanding of this pleading is that the Appellants had left the correct position of the boundary and proceeded to enter and erect posts and structures in the Respondent’s land. In order for the court to be able to determine this, the input of the Land Registrar is crucial and inevitable. It is the Land Registrar who is able to point out the correct position of the boundary and determine whether the structures and posts complained of are within or outside the Respondent’s land. The law has provided a mechanism for doing this in section 18 of the [Land Registration Act](#). That is why the first port of call for such matters is the Land Registrar in accordance with the provisions of the Act. In Willis Ocholla -vs- Mary Ndege (2016)eKLR where it was held that;

“in terms of section 18(2) of the [Land Registration Act](#), proprietors of registered land with a boundary dispute are obligated to first seek redress or solution from the Land Registrar before moving or escalating the dispute to court”



18. I find that the suit having been filed before compliance with section 18 was pre-mature, against the provisions of the law and that the court did not have jurisdiction in terms of section 18(2). I find that the trial court erred in disallowing the preliminary objection.
19. The upshot is that the appeal has merit and is hereby allowed. The order of the trial court dated 27<sup>th</sup> September, 2023 dismissing the Preliminary Objection is hereby set aside and replaced with an order upholding the Preliminary Objection with the effect that the suit before the trial court is struck out with no orders as to costs.
20. Costs of the appeal are awarded to the Appellants.  
Orders accordingly.

**JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 7<sup>TH</sup> DAY OF NOVEMBER, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

**E. ASATI,**

**JUDGE.**

In the presence of:

Maureen: Court Assistant.

Nyangweso for the Appellants.

No appearance for the Respondent.

