



**Shaiyah v Kihonge & another (Environment & Land Case  
112 of 2021) [2023] KEELC 14 (KLR) (11 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 14 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 112 OF 2021**

**JG KEMEI, J  
JANUARY 11, 2023**

**BETWEEN**

**YUSSUF ABDILLAHI SHAIYAH ..... PLAINTIFF**

**AND**

**WILLIAM MUGAI KIHONGE ..... 1<sup>ST</sup> DEFENDANT**

**COUNTY GOVERNMENT OF KIAMBU ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The 1<sup>st</sup> Defendant filed the instant Preliminary Objection dated December 10, 2021 on grounds that;
  - a. The Court lacks jurisdiction to hear the application as it offends the express provisions of Section 18 and 19 of the *Land Registration Act* No 3 of 2012 for reasons that the subject of the suit is a boundary dispute which falls within the jurisdiction of the Land Registrar.
  - b. The suit is fatally defective, misconceived, mischievous, frivolous or otherwise an abuse of the Court process and therefore the Plaintiff's suit herein is unsustainable and is therefore for striking out.
2. The Preliminary Objection was canvassed by way of written submissions which I have read and considered.
3. Supporting the Preliminary Objection, the 1<sup>st</sup> Defendant's Counsel King'ori Kariuki & Co Advocates filed submissions dated April 21, 2022. It was submitted that a Preliminary Objection is limited to pure points of law as enumerated in the case of *Mukisa Biscuits Company Ltd v West End Distributors Ltd* [1969] EA 696. That the Plaintiff's case as gleaned from para. 10 of the plaint dated October 18, 2021 revolves around on a boundary dispute between the Plaintiff's and 1<sup>st</sup> Defendant's properties. That under Section 18(2) and 19 of the *Land Registration Act* any dispute touching on boundaries is preserve of the Land Registrar as emphasized in the cases of *Onesmus Kamau Mungai v Phares*



Mwangi Kamau & 2 Others [2019] eKLR and George Kamau Macharia v Dexka Limited [2019] eKLR.

4. Opposing the Preliminary Objection, the firm of Abdulrahman, Saad & Associates filed submissions dated 30/6/2021 on behalf of the Plaintiff. The Plaintiff submitted that the issue before Court was indeed determined in line with Section 18(2) Land Registration Act by the Thika Survey Office which issued a Survey Report and a Cadastral map in accordance with Section 15(1) Land Registration Act. That the boundary issue having been fully determined, the suit is properly before this Court and the same ought to be heard on merit. The Court was urged to dismiss the Preliminary Objection with costs to the Plaintiff.

5. The germane issue for consideration is whether the Preliminary Objection is merited.

6. The parameters of consideration of a preliminary objection are now well settled. A preliminary objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696. At page 700 Law JA stated:

“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.”

7. At page 701 Sir Charles Newbold, P added:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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 ...”

8. For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid Preliminary Objection should, if successful, dispose of the suit.

9. The Preliminary objection assails the Plaintiff's capacity to invoke this Court's jurisdiction in view of the provisions of Section 18 and 19 Land Registration Act which provides as thus;

“

“18. Boundaries

(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 filed 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.



(3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary:  
Provided that where all the boundaries are defined under section 19(3), the determination of the position of any uncertain boundary shall be done as stipulated in the Survey Act, (Cap 299).

19. 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 to 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.”

10. A cursory look at the prayers sought in the Plaint by the Plaintiff inter alia reveals that prayer ii is to the effect that ‘an order compelling the 1<sup>st</sup> Defendant to remove and/or otherwise move his boundary wall to the right position away from the Plaintiff’s land’. For this Court to competently determine whether or not such a prayer is merited, it is not in doubt that the issue of boundary has to be determined by way of evidence. The Court cannot usurp the Land Registrar’s power to determine the issue of boundaries as stated by statute above.
11. The Plaintiff argued that the suit is properly before this Court because there is a report on record by the Thika Survey office determining the issue of boundaries. Under the Survey Act Cap 299 Laws of Kenya, a surveyor is defined as means a Government surveyor or a licensed surveyor. Without preempting his case, a surveyor is not the Land registrar as contemplated by Section 18 Land Registration Act above and the proviso thereto refers to uncertain boundaries which issue cannot be ascertained by this Court at this preliminary stage.
12. Further Section 19(2) Land Registration Act above a survey report can only be done pursuant to the Land Registrar having heard the rival parties to such a boundary dispute.
13. It is trite that where there exists a legal mechanism of dispute resolution, that mechanism must be allowed to be deployed and the jurisdiction of the Court invoked after exhausting the said mechanism. I rely on the case of The Speaker of the National Assembly v James Njenga Karume [1992] eKLR where the Court 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.
14. Having said that I note that the Plaint contains prayers inter alia which include general and punitive damages, restraining orders, eviction and declaratory orders as to violation of the Plaintiffs rights to



land. My reading of the provisions of sections 18 and 19 of the LRA shows that such remedies are within the mandate of the Court. To serve the interest of justice, I order that the suit is referred to the Land Registrar for the determination of the boundary dispute and the rest of the prayers are deferred awaiting the report of the Land Registrar. I shall make the necessary orders in the end.

15. Going by my observation under para 13 of the Ruling, the Preliminary Objection partially succeeds and I make no orders as to costs.
16. Final orders;
  - a. The Plaintiff to submit the boundary dispute for determination by the Land Registrar pursuant to Sections 18 and 19 of the Land Registration Act within the next 30 days from the date hereof
  - b. The Land Registrar be and is hereby ordered to file its decision before this Court within the next 60 days from the date of this Ruling.
  - c. The suit be and is hereby stayed pending the reception of the decision / report of the Land Registrar.
  - d. Thereafter the Plaintiff/ (or such other party) shall be at liberty to prosecute the other claims as shall be outstanding then.
  - e. I make no orders as to costs.
17. It is so ordered.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 11TH DAY OF JANUARY, 2023 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of**

**Plaintiff – Absent but served**

**Mr. Muriithi HB Kingori for 1<sup>st</sup> Defendant**

**Ms. Maina for 2<sup>nd</sup> Defendant**

**Court Assistant – Phyllis / Kevin**

