



REPUBLIC OF KENYA



KENYA LAW
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**Malungu v Kimeu (Environment & Land Case 176 of 2017)
[2023] KEELC 20183 (KLR) (27 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20183 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 176 OF 2017
TW MURIGI, J
SEPTEMBER 27, 2023**

BETWEEN

AGGREY MAULA MALUNGU PLAINTIFF

AND

NDUNDA KIMEU DEFENDANT

RULING

1. Before me for determination is the notice of motion dated October 24, 2022, brought under order 40 rule 1 & 2 and order 51 rule 1 of the Civil Procedure Rules and section 1A, 1B and 3A of the Civil Procedure Act, article 159 of the Constitution and all other enabling provisions of the law in which the Applicant seeks the following orders:-
 1. Spent.
 2. Spent.
 3. Spent.
 4. That the Plaintiff/Respondent, his agents, servants and any other person acting through him or on his behalf be restrained from entering, trespassing, cutting down trees and/or interfering with Plot No. Nzai/Masumba/461 and the existing boundary between the said Plot and Plot No. Nzai/Masumba/341 pending the hearing and determination of this suit.
 5. That the Officer Commanding Police Station (OCS) Emali Police Station do ensure compliance.
 6. That the costs of this application be provided for.
2. The application is based on the grounds appearing on its face together with the supporting affidavit of Ndunda Kimeu sworn on even date.



The Applicant's Case

3. The Applicant averred that the present suit revolves around a boundary dispute between land parcels numbers Nzai/Masumba/341 and Nzai/Masumba/461. He averred that prior to instituting this suit, no boundary existed between land parcel No. Nzai/Masumba/341 and Nzai/Masumba/461. He further averred that the boundary between the two parcels of land is about 2-3 meters inside land parcel No. Nzai/Masumba/461. That in a bid to ascertain the boundary between the two parcels of land, the County Surveyors and the Land Registrar had in the past prepared different reports which were never adopted by the court.
4. That pursuant to the order issued on July 10, 2019 by Hon Justice Mbogo, the Land Registrar and the Land Surveyor visited the site and compiled a report which in his opinion was inaccurate because the Surveyor relied on points and coordinates that gave a different position of the boundary in dispute.
5. He argued that a large portion of their land will be taken away if the report is adopted by the court because the boundary between the two parcels of land was marked inside their land. He asserted that the markings of the boundary were different from the marking made in the earlier reports.
6. He further averred that immediately after the site visit, the Plaintiff mobilised people who destroyed the existing boundary and placed the boundary along the markings made by the Surveyor before the report was presented and adopted by the court. He argued that the Plaintiff took advantage of the site visit to forcefully invade their land, thereby causing wanton destruction of property. He went on to state that the Plaintiff mobilised members of the community who cut down trees and cleared the land under the pretext that it was his land.
7. He maintains that the police are reluctant to take any action against the Respondent because the matter involves a dispute over land. He urged the court to grant a temporary injunction pending the determination of the dispute as his life and that of his family are in danger.

The Respondent's Case

8. In opposing the application, the Respondent filed a replying affidavit sworn on November 7, 2022. He averred that the application is intended to undermine, discredit and create doubt on the implementation of the report on the boundary dispute which is yet to be filed in court. He argued that the Applicant is not qualified to interpret the GPRS coordinates since he is not a qualified Land Surveyor.
9. He further averred that the photographs annexed to the Applicant's supporting affidavit depict felled trees and not the fence demarcating the two parcels of land which is the area of conflict. In addition, he argued that the photographs are inadmissible as they are not supported with a certificate of electronic evidence.
10. He denied mobilising the community against the Applicant and asserted that the Applicant had not annexed an O.B extract to demonstrate that he filed a report with the police. Lastly, it was argued that there are interim orders in force restraining the Defendant from interfering with the boundary and for status quo to be maintained pending the hearing and determination of this suit.

The Response

11. In a supplementary affidavit filed on February 6, 2023, the Applicant averred that the Respondent has trespassed on 2¹/₂ acres of their land and had placed thorny branches and beacons along the markings pointed out by the Land Registrar as the possible boundary between the two parcels of land. He



reiterated that he reported the matter to the police and to the area chief who stated that they could not interfere since the matter was pending in court.

12. The application was canvassed by way of written submissions.

The Applicant's Submissions

13. The Applicant's submissions were filed on March 6, 2023.
14. Counsel reiterated the contents of the Applicant's supporting affidavit in support of his submissions. In addition, Counsel submitted that the Applicant had satisfied the conditions for the grant of a temporary injunction as laid down in the case of *Gella v Cassman Brown & Co. Ltd* [1973] EA 358.
15. Counsel further submitted that the Applicant will suffer irreparable loss due to the wanton destruction and forcible occupation of 2½ acres of land by the Respondent herein.

The Respondent's Submissions

16. The Respondent's submissions were filed on March 16, 2023.
17. In his submissions, Counsel reiterated the contents of the Respondent's replying affidavit.

Analysis and Determination

18. Having considered the application, the respective affidavits and the rival submissions, the only issue that arises for determination is whether the Plaintiff has established the legal threshold for the grant of an injunction.
19. The law that governs applications for injunction is outlined under order 40 rule 1 of the [Civil Procedure Rules 2010](#) which provides as follows: -
 1. Where in any suit it is proved by affidavit or otherwise;
 - a. That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree, or
 - b. That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

The court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

20. The principles applicable in an application for an injunction were laid down in the celebrated case of *Giella v Cassman Brown & Co Ltd* (*supra*) where the court held as follows: -First the applicant must show a *prima facie* case with a probability of success. Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable harm which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.



21. For the Applicant to succeed in this application, all the three elements must be demonstrated. This was the holding in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others*, CA No. 77 of 2012 where the Court of Appeal held thus: -

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a *prima facie* level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.”

22. The first issue for determination is whether the Applicant has established a *prima facie* case with a probability of success.
23. In the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR the Court of Appeal defined a *prima facie* case in the following terms: -

“A *prima facie* case in a civil application includes but is not confined to a “genuine and arguable case. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

24. The Applicant averred that the Respondent mobilized people to destroy the existing boundary and placed a new boundary as per the markings made by the Surveyor during the site visit. He further averred that the Plaintiff mobilized some neighbours and members of the community to cut down trees and clear the land under the pretext that he is the owner of the land. In this regard the Applicant annexed photographs depicting felled trees in his supporting affidavit.
25. The Respondent on the other hand averred that the Applicant is attempting to discredit the implementation of the report by the Land Registrar which is yet to be filed in court.
26. It is not in dispute that the instant suit revolves around a boundary dispute between land parcel No. Nzau/Masumba 461 and Nzau/Masumba/341. The record shows that on July 10, 2019, Hon Justice Mbogo referred the boundary dispute to the Land Registrar to deal and file a report within 90 days.
27. From the averments by the Applicant, the disputed site was visited by the Land Registrar in the company of two Land Surveyors. The applicant averred that he was not in agreement with the findings contained in the report because the surveyors relied on points and coordinates that gave a different position of the boundary in dispute.
28. It is not in dispute that the report by the Land Registrar has not been filed in court. The Applicant, cannot therefore disagree with the findings of the report which is yet to be presented in court as it would amount to pre-empting the same. On the basis of the material placed before me, I find that the Applicant has not established a *prima facie* case with a probability of success.



29. The Applicant having failed to establish a *prima facie* case, it would be immaterial for me to consider the other principles governing the grant of an injunction enunciated in the case of *Giella v Cassman Brown* (Supra).

30. In so finding, I am persuaded by the case of *Kenya Commercial Finance Co. Ltd v. Afraba Education Society* [2001] EA 86 where the Court of Appeal held thus;

“If the Applicant establishes a *prima facie* case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the Respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a *prima facie* case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”

31. The upshot of the foregoing is that the application dated October 24, 2022 is devoid of merit and the same is dismissed with costs to the Plaintiff.

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RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 27TH DAY OF SEPTEMBER, 2023.

HON. T. MURIGI

JUDGE

IN THE PRESENCE OF:-

Muia for the Defendant.

