



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO. 11 OF 2018

BENJAMIN MAILU KYELE *alias* PETER KYELE.....APPELLANT

VERSUS

DUNCAN PAUL MUKINYA.....RESPONDENT

RULING

1. In the Application dated 18th April, 2018, the Appellant is seeking for the following orders:

a. That there be a stay of execution of the Ruling delivered on 4th April, 2018 in Land Case No. 3 of 2018 at Kitui Law Courts pending the hearing and determination of the Appeal.

b. That the Respondent by himself, his servants, employees, agents or anyone calming under him be restrained from entering, constructing or in any other way interfering with the appellant's portion of land Parcel No. Kisasi/Mosa/700 measuring 50ft x 100ft pending hearing and determination of the instant Application and the Appeal.

c. That costs be provided for and borne by the Respondent.

2. The Application is premised on the grounds that the Appellant owns two (2) parcels of land measuring 50ft x 100ft each hived off from land parcel number Kisasi/Mosa/700; that the Respondent, has encroached on the Appellant's parcels of land and that on 4th April, 2018, the lower court dismissed the Appellant's Application for injunction.

3. The Appellant deponed that the Respondent's parcel of land borders his two plots; that the Respondent's Secretary had the boundaries of his land surveyed without consulting the previous purchasers and that the Respondent's perimeter wall and foundation encroaches on his land.

4. The Respondent filed a Notice of Preliminary Objection and a Replying Affidavit. In his Preliminary Objection, the Respondent averred that the Appellant does not have the *locus standi* to bring the suit because he is not the registered proprietor of the land.

5. In the Replying Affidavit, the Respondent deponed that the court visited the site and heard from one Kanini Nyamai, whom the Appellant allegedly bought the land from; that the court observed and noted that it is the Appellant who was trespassing into his land by claiming that his land diagonally faces the road and that the trial court arrived at the correct decision.

6. The Respondent finally deponed that he has already finished constructing the perimeter wall and that the Application has been overtaken by events.

7. The Appellant's counsel submitted that the Appellant's Application was dismissed without being heard; that the Application was never argued in court and that an informed decision could not have been reached without formally hearing the parties.

8. On his part, the Respondent's advocate submitted that the Respondent has completed the construction; that any order issued by this court is of no value; that the lower court allowed the Respondent to continue constructing the wall and that the issue of the boundary dispute should be dealt with by the Land Registrar, and not the courts.

9. In the Memorandum of Appeal filed on 20th April, 2018, the Appellant is challenging the Ruling of the learned Magistrate dated 4th April, 2018. In the said Ruling, the learned Magistrate gave what he called "*Directions after scene visit on 28th March, 2018*". In the said "*directions*", the learned Magistrate noted that "*the sentiments of the seller have been taken into account and the court finds no merits for the orders of injunction at this stage.*"

10. Although the issue of whether the learned Magistrate heard the Appellant before issuing the orders of injunction will be determined after hearing the Appeal, the “*Ruling*” of the learned Magistrate for 4th April, 2018 shows that the final order of injunction was given upon the court visiting the site, and not after hearing the Application that was pending.

11. Indeed, there is no indication in the said “*Ruling*” or “*Directions*” showing that the Appellant’s objection to the construction of the disputed area was heard on merit before the Respondent was allowed by the court to continue with the construction.

12. Considering that every party has a constitutional right to be heard, and in view of the fact that the Appeal by the Appellant will be rendered nugatory if the Respondent continues to develop the suit land, I shall allow the Application dated 18th April, 2018 as follows:

a. That there be a stay of execution of the Ruling delivered on 4th April, 2018 in Land Case No. 3 of 2018 at Kitui Law Courts pending the hearing and determination of the Appeal.

b. That the Respondent by himself, his servants, employees, agents or anyone calming under him be restrained from entering, constructing or in any other way interfering with the portion of land Parcel No. Kisasi/Mosa/700 measuring 50ft x 100ft pending hearing and determination of the intended Appeal.

c. That costs be provided for and be borne by the Respondent.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 29TH DAY OF MARCH, 2019.

O.A. ANGOTE

JUDGE