



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CIVIL SUIT NO.24 OF 2012**

**JACKSON MWANIKI NDUNGU.....1<sup>ST</sup> PLAINTIFF**

**MICHAEL NDUNGU MWANIKI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**PETER ANJENYO VUHYA.....1<sup>ST</sup> DEFENDANT**

**CRESTERS KULOBA WAMBU.....2<sup>ND</sup> DEFENDANT**

**AND**

**PAUL KAMAU MWANGI.....INTERESTED PARTY/APPLICANT**

**RULING**

The plaintiff filed this suit on 8<sup>th</sup> March 2012 claiming that whereas he is the registered proprietor of land parcel No. **E. BUKUSU/S. KANDUYI/1596** which has since been sub-divided into parcels No. **E. BUKUSU/S. KANDUYI 13955, 13956, 13957, 13958, 13959, 13960, 13961, 13962 and 13963**, the defendant has without any colour of right trespassed into the following four parcels i.e. **E. BUKUSU/S. KANDUYI/13955, 13956, 13960 and 13961** (herein the suit land) by erecting barbed wires and constructing thereon. The plaintiff therefore prays for an order of injunction and eviction as well as general damages for trespass.

The 1<sup>st</sup> defendant filed a defence denying the allegation of trespass and stating that he is the proprietor of parcels **No. E. BUKUSU/S. KANDUYI/14796, 14677 and 14676** and has nothing to do with the suit land.

The 2<sup>nd</sup> defendant similarly filed a defence claiming he is a stranger to the allegations raised by the plaintiff and added that he sold to the 1<sup>st</sup> defendant land parcels **No. E. BUKUSU/14796, 14677 and 14676** which are distinct and different from the suit land and therefore the remedies of injunction, eviction and general damages are not available to the plaintiff. He added further that he would raise a Preliminary Objection for the dismissal of the plaintiff's case for violating **Order 3 and 4 of the Civil Procedure Rules** and also **Section 2 of the Environment and Land Court Act**.

There are two applications pending in this matter. One is dated 11<sup>th</sup> September 2017 filed by **PAUL KAMAU MWANGI** the Applicant seeking to be enjoined in these proceedings as an interested party and the other dated 16<sup>th</sup> January 2018 by the 2<sup>nd</sup> defendant seeking orders that this suit be declared to be res judicata and also contravenes the provision of **Section 18 of the Land Registration Act 2012** and should be struck out. When the parties appeared before me, it was agreed that the parties canvass the application dated 11<sup>th</sup> September 2017 first.

The application dated 11<sup>th</sup> September 2017 seeks to enjoin one **PAUL KAMAU MWANGI** (the Applicant herein) as an interested Party. It is premised under the provisions of **Sections 1A, 1B, 3 and 3A of the Civil Procedure Act and Orders 1 Rule 3 and 51 Rule 1 of the Civil Procedure Rules**. It is based on the grounds set out therein and also supported by the Applicant's affidavit. The gist of the application is that the Applicant is the registered proprietor of the land parcel **No. E. BUKUSU/S. KANDUYI/11020** which was a sub-division of the land parcel **No. E. BUKUSU/S. KANDUYI/1595**. That the defendants are the proprietors of the parcels **No. E. BUKUSU/S. KANDUYI 8828 and 8830** which share a boundary with his land parcel **No. E. BUKUSU/S. KANDUYI/11020** and during the pendency of this suit, the 2<sup>nd</sup> defendant forcefully and without any colour of right curved off a portion of land parcel **No. E. BUKUSU/S. KANDUYI/11020** in order to give credence to his case against the plaintiff. The decision in this case will therefore have a direct effect on the acreage of the land parcel **No. E. BUKUSU/S. KANDUYI/11020** and it is imperative that he is enjoined in this suit as an interested party for a complete and final determination of this suit.

The plaintiffs and 1<sup>st</sup> defendant did not oppose the application.

The 2<sup>nd</sup> defendant filed grounds of opposition describing the application as frivolous, vexatious and an abuse of the due process of the Court. Most significantly, the 2<sup>nd</sup> defendant questioned the jurisdiction of this Court to grant the orders sought in view of the provisions of **Section 18 of the Land Registration Act 2012**.

Submissions have been filed both by the Applicant and the 2<sup>nd</sup> defendant.

I have considered the application, the grounds of opposition and the submission by Counsel.

Although the Applicant has cited the provisions of **Order 1 Rule 3 of the Civil Procedure Rules**, the correct provision is **Order 1 Rule 10(2)** of the said rules which empowers the Court, at any stage of the proceedings, to enjoin a party.

***“... whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit...”***

In the case of **TRUSTED SOCIETY OF HUMAN RIGHTS V MUMO MATERI MATEMO & OTHERS [2014 KLR]**, the Supreme Court held as follows;

***“... an interested party is one who has a stake in the proceedings though he or she was not a party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made. Either way, such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings and champions his or her cause”.***

The Applicant has pleaded in paragraph 5 of his supporting affidavit as follows:

***5: “That while these proceedings were still pending in Court, the 2<sup>nd</sup> defendant forcefully and without any colour of right curved off a portion of land parcel No. E. BUKUSU/S. KANDUYI/11020 ostensibly to give credence to his case against the plaintiffs/Respondents to maintain the shape of the Defendants/Respondent’s parcels.”***

Then he goes on to deposed as follows in paragraph 7 of the same affidavit:

***“That the decision that this Court will render in this case will have a direct effect on the acreage of land parcel No. E. BUKUSU/S. KANDUYI/11020 which is held by the Applicant”.*** Emphasis added.

From the above averments, and bearing in mind that the basis of enjoining a party is to **“effectively and completely”** adjudicate over the issues raised in a suit and also taking into account that the plaintiffs are alleging trespass on the suit land, it is, in my view, proper that the Applicant be enjoined in these proceedings as an interested party. I do not think that this application is frivolous, vexatious or an abuse of the Court process as claimed by the 2<sup>nd</sup> defendant in his grounds of opposition.

It is also the 2<sup>nd</sup> defendant’s case that this Court lacks jurisdiction to grant the orders sought by virtue of the provisions of **Section 18 of the Land Registration Act 2012**. The relevant **sub-section is 18(2)** which reads as follows:

***18(2) “The Court shall not entertain any action or other proceeding relating to a dispute as to the boundaries of registered land unless the boundaries have determined in accordance with this section.”***

I understand the 2<sup>nd</sup> defendant to be claiming that the plaintiff’s claim relates to a dispute over boundaries which have not been determined as required under the **Survey Act (chapter 299 Laws of Kenya)**. To determine what this dispute is about, this Court can only refer to the pleadings of the parties and no more.

It is clear from the plaint herein that the plaintiffs are alleging that the defendants have trespassed onto the suit land and should therefore be enjoined and evicted therefrom. That is clear from paragraphs 7, 8 and 9 of the plaint. In his defence filed herein on 13<sup>th</sup> March 2012 and particularly paragraph 3 thereof the 1<sup>st</sup> defendant says:

***“The defendant in response to paragraph 5 of the plaint categorically denies trespass and or interest on land parcels listed and on the contrary, states that his parcels of land are Nos. E. BUKUSU/S. KANDUYI/14796, 14677 and 14676 of which he has title deeds.”***

On his part, the 2<sup>nd</sup> defendant in paragraph 7 of his defence filed on 23<sup>rd</sup> October 2013 has pleaded as follows:

***“The 2<sup>nd</sup> defendant denies the contents of paragraph 9 of the plaint. The 2<sup>nd</sup> defendant states that the 1<sup>st</sup> defendant is occupying title numbers EAST BUKUSU/SOUTH KANDUYI/14677 14796 and 14676 which titles are distinct from the alleged title number EAST BUKUSU/SOUTH KANDUYI.13955, 13956, 13960 and 13961 and thus the order of injunction, eviction and general damages are not available to the plaintiff.”***

It is the parties’ pleadings that determine what dispute is before the Court for its consideration. And from what I have cited above from the plaint and defences, the plaintiffs are claiming a trespass on the suit land which the defendants have denied and stated that they are on different parcels of land. There is no pleading about a boundary dispute and the Court cannot go beyond the parties’ pleadings. Once a party

pleads that the other has trespassed onto his land, then it implies that the boundary to the land on which the trespass has been committed has been determined and is known with certainty. This is because a trespass, as defined in **BLACK'S LAW DICTIONARY 10<sup>TH</sup> EDITION** is:

***“An unlawful act committed against the person or property of another...wrongful entry on another’s real property”.***

The Court cannot therefore assume that this is a dispute over boundaries when the parties themselves have not done so. Under Order 2(1) of the Civil Procedure Rules, every pleading in Civil proceedings:

***“shall contain information as to the circumstances in which it is alleged that the liability has arisen.”*** As is now clear from what I have already stated above, the liability being alleged in this case is on trespass to land and it has been denied by the defendants. There is no issue raised as to boundary dispute and if it arises in the course of the trial, the Court will know how to deal with it.

Secondly, the 2<sup>nd</sup> defendant cannot now question this Court’s jurisdiction to handle this dispute when in paragraph 10 of his defence he pleaded as follows:

***“Jurisdiction is admitted”.***

The 2<sup>nd</sup> defendant cannot now turn round and allege that this Court has no jurisdiction. He cannot approbate and reprobate at the same time.

Therefore, and for the reasons set out in the foregoing passages of this ruling, I am satisfied that the Applicant ought to be enjoined in these proceedings as an interested party. I accordingly allow his Notice of Motion dated 11<sup>th</sup> September 2017 and make the following orders:

- 1. PAUL KAMAU MWANGI be enjoined in these proceedings as an interested party.**
- 2. The Interested party to file and serve his pleadings within 14 days from the date of this ruling.**
- 3. The other parties shall also have 14 days from the date of service to file their responses.**
- 4. Thereafter parties to comply with pre-trial proceedings before the Deputy Registrar so that this suit which was filed in 2012 is expedited.**
- 5. Meanwhile, the 2<sup>nd</sup> defendant is at liberty to take a date to prosecute his application dated 16<sup>th</sup> January 2018.**
- 6. Costs in the cause.**

**BOAZ N. OLAO**

**JUDGE**

**22<sup>ND</sup> NOVEMBER 2018**

Ruling dated, delivered and signed in open Court this 22<sup>nd</sup> day of November 2018.

Mr. Onyando for Plaintiff - present

Mr. Wasilwa for Mr. Ondogo for 1<sup>st</sup> defendant – present

Mr. Wekesa for Mr. Bwonchiri for 2<sup>nd</sup> defendant – present

1<sup>st</sup> and 2<sup>nd</sup> defendants – present

**BOAZ N. OLAO**

**JUDGE**

**22<sup>ND</sup> NOVEMBER 2018**