



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 608 OF 2017

KETUPEI OLE ATETI MAYA.....PLAINTIFF

VERSUS

MOSES MEITAMEI NKIMINIS.....DEFENDANT

RULING

What is before this Court is a Notice of Motion dated 5th April, 2017 by the Plaintiff brought pursuant to Section 1A, 1B and 3 A of the Civil Procedure Act, Cap 21, Order 40 Rule 1, 2, 3 and 4, Order 51 Rule 1 of the Civil Procedure Rules of 2010, of the Laws of Kenya and all the other enabling provisions of the law. The Defendant also filed a notice to raise a Preliminary Objection dated 25th April, 2017.

The Notice of Motion application dated 5th April, 2017 is based on the following grounds which in summary are that Plaintiff is the registered owner of suit property KAJIADO/PURKO/435. The Defendant has interfered with the said property by trespassing and grazing his animals on the suit parcel . Unless restrained the Defendant will continue to interfere with the suit parcel.

The application is supported by the affidavit of KETUPEI OLE ATETI MAYA the Plaintiff herein where he deposes that sometime in early 2016, the Defendant interfered with his property by trespassing and growing crops therein. He avers that unless the Court intervenes, there is likely to be a breach of peace as the Defendant will not vacate the suit property peacefully.

The Defendant opposed the application and filed a replying affidavit by one MOSES MEITAMEI NKIMINIS where he deposes that there is no dispute at all regarding the Plaintiff's ownership of land parcel number KAJIADO/PURKO/435 whereas he is owner of KAJIADO/PURKO/647. He denies trespassing on the Plaintiff's land and avers that it is the Plaintiff who has trespassed on his property. Further that they have been having a long running boundary dispute on the aforementioned parcels of land with the Registrar including the Surveyor visiting the site and preparing a report which is marked as annexure 'MMNII'. He avers that the Plaintiff instituted judicial review proceedings vide **Nairobi Miscellaneous Application No. 314 of 2016** with the ruling thereon delivered on 24th January, 2017. He states that the dispute herein is a boundary one, the procedure and mechanism as enshrined within the relevant Act has not been exhausted.

The Notice of Motion dated 5th April, 2017 and the Notice of Preliminary Objection dated 25th April, 2017 were argued together.

Parties filed their respective submissions which I have considered.

Issues and Determination

Upon perusal of the application, affidavits and submissions filed herein, the main issues for determination at this juncture are:

- Whether the Court has jurisdiction to entertain this application.
- Whether the Plaintiff is entitled to the injunctive orders sought.
- Whether the Judicial Review Proceedings affect the instant application

On the first issue whether the Court has jurisdiction to entertain this application, the Defendant expressly stated that the question of title to the Plaintiff's land is not in dispute. He however contended in his replying affidavit that they have a long running boundary dispute with the Plaintiff and raised a preliminary objection to the effect that the Court does not have jurisdiction to entertain this matter in accordance with the provisions of Section 18 (2) of the Land Registration Act. This section stipulates as follows: **'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.'**

According to this section it is evident that the parties having a boundary dispute have recourse to first seek the intervention of the Land Registrar before moving to Court. According to the Defendant's averments within his replying affidavit, they have been having a long running boundary dispute on the aforementioned parcels of land with the Registrar including the Surveyor visiting the site and preparing a report. These averments were not controverted by the Plaintiff. I note from annexure 'MMNIII' that there were subsequent summons by the Land Registrar to the Plaintiff to attend site meeting to further deliberate on the boundary dispute but through his advocate messrs Onchiri & Company Advocates vide a letter dated 2nd October, 2014, sought for the same to be rescheduled. In the circumstances I find that this Court does not have jurisdiction to entertain the boundary dispute between the Plaintiff and Defendant's parcel of land KAJIADO/PURKO/435 and KAJIADO/PURKO/647 respectively until the same is determined by the Land Registrar.

On the second issue as to whether the Plaintiff is entitled to the injunctive orders sought. Based on the fact that the Land Registrar has not determined the issue of the boundary between the Plaintiff and Defendant's parcel of land. I do not find that the Plaintiff has proved the acts of trespass alleged to warrant the granting of the injunctive orders sought.

As to whether the Judicial Review Proceedings has an effect of the current application. I note that in the Nairobi Miscellaneous Application No. 314 of 2016 the Judge had ruled on 24th January, 2017 that **'The applicant should have exhausted the remedies provided under the Land Registration Act 2012 before moving this Court for judicial review.'** In as much as the judicial review was challenging the illegality in the decision of the County Land Registrar and the County Surveyor to restart the boundary dispute, I note the Court proceeded to make a finding on the issue that the Plaintiff had not exhausted the remedies to boundary disputes as enshrined within the Land Registration Act. These proceedings hence have an effect on the current application.

In the circumstances I uphold the Defendant's preliminary objection dated 25th April, 2017 and dismiss the Plaintiff's Notice of Motion dated 5th April, 2017 with costs.

Dated signed and delivered in open court at Kajiado this 26th September, 2017.

CHRISTINE OCHIENG

JUDGE

REPRESENTATION

Koin for defendant

Ojienda for Nzaku for plaintiff/applicant

Court Assistant Mpoye