



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 180 OF 2012

ROSELYNE OTAGOPLAINTIFF/APPLICANT

VERSUS

JONATHAN NYANGAU.....DEFENDANT/RESPONDENT

R U L I N G

1. The Applicant, **Roselyne Otago** filed an application dated 25th May, 2012 seeking injunction orders restraining the Respondent, **Jonathan Nyangau** from trespassing, selling, transferring, alienating, developing, charging and or in any manner interfering with the applicant's possession and ownership of **LR/No. Mavoko Township Block 3(Waswa) 4032** (*subject land*) pending hearing and determination of the suit.
2. The application is based on grounds that the Applicant acquired the suit premises from **Waswa** after paying a consideration of Kshs. 41,000/= making her a *bonafide* owner. The Respondent has now encroached on it and commenced excavation with a view of developing it.
3. In her supporting affidavit, the applicant deponed that she purchased the subject land and she was issued with a title deed. She went to the portion of land in September, 2007 only to find the appellant, the owner of **Plot No. 4033** having encroached on her parcel **No. 4032**. The land was surveyed by the **Waswa Welfare Society's** surveyor in the presence of both parties who confirmed that the respondent had encroached on her land and fenced it off with a barbed wire. Beacons were identified. Despite the findings the respondent went ahead to develop the land. She reported the matter to the administration and the Land Registrar.
4. In a response thereto, the respondent filed a replying affidavit stating that he was allocated seven parcels of land by **Waswa LR No. Mavoko Township 4033, 4034, 4035, 4060, 4061 and 4062**. He denied having encroached on the applicant's land. He stated that the structures shown on photographs are structures on **Plot No. 4033** and not the subject land.
5. In a further affidavit filed by the applicant she stated that the District Surveyor's report confirmed encroachment on the subject premises by the respondent.
6. Conditions for granting of an interlocutory injunction were set out in the case of **Giella versus Cassan Brown[1973] E.A. 358**. The applicant must establish a *prima facie* case with a probability of success, that he/she will suffer irreparable damage should the orders sought be denied and where the court is in doubt, it should decide the application on a balance of convenience.
7. A *prima facie* case was defined by the Court of Appeal in the case of **Mrao Ltd versus First American Bank of Kenya Ltd & 2 others[2003] eKLR** as:-

“...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 later.”

8. In the instant case both parties are in agreement that they own separate parcels of land. The applicant owns **Mavoko Township Block 3(Waswa) 4032** while the respondent owns **Mavoko Township Block 3 (Waswa) 4033** and other 6 titles aforementioned. Admitting that he has commenced development of the portion, the respondent argues that he has fenced off his own parcel of land but not the applicants.

9. The applicant has demonstrated by way of annexed photographs **‘RO4’** the ongoing development on the land. These developments according to the respondent are on his portion of land. The main contention herein is therefore the actual boundary between the two (2) plots. The District Surveyor having visited the land found that the respondent being the proprietor of parcel **Number, 4033** had encroached on parcel **number 4032** entirely and having constructed semi-permanent structures thereon. This would be a clear case of trespass. It is evidence that the applicant has established a *prima facie* case with a probability of success. It calls upon this court to remedy the situation on interim basis by injuncting the respondent from continuing with the development pending hearing and determination of the suit.

10. I therefore grant orders injuncting the respondent as sought.

11. The respondent is condemned to pay costs of the application.

12. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 14TH day of JANUARY, 2015.

L.N. MUTENDE

JUDGE