



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 41 OF 2015

MARTIN KEMUMA PLAINTIFF

VERSUS

FRANCIS ORUOCHI 1ST DEFENDANT

COUNTY GOVERNMENT OF KISII 2ND DEFENDANT

RULING

1. The plaintiff is the registered proprietor of all that parcel of land known as **LR No. Wanjare/Bomorenda/3014** (hereinafter referred to as “**the suit property**”) while the 1st defendant is the registered proprietor of all that parcel of land known as **Plot No. 105 Nyambunwa market** (hereinafter referred to only as “**Plot No. 105**”). The 2nd defendant is a County Government established under Article 176 (1) of the Constitution of Kenya within whose jurisdiction the suit property and Plot No. 105 are situated. The plaintiff brought this suit against the defendants on 10th February 2015 seeking the following reliefs;

(a) A permanent injunction restraining the defendants from entering, trespassing, encroaching, destroying boundaries, wasting and/or demolishing any structures on the suit property.

(b) An order compelling the defendants to restore the boundary of the suit property to its original place.

2. In his plaint dated 10th February 2015, the plaintiff averred that on 10th January 2015, the 1st defendant with the assistance of the 2nd defendant entered the suit property without his consent or permission and destroyed the features that marked the boundary of the said parcel of land. The plaintiff averred that following the said incident, the 2nd defendant issued him with a notice dated 30th January 2015 demanding that he demolishes the structures that he has put up on the suit property, failure to which the same shall be demolished by the 2nd defendant. The plaintiff averred that he will suffer loss and damage if the 2nd defendant makes good its threat to demolish the said structures. It is on account of the foregoing that the plaintiff sought the reliefs that I have set out herein above.

3. Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 10th February 2015 seeking a temporary injunction to restrain the defendants from, demolishing structures erected on, alienating, wasting, trespassing on, destroying and/or entering onto the suit property pending the hearing and determination of this suit. The plaintiff’s application was supported by the affidavit of the plaintiff sworn on 10th February 2015 and the grounds that were set out on the face thereof. In his

affidavit in support of the application, the plaintiff reiterated the contents of the plaint that I have highlighted above. The plaintiff contended that the suit property is separate and distinct from Plot No. 105 and as such the defendants have no right to demand that he demolishes the structures that he has put up thereon. The plaintiff reiterated that he stands to suffer irreparable loss and damage if the injunction sought is not granted to restrain the threatened demolition of his structures on the suit property.

4. The plaintiff's application was opposed by the defendants through replying affidavits sworn by the 1st defendant on 16th February 2015 and by one, Emily Osinde on behalf of the 2nd defendant on 17th February 2015. In his affidavit, the 1st defendant contended that the dispute between the parties herein concerns the boundary of the suit property and Plot No. 105. The 1st defendant contended that he has owned and occupied Plot No. 105 peacefully for several years until this year when the plaintiff trespassed on a portion thereof and erected a semi-permanent structure. The 1st defendant contended that since the dispute between the parties revolves around the boundary between the suit property and Plot No. 105, this court has no jurisdiction to determine the same. The 1st defendant contended that Kisii County Surveyor had visited the two parcels of land and confirmed that it is the plaintiff who has encroached on Plot No. 105. In her affidavit, Emily Osinde deposed that the notice that was issued by the 2nd defendant to the plaintiff concerned Plot No. 105 and not the suit property. She deposed that the plaintiff encroached on Plot No. 105 and put up structures thereon without approval from the 2nd defendant. The said structures according to her are illegal and the 2nd defendant was entitled to give notice to the plaintiff to remove the same or risk the demolition of the same by the 2nd defendant. She denied that the 2nd defendant's employees and/or servants entered the suit property and destroyed the boundary between the suit property and Plot No. 105.

5. I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the replying affidavits filed by the defendants in opposition to the application. Finally, I have considered the oral submissions that were made before me by the advocates for the parties on 5th March, 2015. The principles that guide this court while considering applications for interlocutory injunction are now well settled. As was stated in the case of **Giella –vs- Cassman Brown & Company Ltd [1973] E. A 358**, an applicant for interlocutory injunction must establish a prima facie case against the respondent. He must also demonstrate that unless the injunction is granted, he is likely to suffer irreparable harm that cannot be compensated in damages. In the event that the court is in doubt as to the foregoing, the application would be determined on a balance of convenience. On the material before me, I am not satisfied that the plaintiff has established a prima facie case against the defendants with a probability of success. What has come out from the affidavit evidence that has been placed before the court is that there is a dispute between the plaintiff and the 1st defendant over the boundary between the suit property and Plot No. 105. The plaintiff has contended that he has put up semi-permanent structures on the suit property which structures the defendants have threatened to demolish unless the same are removed by the plaintiff a demand which the plaintiff has termed unlawful. The plaintiff has contended that the structures in dispute are on the suit property and that Plot No. 105 is being used by the defendants merely as an excuse to demolish the same.

6. The 1st defendant on the other hand has contended that the structures in dispute have been erected on Plot No. 105 and not on the suit property as claimed by the plaintiff. The 2nd defendant was dragged into the boundary dispute by the 1st defendant. The 1st defendant had sought the assistance of the 2nd defendant to have the said semi-permanent structures that according to him have been erected illegally on his parcel of land removed. It is pursuant to this request that the 2nd defendant issued a notice to the plaintiff on 30th January 2015 to demolish the said structures and remove the same from Plot No. 105 failure to which the same would be demolished by the 2nd defendant. The 2nd defendant has contended that the said structures were been put up by the plaintiff on Plot No. 105 without first obtaining approval from the 2nd defendant and as such the same are illegal and liable to be demolished by the 2nd defendant.

7. This court has no jurisdiction to determine boundary disputes. Jurisdiction to determine boundary disputes has been conferred upon the land registrar under section 18 of the Land Registration Act, 2012.

Section 18 (2) of the said Act prohibits this court from entertaining any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries of such land have been determined in the first instance by the land registrar as aforesaid. In the circumstances, this court is not competent to determine whether the structures in dispute are on the suit property as claimed by the plaintiff or on Plot No. 105 as claimed by the defendants.

8. The plaintiff has not placed any evidence before me to show that the structures in dispute are on the suit property. The determination of this issue is dependent on the determination of the boundary between the suit property and Plot No. 105. Since this court has no jurisdiction to determine boundary disputes as I have stated above, I am not satisfied that the plaintiff's claim herein has any chances of success against the defendants. The 2nd defendant had also contended that the structures in respect of which the plaintiff has been given demolition notice are illegal the same having been put up without approval by the 2nd defendant. The plaintiff has not denied these allegations. The 2nd defendant has power under the Physical Planning Act, Cap.286 Laws of Kenya to control developments within its jurisdiction. It has a right under the said Act to demolish buildings or structures put up without its approval provided prior notice of the intended demolition is given to the developer. In the absence of any evidence that the structures in dispute were put up with the approval of the 2nd defendant, the chances of success of the plaintiff's case against the 2nd defendant is very minimal.

9. Having held that the plaintiff has failed to establish a prima facie case against the defendants, it is not necessary for me to consider whether or not the plaintiff would suffer irreparable harm if the orders sought are not granted. I would say however that if I was to determine the issue, I would have determined it against the plaintiff. The plaintiff has not told the court the purpose for which the disputed structures were put up. The court is therefore not in a position to assess the nature of loss that the plaintiff is likely to suffer if the injunction sought is not granted so as to be able to determine whether the loss can be compensated in damages. The plaintiff has therefore failed to demonstrate that he will suffer irreparable harm unless the orders sought are granted.

10. The upshot of the foregoing is that the plaintiff has failed to satisfy the conditions for granting interlocutory injunction. The plaintiff's application dated 10th February 2015 is consequently dismissed with costs to the defendants.

Delivered, Signed and Dated at Kisii this 24th day of April, 2015.

S. OKONG'O

JUDGE

In the presence of:

N/A for the plaintiff

Mr. Illah for the 1st defendant

Mr. Soire for the 2nd defendant

Mobisa Court Clerk

S. OKONG'O

JUDGE