



**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND CIVIL CASE NO. 272 OF 2013**

**BEATRICE MATOYA ..... 1<sup>ST</sup> PLAINTIFF**

**TABITHA BONARERI MATOYA ..... 2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**HENRY MANYANGE MATOYA**

**Alias HENRY MATOYA MANYANGE ..... 1<sup>ST</sup> DEFENDANT**

**TERESA KEMUNTO OBIRI ..... 2<sup>ND</sup> DEFENDANT**

**DAVID NYAKERIGA BOSIRE AND**

**ELIZABETH OMWENGA DAVID ..... 3<sup>RD</sup> DEFENDANTS**

**RULING**

1. The plaintiffs brought this suit against the defendants on 19<sup>th</sup> June, 2013 seeking; an order that the Land Registrar, Kisii do beacon all that parcel of land known as LR. No. Central Kitutu/DarajaMbili/508 (hereinafter referred to only as **“the suit property”**) as per the DarajaMbili Registration Diagram No. 8 of October, 1972 in the presence of the area chief, Kisii Township Location and, a permanent injunction to restrain the defendants and their co-beneficiaries in respect of the parcels of land known as LR. Nos. Central Kitutu/DarajaMbili/507,2031 and 2139 (hereinafter referred to as **“Plot No. 507, Plot No. 2031 and Plot No. 2139** respectively) from tampering, wasting or encroaching on the suit property. Together with the plaint, the plaintiffs filed an application by way of Notice of Motion dated 18<sup>th</sup> June 2013 under certificate of urgency seeking three main prayers namely; an order of a temporary injunction restraining the defendants by themselves or through their agents, representatives, assigns or anybody acting on their behalf from trespassing, encroaching, entering or dealing with the suit property pending the hearing and determination of this application,an order that the District Land Registrar Kisii and the District Surveyor do re-beacon and/or demarcate the boundaries of the suit property within the next 45 days and, that the matter be listed for further directions.This is the application which is before me.

2. The plaintiffs’ application was brought on the grounds set out on the face thereof and was supported by the affidavit by the 1<sup>st</sup>plaintiff sworn on 18<sup>th</sup> June, 2013. The application was brought on the grounds that the plaintiffs are the administratrixes of the estate of one, Walter Otworì Matoya, deceased(hereinafter referred to only as **“Otworì”**). Otworì was and is still the registered proprietor of the suit property while

Plot No. 507 and Plot No. 2031 are registered in the names of Otworí's two brothers, Francis Obaga Otworí("Obaga") and Zacharia Obiri Matoya("Obiri") who are also deceased respectively. The 1<sup>st</sup> defendant is the son of Obaga while the 2<sup>nd</sup> defendant is the widow of Obiri. The 1<sup>st</sup> and 2<sup>nd</sup> defendants and other beneficiaries of the estate of Matoya and Obiri are occupying and using Plot No. 507 and Plot No. 2031 aforesaid. The plaintiffs claim that there is in existence a boundary dispute between the plaintiffs and the defendants. The dispute revolves around the boundaries of the suit property, Plot No. 507, Plot No. 2031 and Plot No. 2139. The plaintiffs claim that the 1<sup>st</sup> and 2<sup>nd</sup> defendants and members of their families have encroached on the suit property. The plaintiffs have claimed that the 3<sup>rd</sup> defendants who are husband and wife have also encroached on the suit property through Plot No. 2039. The plaintiffs have claimed that this dispute over the boundary of the said parcels of land has been going on for several years and no solution acceptable to all parties has been found. The plaintiffs have claimed that the said boundary dispute had been determined by the Land Registrar, Kisii District and that what remains is for the report of the said registrar to be formally adopted by the court and for the court to order for the beacons marking the boundaries of the said parcels of land to be placed on the ground. This according to the plaintiffs would diffuse the tension on the ground.

3. The Summons to Enter Appearance together with plaintiffs' application were served upon the defendants but the defendants neither entered appearance nor filed any pleading in opposition to the plaintiff's application. When the application came up for hearing on 25<sup>th</sup> November, 2013, the 1<sup>st</sup> plaintiff relied on her affidavit in support of the application and highlighted the attempts that had been made to resolve the boundary dispute between the parties herein. The 1<sup>st</sup> plaintiff also referred the court to the report that was made by the Kisii Central District Land Registrar on 18<sup>th</sup> April, 2012 on the dispute in which the said registrar recommended that the dispute be referred to this court for determination. According to the 1<sup>st</sup> plaintiff, the said land registrar had pointed out the fact that the defendants had encroached on the suit property. She submitted that in the circumstances, it is necessary that the land registrar be ordered to demarcate the boundaries of the properties whose boundaries are in dispute and that an aerial map be used in the exercise. In addition to the aerial map, the 1<sup>st</sup> plaintiff submitted that the land registrar should also employ google maps technology. The 1<sup>st</sup> plaintiff in conclusion urged the court to allow the plaintiffs application.

4. I have considered the plaintiffs' application together with the affidavit filed in support thereof. The plaintiffs have sought two main prayers in the present application. The first main prayer relates to a temporary injunction while the other one relates to an order directing the District Land Registrar and District Land Surveyor Kisii District to re-beacon and demarcate the boundaries of the suit property, Plot No. 507, Plot No. 2031 and Plot No. 2139. I will consider the two reliefs sought separately starting with the prayer seeking an order for the re-beaconing and demarcation of the boundaries of the aforementioned parcels of land. I am of the opinion that this prayer cannot be granted at this stage. This is one of the main prayers that the plaintiffs have sought in their plaint. If the court was to grant this relief at this interlocutory stage, the plaintiff would have obtained the main relief sought in this suit and as such there would be no need to conduct a trial. The other reason why I think that this prayer cannot be granted is that the same is directed against the District Land Registrar and the District Surveyor who have not been made parties to this suit. If the court was to grant the relief, the court would have condemned the two government officers unheard in breach of the rules of natural justice. For the foregoing reasons, prayer 4 in the plaintiffs' application cannot be granted.

5. On the plaintiff's prayer for a temporary injunction, again, I am of the opinion that the order cannot issue. This is also for two reasons. First, the injunction is sought pending the hearing and determination of the application. What this means is that the order if issued will lapse as soon as the ruling herein is read out. Secondly, even if the application for injunction is considered on merit, I am not satisfied that the plaintiffs have met the conditions for granting a temporary injunction. The principles to be applied when considering an application for interlocutory injunction are well settled. As was stated in the case of, **Giella vs. Cassman Brown & Co. Ltd. (1973) E.A 358**, an applicant for interlocutory injunction must demonstrate that he has a prima facie case against the respondent with a probability of success and that unless the injunction is granted he will suffer irreparable harm. If the court is in doubt as to the above, the application would be determined on a balance of convenience. In the case of, **Mrao Ltd. vs. First**

**American Bank of Kenya Ltd. & 2 Others [2003] KLR 125**, it was held that a prima facie case in a civil application includes but is not confined to a genuine and arguable case. It was said to be a case which on the material presented to 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 latter. The duty was upon the plaintiffs to satisfy the court that the defendants have infringed on their rights. The infringement complained of by the plaintiffs herein is trespass. The onus was upon the plaintiffs to place material before the court to demonstrate on a prima facie basis that the defendants have encroached on the suit property. The plaintiffs have failed in this regard. What I have gathered from the material placed before me by the plaintiffs is that the exact boundary of the suit property vis-à-vis the properties in occupation by the defendants is yet to be conclusively determined. I am unable to agree with the plaintiffs that the report by the Kisii Central District Land Registrar dated 18<sup>th</sup> April, 2012 determined the boundary dispute between the parties herein. If that was the case, there was no reason for the recommendation that was made in that report that the dispute be referred to this court for determination. Due to the foregoing, it is my finding that the plaintiffs have not established a prima facie case against the defendants herein that would justify the granting of the temporary injunction sought.

6. The upshot of the foregoing is that the plaintiffs' application dated 18<sup>th</sup> June, 2013 is not for granting. The same is accordingly dismissed. The costs of the application shall be in the cause.

**Delivered, dated and signed at Kisii this 4<sup>th</sup> day of April 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

Present in person            for the Plaintiffs

N/A                                for the Defendants

Mobisa                          Court Clerk

**S. OKONG'O**

**JUDGE**