



IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 325 OF 2013

MOSE ORANGI PLAINTIFF

VERSUS

JACQUES ORANGI AYIENDA 1ST DEFENDANT

DONALD BOSIRE AYIENDA 2ND DEFENDANT

RULING

1. The plaintiff brought this suit against the defendants on 23rd July 2013 seeking; a declaration that the defendants interference with the boundary features between LR Nos. West Kitutu/Mwakibagendi/876 and 1562 is illegal null and void, an injunction restraining the defendants from in any way interfering with the said boundaries as they exist until the final determination of this suit and an order directing the Land Registrar and surveyor to correct the registry index map to accord with the status on the ground. Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 23rd July 2013 brought under order 40 rule 3 of the Civil Procedure Rules seeking; a temporary injunction restraining the defendants, their agents and/or servants from in any way interfering with the boundary features demarcating the parcel of land known as LR No. West Kitutu/ Mwakibagendi/876 (“Plot No. 876”) and West Kitutu/ Mwakibagendi/ 1562 (“Plot No. 1562”) pending the hearing and determination of this suit. The plaintiff’s application was brought on the grounds set out in the body of the same and on the affidavit sworn by the plaintiff on 23rd July 2013. In the said grounds put forward in support of the application and in his affidavit aforesaid, the plaintiff contended that at all material times the plaintiff was and still is the registered proprietor of Plot No. 1562 while one, Johnson Ayienda Orangi was the registered proprietor of all that parcel of land known as Plot No. 876.
2. The plaintiff contended further that the defendants herein had a civil case with the said Johnson Ayienda Orangi (“Ayienda”) over Plot No. 876 namely, Kisii CM Misc. Application NO. 115 of 2011 (“the case”) in which case it was decided that Plot No. 876 be sub-divided between the defendants. The plaintiff contended that in purported execution of the said court order, the defendants destroyed the boundary features between Plot No. 876 and Plot No. 1562 and curved out land measuring one (1) acre from Plot No. 1562 which they claimed to be part of Plot No. 876. The plaintiff contended that the boundary between Plot No. 876 and 1562 which was destroyed by the defendants has been in place for the last 40 years and that the plaintiff has never had any boundary dispute with Ayienda. The plaintiff claimed that he will suffer irreparable harm if the defendants are allowed to destroy his boundary fence. He therefore beseeched the court to maintain the status quo pending the hearing and determination of this suit. The plaintiff annexed to his affidavit in support of the application a copy of certificate of official search in respect of Plot No. 1562, a copy of map for West Kitutu/Mwakibagendi registration area and a copy of the land adjudication register for Plot No. 1562.
3. The plaintiff’s application was opposed by the defendants. Through a replying affidavit sworn by the 1st defendant Jacques Orangi Ayienda on 11th September 2013, the defendants claimed that the

plaintiff's suit has been bought for ulterior motives and that the same does not disclose any cause of action against the defendants. The defendants contended that after the court order that was issued in the civil case aforesaid between the defendants and Ayienda, the surveyors proceeded to Plot No. 876 for the purposes of sub-dividing the same in compliance with the said court order. The exercise was carried out in the presence of among others the plaintiff. The defendants contended that the sub-division of Plot No. 876 was carried out on the basis of the registry index map (RIM) on which the said parcel of land fell and that all those who were present during the said survey exercise were given an opportunity to inspect the same. The defendants claimed that if the plaintiff was serious in his claim that the survey of plot No. 876 and the sub-division thereof was not properly carried out, the plaintiff should have joined the surveyor who carried out the survey as a party in these proceedings.

4. The defendants contended that this suit is an attempt by the plaintiff to assist Ayienda to frustrate the execution of the order that was issued in the civil case. The defendant contended that the plaintiff has failed to show to the court the alleged boundary features between Plot No. 876 and Plot No. 1562 which were destroyed by the defendants. The defendants contended that the plaintiff has failed to demonstrate on a prima facie basis that the defendants destroyed the boundary features between Plot No. 876 and Plot No. 1562. The defendants annexed to their affidavit in reply, a copy of a letter dated 11th July 2013 addressed to the Chief Magistrate's Court, Kisii on the execution of the court order issued in the civil case by the sub-division of among others Plot No. 876, a copy of a list containing the names of the people who were present when the surveyor was carrying out the sub-division of Plot No. 876, a copy of the decree that was issued in the civil case, a copy of the proceedings and decision of the Marani District Land Disputes Tribunal in Land Case No. 38 of 2011 between the defendants and Ayienda, a copy of the court order given on 31st May 2013 in Kisii High Court Misc. Civil Application No. 109 of 2011 and a copy of the mutation form for the sub-division of Plot No. 876 into two portions.
5. On 25th September 2013, the advocates for the parties agreed to argue the plaintiff's application by way of written submissions. The plaintiff filed his submissions on 31st October 2013 while the defendants filed their submissions in reply on 16th December 2013. I have considered the plaintiff's application and the affidavit sworn by the 1st defendant in opposition thereto. I have also considered the respective written submissions by the advocates for both parties and the case law cited. The law on temporary injunction is now well settled. An applicant for a temporary injunction must demonstrate that he has a prima facie case with a probability of success against the respondent and that unless the order is granted, he stands to suffer irreparable harm. If the court is in doubt, the court would determine the application on a balance of convenience.
6. For case law in support of the foregoing principles, see the case of, **Giella vs. Cassman & Brown Co. Ltd [1973] E. A 358** and the case of, **Aikman vs. Muchoki [1984] KLR 353** that was cited by the defendants. The plaintiff's case against the defendants if I have understood it well is based on the tort of trespass. The plaintiff has claimed that the defendants in purported execution of the order that was issued in their favour in the civil case trespassed into Plot No. 1562 and curved out a portion thereof measuring one (1) acre claiming that the same forms part of Plot No. 876. In the course of the said trespass, the defendants are said to have destroyed the features that had marked the boundary between Plot No. 876 and Plot No. 1562 for over 40 years. Trespass has been defined as unlawful or unauthorized entry into the land in possession of another.
7. The onus was therefore upon the plaintiff to demonstrate on a prima facie basis that the defendants without his consent entered Plot No. 1562 and took possession of or occupied a portion thereof measuring one (1) acre as aforesaid. I must say that the plaintiff has failed to discharge this onus of proof. The material placed by the plaintiff before the court only proves that the plaintiff is the registered owner of Plot No. 1562 on first registration and that Plot No. 1562 shares a boundary with Plot No. 876. The plaintiff placed no evidence before the court to prove the defendants alleged entry into Plot No. 1562 and occupation of a portion thereof measuring one (1) acre. The plaintiff has also not placed any evidence before the court to show that the sub-division of Plot No. 876 by the defendants and the surveyor who has not been joined in these proceedings was not properly done. It is my finding therefore that the plaintiff has failed to demonstrate that he has a prima facie case with a probability of success against the defendants. Having reached this conclusion, I am not obliged to consider whether the plaintiff stands to suffer irreparable harm

unless the injunction sought is granted.

8. In conclusion, I find no merit in the plaintiff's application dated 23rd July 2013. The same is hereby dismissed with costs to the defendants.

Delivered, dated and signed at Kisii this 23rd day of May 2014.

S. OKONG'O

JUDGE

In the presence of:-

N/A for the Plaintiff

N/A for the Defendants

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE