



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MAKUENI**

**ELC CASE NO. E034 OF 2021**

**MOURICE MUTHIANI.....PLAINTIFF/APPLICANT**

**VERSUS**

**HARRISON MULINGE WAIVATI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**PETER KAMALU KELLI.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. By a Notice of Motion dated 29<sup>th</sup> of October 2021 brought under Article 40 of the Constitution, Sections 18, 19., 20, 24, 25, and 26 of the Land Registration Act 2012, Order 40 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules 2010 and Sections 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law, the Applicant is seeking for the following orders: -

**1) Spent.**

**2) Spent.**

**3) That pending the hearing and determination of this suit, an order of injunction do issue restraining the Respondents whether by themselves or their representatives, servants, agents, and/or assigns from trespassing onto, selling, alienating, and/or in any other manner whatsoever interfering with or otherwise dealing with the properties known as Makueni/Maiyani/771, Makueni/Maiyani/774 and Makueni/Maiyani/778.**

**4) That the OCS Kilome Police Station be directed to ensure the enforcement of the orders granted by this Honourable Court.**

**5) That the cost of the application be awarded to the Applicant herein.**

2. The application is premised on the grounds on the face of the application and on the supporting affidavit of the Applicant sworn on 29<sup>th</sup> of October 2021.

3. A summary of the grounds and the averments by the Applicant is that the Applicant is the registered owner of the suit properties having purchased the same from one Joseph Muvaa and Paul Maweu. The Applicant averred that after he purchased the suit properties, he took possession of the same until 2011 when the Respondents trespassed on his property and maliciously pulled down the structures, the live fence and cut down the trees thereon. The Applicant further averred that after the Respondents threatened to evict him from the suit properties using crude weapons, he reported the matter to the area chief who visited the ground in the company of the surveyor one Samuel Katungi who later prepared his report.

4. He further averred that he requested the Land Registrar Makueni to settle the boundary dispute and the District Surveyor vide a letter dated 26/02/2019 to the DCIO Mukaa Sub County concluded that there was no boundary dispute and that the 1<sup>st</sup> Respondent had abetted the offence of trespass by authorizing his son the 2<sup>nd</sup> Respondent to build his home and burn charcoal on Plot No. 771. The Applicant argued that the District Surveyor concluded in his findings that there was trespass and malicious damage to property. The Applicant further averred that, pursuant to Section 19 of the Land Registration Act, he made an application to the Land Registrar vide a letter dated 03/12/2019 to ascertain and fix the boundaries in respect to the suit properties which was yet to be done. The Applicant averred that on 26<sup>th</sup> of October 2021, while collecting evidence in the suit property, the Respondents attacked and inflicted him with severe injuries which prompted him to report the matter the following day at Salama Police station. He urged the court to grant the orders as he stood to suffer irreparable harm as he could not access his parcels of land.

5. The Respondents were duly served but failed to enter appearance and to file their responses.

6. The application was canvassed by way of written submissions. The Applicant's written submissions were filed on 14<sup>th</sup> of March which I have duly considered.

### **ANALYSIS AND DETERMINATION**

7. Having considered the application and the written submissions, I find that the only issue for determination is whether the Applicant has met the threshold for the grant of an order of injunction.

8. The law that governs applications for injunction is premised under Order 40 Rule 1 of the Civil Procedure Rules 2010 which provides as follows:-

**1. Where in any suit it is proved by affidavit or otherwise-**

**a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree, or**

**b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,**

**The court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.**

9. The principles applicable in an application for an injunction were laid down in the celebrated case of **Giella Vs Cassman Brown & Co Ltd [1973] EA 358** where the court held that in order to qualify for an injunction;

*ü First the applicant must show a prima facie case with a probability of success.*

*ü Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable harm which would not be adequately compensated by an award of damages.*

*ü Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.*

10. The Applicant in an application for injunction must first establish that he has a *prima facie* case with a probability of success.

11. A *prima facie* case was defined by the Court of Appeal in **Mrao Ltd Vs First American Bank of Kenya Ltd & 2 Others (2003) eKLR** as follows;

***“a prima facie case 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 latter.”***

12. On the issue as to whether the Applicant has established a *prima facie* case with a probability of success, the Applicant's claim over the suit property is anchored on the certificate of titles registered in his name. I have carefully looked at the certificates of title marked as annexure MMW 2 a-b in the Applicant's supporting affidavit and I find that land parcel number Makueni/Maiyani/771 and Makueni/Maiyani/774 are registered in the names of the Applicant herein. The Applicant has clearly demonstrated that he is the registered owner of land parcel number Makueni/Maiyani/771 and Makueni/Maiyani/774 which are part of the suit properties. I am satisfied that the Applicant has established that he has a *prima facie* case with a probability of success.

13. As regards the issue whether the Applicant will suffer irreparable harm which cannot be adequately compensated by award of damages, the Applicant must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured.

14. The Court of Appeal in **Nguruman Limited Vs Bonde Nielsen & 2 Others (2014) eKLR** held that: -

***“On the second factor, the applicant must establish that he might otherwise suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the Applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot adequately be compensated by an award of damages. An injury is irreparable where there is no stand by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation of whatever amount, will never be adequate remedy.”***

15. It is not in dispute that the Applicant is the registered owner of land parcel number Makueni/Maiyani/771 and Makueni/Maiyani/774.

The Applicant further submitted that after he purchased the suit properties, he took possession of the same up to 2011 when the Respondents trespassed on the suit properties and maliciously destroyed the structures thereon.

16. The Applicant averred that the Respondents had violently denied him from accessing the suit properties. The Applicant produced an OB extract from Salama Police Station, photographs taken to depict the injuries that he sustained as a result of the attack by the Respondents and a treatment note from Kilungu sub County Hospital annexed to his supporting affidavit. To demonstrate that the Respondents have indeed trespassed and maliciously destroyed his property, the Applicant annexed photographs of the suit property (annexure MMW3) and a letter dated 26<sup>th</sup> of February 2019 by the District Surveyor Office Yoani addressed to the DCIO Mukaa Sub County. It is evident from the letter that the District Surveyor in his findings concluded that:-

- a) **There is no boundary dispute between the parcels of land as the boundaries are clear.**
- b) **The 1<sup>st</sup> Defendant is abetting a crime of trespass as he has authorised his son the 2<sup>nd</sup> Defendant to build a house on plot no 771.**
- c) **The 2<sup>nd</sup> defendant has encroached on Plot no 774 and built a toilet.**
- d) **The 2<sup>nd</sup> defendant has taken the whole of plot number 771 and built a house while carrying out charcoal burning activities.**
- e) **That it was a risky venture for the Applicant to access his property.**

17. According to the findings of the District Surveyor, the situation around the suit property is risky to the Applicant as he cannot access his land.

18. From the Applicant's pleadings and annexures, it is evident that the Applicant has been in possession of the suit land. It is also evident that the Respondents have violently denied him access to his land.

19. The Applicant having demonstrated that he is the registered owner and occupier of the suit properties, that the Respondents have trespassed and maliciously destroyed his property, I find that the Applicant has established that he is likely to suffer irreparable harm which cannot be adequately compensated by way of damages if the orders sought are not granted.

20. I find that the balance of convenience tilts in favour of the Applicant as he is the registered owner and occupier of the suit properties.

21. The upshot of the foregoing is that the application dated 29<sup>th</sup> of October 2021 is merited and I proceed to allow the same in the following terms:-

- a) ***That pending the hearing and determination of this suit, an injunction be and is hereby issued restraining the Respondents whether by themselves or their representatives, servants, agents, and/or in any other manner whatsoever interfering with or otherwise dealing with the properties known as Makueni/Maiyani/771 and Makueni/Maiyani/774.***
- b) ***That the OCS Kilome Police Station be and is hereby directed to ensure the enforcement of the orders granted by this Honourable Court.***

22. Costs of the application is awarded to the Applicant.

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**HON. T. MURIGI**

**JUDGE**

**RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 27<sup>TH</sup> DAY OF APRIL 2022.**

**IN THE PRESENCE OF: -**

Court Assistant – Mr. Mohammed

Makundi for the Applicant.