



**REPUBLIC OF KENYA**

**High Court at Bungoma**

**Environmental & Land Case 128 of 2012**

DAVID WALIAULA MAKHASO ..... PLAINTIFF

VERSUS

JASON M. MOLA.....1<sup>ST</sup> DEFENDANT

TITUS WALIAULA MOLA..... 2<sup>ND</sup> DEFENDANT

MARY MOLA.....3<sup>RD</sup> DEFENDANT

BUNGOMA DISTRICT LAND REGISTRAR ..... 4<sup>TH</sup> DEFENDANT

**RULING**

The applicant has filed a notice of motion dated 13<sup>th</sup> December 2012 seeking orders or temporary injunction as set out on the face of the motion. Prayer 1 & 2 were granted *ex parte* on 13<sup>th</sup> December 2012. What is for determination before this court is prayer No. 3 which seeks to have the orders granted on 13<sup>th</sup> December 2012 confirmed pending the hearing of the suit.

The application is opposed and the respondent has filed a replying affidavit sworn by the 1<sup>st</sup> respondent on 4<sup>th</sup> January 2013.

Mr. Wangila for the applicant submitted that the applicant has occupied land parcel No. Malakisi/N & C Namwela/539 which he has used till the year 2010. The applicant contends that the boundary between N & C Namwela/539 and 564 was put by the applicant's father in 1969 before adjudication. That parcel No. 539 is cut by a stretch of access road to Menu coffee factory. According to the applicant, the boundaries between the two parcels is a live fence, which the defendants recently destroyed. Finally it is the applicant's contention that during survey, their land was mistakenly captured to be part of parcel 564 and the subsequent subdivision of parcel 564 was illegal.

Mr. Makokha for the respondent opposed the application. He submits that adjudication was done in 1968 after which area maps were drawn. The first registered owners were Patrick for 539 and Joab 564 and they were brothers. They had no boundary dispute as regards the two plots while they lived. The 1<sup>st</sup> respondent has annexed a map to his replying affidavit and submits the map shows the two plots do not share a live boundary. Finally it is their submission that the applicant has not satisfied the principles set

out in the case of Giella Vs. Cassman Brown. The respondent's averment is that under Section 104 of the Land register Act validates all transactions undertaken under the repealed Cap 300.

This court is called to look into the application and analyze whether it meets the thresh hold for granting the equitable remedy of injunction sought. It is not in dispute that each of the parties are beneficiaries of the estates of their deceased father's parcels of land N & C Namwela/539 and 564. What is in dispute according to the applicant is whether the access road from Namwela market to Menu coffee factory is part of his land or as the respondent put it that the access road is the boundary between the two plots.

The applicants contend that while carrying out sub-division of parcel 564, the respondents destroyed the live fence separating the two suit parcels. Again the respondent has not denied carrying out the subdivision but defend the process as properly taken.

According to the map annexed to the replying affidavit of the respondent, the access road indicated to reach Menu coffee factory appears to be the boundary between the two parcels N & C Namwela 539 & 564. Secondly my understanding of the Law, if the access road cuts though parcel No. 539 as alleged by the applicant, then a brace should have been put in the map to show the plot immediately after the road is part of this land. There is no such brace on the map in respect of land parcel No. 539.

The applicants submit that the error on the map was occasioned by the surveyors during adjudication in 1969. This kind of error can only be determined at the hearing of the main suit and not an application stage. The applicant is guilty of laches for allowing an error occasioned in 1969 to stay uncorrected upto now to merit the equitable remedy he is seeking. It does not come out clearly from his pleadings and oral submission as to what extent (size) of his land the respondents have or are intent on taking and lack of such clarity makes it hard for this court to tilt the balance of the convenience to his favour.

The applicant is asking the court to restrain the respondents from destroying the boundary that separates the two parcels. In his affidavit in support of the application, he has not explained the action of the defendant which to him constitutes destruction of the boundary. Paragraph 8 of the affidavit states thus;

***“that the status quo should be maintained and the boundary that has existed since 1969 remain intact and titles No. Namwela 1253 & 1254 be revoked and/or annulled pending determination of suit.***

In paragraph 10 of the plaint, he also avers that the new titles are obtained fraudulently and should be revoked. Paragraph 12 states that the 1st defendant is in the process of altering and or destroying the existing boundary. He does not proffer what it is which the 1<sup>st</sup> defendant is doing which amounts to altering or destroying existing boundary.

In conclusion, I find that the plaintiff has not shown to the court what loss he will suffer if the defendants are not restrained neither that the loss cannot be compensated by way of damages. I therefore dismiss the application for injunction with costs to the defendants.

RULING delivered in open court this 29<sup>th</sup> day of January 2013.

A. OMOLLO  
**JUDGE.**