



**REPUBLIC OF KENYA**

**High Court at Nakuru**

**Civil Case 166 of 2010**

**BOARD OF GOVERNORS,**

**SOLAI KALE SECONDARY SCHOOL.....APPLICANT/PLAINTIFF**

**VERSUS**

**ISAAC LELEI.....1<sup>ST</sup> RESPONDENT/DEFENDANT**

**CHRISTINE LELEI.....2<sup>ND</sup> RESPONDENT/DEFENDANT**

**SYLVESTER KIPYEGON BETT.....3<sup>RD</sup> RESPONDENT/DEFENDANT**

**DENNIS KIPTOO LELEI.....4<sup>TH</sup> RESPONDENT/DEFENDANT**

**SYLUS CHERUIYOT BETT.....5<sup>TH</sup> RESPONDENT/DEFENDANT**

**PASTOR MAIYWA JOHN PIERRE.....6<sup>TH</sup> RESPONDENT/DEFENDANT**

**RULING**

The plaintiffs brought a motion dated 13<sup>th</sup> July, 2010 for restraining orders to be directed against the defendants in respect of parcel of land No.MAJI TAMU/ZIWANI BLOCK 1/42 (NO.42). This court in considering that application, found in its ruling delivered on 17<sup>th</sup> June, 2011 that the plaintiff had demonstrated a *prima facie* case and were entitled to an order of injunction against the defendants.

The defendants have now brought this application claiming that the plaintiff is using the restraining orders of 17<sup>th</sup> June, 2011 to interfere with parcels No.MAJI TAMU/ZIWANI BLOCK 1/123 (NO.23) belonging to the estate of the late Kimaiywa Masai; that the plaintiff has destroyed property on No.23 and erected a fence across it curving out about 5 acres and have barred the defendants from accessing it. Consequently, the defendants want the plaintiff's restrained from continuing with their wasteful activities. The defendants have also sought that the orders issued on 17<sup>th</sup> June, 2011 be discharged, varied or set aside.

In reply, the Chairman of the Board of Governors of the plaintiff has stated in his replying affidavit that there are no grounds for this court to vary or set aside its orders of 17<sup>th</sup> June, 2011. It is the plaintiff's contention that it is the defendants who have repeatedly been interfering with the fence to No.42 in order to cultivate it and graze on it; that the order of 17<sup>th</sup> June, 2011 was meant to deal with the defendant's trespass on No.42.

I have considered the foregoing arguments as well as the written submissions filed and highlighted by counsel for the parties. No doubt the defendants have been restrained by this court's temporary order from:

**“.....trespassing, cultivating, grazing or in any way dealing with the plaintiff's parcel of land NO. MAJI TAMU/ZIWANI BLOCK 1/42 pending the hearing and determination of this suit.”**

(emphasis supplied).

But now the defendants claim that that order is being used by the plaintiff to waste No.23. The defendants have not explained the nexus between No.23 and No,42 except in paragraph 11 of the supporting affidavit as follows:

**“11. THAT although the plaintiff's application sought**

**orders to preserve MAJI/ZIWANI BLOCK 1/42, however, on the ground, the plaintiff servants and/or agents have curved out substantial portion of MAJI TAMU/ZIWANI BLOCK 1/23 and erected a fence thereon.”**

The truth of the matter is that the defendants and the plaintiffs have had protracted boundary dispute, which prompted the court (Wendoh, J) on 19<sup>th</sup> October, 2011 to record a consent to the effect that:

**“1. ....the Land Registrar and the District Surveyor do visit the land parcel NO.MAJI TAMU/ZIWANI BLOCK 1/23 and BLCOK 1/42 to place the beacons and mark the boundary between the two parcels of land.”**

The report was filed on 27<sup>th</sup> February, 2012 and in it the surveyor found that No.23 had overlapped No.42 as well as No.25.

By dint of **Order 40 rule 7** of the **Civil Procedure Rules**, any party aggrieved by an order of injunction may apply for its setting aside. This rule donates a discretionary power to the court. Like all discretionary power, the power to set aside an order must be exercised judicially and on sound legal principles. The discretion will be exercised in favour of a party so as to do justice to all the parties involved. See **Maina V. Mugira**, Civil Appeal No.27 of 1982.

In view of the fact that the court has already issued an injunction in favour of the plaintiff over the very portion which is in dispute, having held that the plaintiffs have a *prima facie* it would be improper to issue a similar order directed against the plaintiff.

Indeed there will be total confusion on the ground. Secondly, although the defendants maintain that they were not involved in the demarcation of the boundary, the report, *prima facie* concludes that the defendants' parcel has overlapped No.42 and another parcel. At the hearing those details will become clearer.

At this stage the court is only concerned with the question whether the defendant has, in this application shown a *prima facie* case. They have not.

Finally, the defendants have not persuaded me that the orders of 17<sup>th</sup> June, 2011 ought to be discharged and/or set aside.

For these reasons, this application fails and is dismissed with costs.

**Dated and Signed at Nakuru this 18<sup>th</sup> day of January, 2013.**

**W. OUKO  
JUDGE**

**Dated, Signed and Delivered at Nakuru this 31<sup>st</sup> day of January, 2013 by Hon. Justice M. J. Emukule.**

**JUDGE**