



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 609 of 2012

VINI INVESTMENTS LIMITEDPLAINTIFF/APPLICANT

VERSUS

JAMES MBURU NDUU.....DEFENDANT/RESPONDENT

RULING

1. The matter coming before me for determination is a Notice of Motion dated **17th September, 2012**. It is brought under Order 40 Rule 1 and 4, Order 51 Rule 1 and 3 of the Civil Procedure Rules and Section 63(e) of the Civil Procedure Act. It is supported by the Supporting Affidavit of **VISHAL NANCHAND SHAH** dated 17th September, 2012. In the said application, the Plaintiff prays for an order of temporary injunction to restrain the Defendant from entering trespassing onto and/or constructing dealing or in any way interfering in any way with the parcel of land known as **L.R. No. 4953/2200** (*the "Suit Property"*) Also prayed is an order of mandatory injunction.
2. In a nutshell, the Plaintiff's case is that he is the registered proprietor of the suit property, having bought the same from Benja Properties Limited in 2011. The Plaintiff has annexed the Sale Agreement, Transfer document and Title Deed relating to the suit property. Further, he furnishes evidence to the effect that a land surveyor, Mr. P.W. Karanja placed beacons defining the boundaries of the suit property and issued a beacons certificate. He further contends that he subsequently approached the Municipal Council of Thika for its approval of his plan to construct a boundary wall round the suit property.

He also furnished evidence indicating that the Municipal Council of Thika approved of those plans and he proceeded to award a contract to Jukumu Building Contractors to undertake the task. He maintains that the construction of the perimeter wall on the suit property was strictly along the boundaries identified by the beacons already on the ground. He avers that upon completion of the said works, he engage private security personnel to guard the suit property.
3. The Plaintiff contends that the Defendant is the registered owner of **L.R. No. 4953/2471** which borders the suit property. The Plaintiff claims that on 15th August, 2012, the Defendant forcibly removed the Plaintiff's personnel from the suit property and trespassed upon the same claiming that the perimeter wall constructed by the Plaintiff was on his property and proceeded to demolish sections of the perimeter wall. He contends that the Defendant then proceeded to construct a wall in the demolished section. The Plaintiff stated that he reported the matter to the police without the problem being resolved leading him to commence this suit against the Defendant to obtain relief from this Court.
4. The motion is contested. The Defendant filed his Replying Affidavit sworn on 3rd October, 2012. In it, he responded to the effect that he is indeed the registered proprietor of **LR. No. 4953/247** which he acquired in 1996 through a Barclays Bank Loan. He argues that upon its purchase he was shown the beacons thereof and has enjoyed his land all these years. He contended that in November, 2011 he found

trenches being dug. He states that in March, 2012 he visited his land again and found people building a wall which encroached upon his land. He said he reported the matter to the area chief who took no action to stop the encroachment.

He further contends that his land was surveyed, the survey plan was approved and is folio (Registers) No. 256/67. That the Deed Plan was also prepared and is No. 181938 dated 7th April, 1994. That the Registry Index map was prepared and is Thika Municipality Block 14/5. He contends that he never entered the suit property but that the Plaintiff wants to grab a portion of his land.

5. In answer thereto, the Plaintiff filed a further Affidavit sworn by **SHAH VISHAL NEMCHAND** on 4th December, 2012 to the effect that the Beacon Certificate produced in evidence hereto was prepared by **P.W. KAPANGA**. He further averred that the construction of the perimeter wall was done on the Plaintiff's land and was at no time encroaching upon the Defendant's land.

6. A further affidavit sworn by **EVELYN AWINO OYUGI** on 8th January, 2013 produced a copy of the survey plan of the suit property.

7. The Defendant filed a further Replying Affidavit in response to the further affidavit sworn on 4th December, 2012. In it he produced photographs trying to show the location of the disputed property.

8. The Plaintiff filed their written submissions as well as the Respondents dated 25th January, 2013 and the Applicant's response thereto dated 15th February, 2013 which I have read and taken into consideration.

9. I have heard the rival arguments. This is clearly not a dispute relating ownership of land. At the heart of the suit is a boundary dispute between the registered proprietor of the suit property as against the owner of the neighbouring parcel of land known as LR. No. 4953/2471 ("**the other property**"). The applicant seeks both a temporary injunction and a mandatory injunction against the Respondent preventing him from interfering with the suit property.

10. In deciding whether to grant the temporary injunction, I wish to refer to and rely on the precedent set in the case of ***GIELLA V CASSMAN BROWN (1973) EA 358*** in which the conditions for the grant of an interlocutory injunction were settled as follows:

"The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. Firstly, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."

Has the Plaintiff made out a prima facie case with a probability of success? In the case of ***MRAO VERSUS FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KRL 125***, a prima facie case was described as:

"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."

Looking at the facts of this case, the question whether a prima facie case has been established must focus on the boundary dispute herein. Both parties contend that their parcels of land were surveyed and beacons established. However, there is clearly no consensus between the two parties on the exact location of the beacons on their parcels of land.

Looking at the case made by the applicant in this case, his contention that the suit property was duly

surveyed by Mr. Kapanga and a Beacon Certificate issued has been seriously challenged by the Defendant's similar claim regarding the other property. What remains is an unclear scenario whereby the boundary of the suit property *vis a vis* the other property is unclear. This issue can only be finally settled but by the Director of Surveys. At this juncture therefore, it is not possible to ascertain which of the two parties has a superior claim as to where the correct boundary of the suit property and the other property lies. That being the case, this Court finds that a genuine and arguable case has not been established and the applicant has therefore not established a *prima facie* case. This being the Court's finding, it is not necessary to proceed to examine whether the other two conditions on the **GIELLA** case have been satisfied.

11. The wording of prayer 3 in the nature of a mandatory injunction and the Court cannot issue an order of mandatory injunction at the interlocutory stage unless in very special circumstances. Refer to the case of ***LOCABAIL INTERNATIONAL VS AGRO EXPORT (1986) I ALLER 901*** "***A mandatory injunction ought not to be granted on a interlocutory application in the absence of special circumstances and only in clear cases where the Court thought that the matter ought to be decided at once, or where the injunction was directed at simple and summary act which could easily be remedied or where the Defendant had attempted to steal a match on the Plaintiff. Moreover, before granting a mandatory interlocutory injunction the Court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.***"

For the reasons cited *vis a vis* a temporary injunction, this Court cannot grant the mandatory injunction sought herein. This particular case is not a clear case whatsoever. The determination of the heated boundary dispute is the true province of the trial Court on tested evidence.

12. In light of the foregoing, I dismiss the application.

No order as to costs.

SIGNED AND DELIVERED ON THE 8TH DAY OF MARCH 2013.

**MARY M. GITUMBI
JUDGE**