REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

LAND AND ENVIRONMENT COURT

E.L.C.NO.50 OF 2013

PRESBYTERIAN FOUNDATION.....PLAINTIFF

VERSUS

ATTORNEY GENERAL.....DEFENDANT

R U L I N G

The application herein is dated 19/3/2013 and filed on 20/3/2013 and same was certified urgent as it had been alleged that the 2nd respondent had embarked on constructing permanent structures next to the dental unit that are clearly inside the applicants parcel of land.

The applicant prays for an order restraining the second respondent, his agents or servants from erecting or continuing to erect any structures along the disputed boundary or within the applicant's parcel of land thus **NYERI MUNICIPALITY BLOCK.1/178.**

I have read the pleadings herein, the Notice of Motion and supporting affidavit, the replying affidavits and have also visited the parcels of land under dispute.

The application is properly made under the provisions of Order 40 rules 1,2,3 and 4 of the Civil Procedure Rules 2010 wherein the orders sought against the government are not in the form of injunction ***per se,*** but restraining orders and therefore the provisions of the Government Proceedings Act CAP 40 Laws of Kenya do not apply. At this stage what I need to consider is whether the plaintiff applicant has established a ***primafacie*** case with a likelihood of success, secondly that if a restraining order is not granted, the plaintiff will suffer ***irreparable damage***. Thirdly, that if the court is in doubt then it can decide on ***balance of probabilities***.

During the site visit, the District Land Surveyor and the Provincial Physical Planner clearly indicated that the 2nd defendant had encroached into the plaintiff's land. This was not disputed by the 2nd Defendant but it was alleged by the 2nd defendant that the plaintiff had been compensated by being awarded land by the Government excluding two houses thereon which houses were purchased by the plaintiff. There is no doubt that a boundary dispute exists between the plaintiff and the defendant. In the affidavit sworn on 20th March 2013 and filed on the same date in support of the application dated 19th March 2013**, *Samuel Waweru Njoroge***, the secretary to the Presbyterian Foundation, clearly states that **NYERI MUNICIPALITY/BLOCK 11/178** is occupied by the plaintiff whilst **NYERI MUNICIPALITY BLOCK 11/179** is occupied by the Provincial General Hospital Nyeri. The common border is fixed and the beacons can be located. When the court visited the site the actual boundary was shown by the Provincial Surveyor and the court observed an existing boundary that dates back to the year 1983, almost 30 years ago. The court also observed that the defendant was putting up permanent

structures on the plaintiff's parcel of land according to the actual boundary.

The defendants in their defense state that they own land parcel No.**NYERI MUNICIPALITY BLOCK 11/179** and that there is no boundary dispute as the plaintiffs were compensated by the Ministry of Housing, and amendments done on the R.I.M, and a P.D.P was prepared and therefore concludes that it is the plaintiff who has encroached on the defendant's land. During the site visit, the current R.I.M of the area was availed but the amendments alleged by the defendants were not seen on the map.

In his replying affidavit Mrs. Miriam Wambugu, the Provincial Physical Planning Co-ordinator, Central Province states that the boundary dispute between the P.C.E.A and Nyamachaki Primary school, ***on the one hand*** and the Provincial General Hospital ***on the other*** dates back to the 1970's and that the plaintiff was compensated for the encroached portion through allocation of alternative land with two government houses. She states further that her office is preparing a P.D.P for compensation and that the boundaries will be adjusted and realigned.

The second replying affidavit was filed by Dr. Julius Kimani Mwango, the Medical Superintendent of Nyeri Provincial General Hospital who depones that there is no pending boundary dispute between the plaintiffs and the defendants and the construction being undertaken is not on the plaintiffs land and that the same is being undertaken in Block 11/179 owned by the defendant. The defendant is rehabilitating one building which was put up in the 1980's as a dental unit. Moreover, he states that the defendants are rehabilitating the section into a modern civil servants clinic, with a new waiting area and washrooms. He states that the project is being undertaken to serve the public in line with vision 2030. In paragraph 10 of the affidavit, he states that the old dental unit was build on plaintiff's land but they were compensated for loss of this portion of the land. He has annexed three letters dated 8/7/2008, 14/7/2010 and 21/3/2011. The import of these letters is that the plaintiffs have been compensated for the land taken by being allocated alternative land with two government houses, however they paid for the houses which were valued at kshs.906,000.

In a further affidavit sworn on the 3/5/2013 and filed on the same date, the plaintiffs state that the defendants are mixing up the issues that are different, the issue of the boundary dispute and the issue of the plot allocated to the church where the two government houses are situated which has a separate and independent history.

According to the plaintiff the Government allotted the church a parcel of land through allotment number 11204/11/56 of 22/6/1979 but it later repossessed the same. The plaintiff has annexed a letter by the commissioner of lands dated 7/12/1983. I have scrutinized the letter and do find that the commissioner of lands confessed that the allotment letter was issued by mistake because the plot was already developed for hospital. This court observes that an allotment letter does not confer tittle and therefore cannot be evidence of ownership and therefore it is doubtful that the Government could compensate the plaintiff for land that was allotted by mistake when the same Government had already developed the land for a hospital at the time of the mistaken allotment.

The deponent states that the Government kept on promising the church that it would allocate it another plot and eventually allocated it another plot with two Government houses for which the church has already paid hence securing the houses and the plot.

At this stage, this court does not believe that the compensation made by the Government was in respect of the allotment letter No.1204/11/13 of 22/6/1979 because at the time of issuance of the letter, the plot had been developed and the hospital had already developed the plot. There are very high chances of success in the argument by the defendant that the compensation made by the Government to the plaintiffs was in respect to the land at the disputed boundary because according to the surveyor the Provincial General Hospital took away land from the church at the time they fenced their property. Annextures JKM 1 in the affidavit of Dr. Julius Kimani Mwango indicates that the compensation was in respect to the land taken from the plaintiffs for the expansion of the hospital.

The issue that the court should determine is whether the plaintiff has established a prima facie

case. There is no doubt that the plaintiff has established that the hospital has encroached on his land. The Provincial Surveyor, the Provincial Physical Planner and the Hospital Medical Superintendent have agreed with the plaintiff that there has been encroachment on the plaintiffs land, however, they have been quick to add that the plaintiff has been compensated for the land, an allegation that the plaintiffs have disagreed with. The court finds that the development being undertaken by the defendants are partly on the plaintiffs land Block 11/178 which part was fenced off together with the hospital land comprised in Block 11/179. There is a clear old existing fence that separates the hospital and the church's property, however, the beacons for both properties are also equally visible and indicate that defendants are occupying part of the plaintiff's parcel of land. Whether the plaintiff was compensated by the Government for the land taken away by the hospital is an issue that will be canvassed in the main suit. I do find that the plaintiff has satisfied the principles set out in the *locus classicus* case of **Giella -VS Cassman Brown** in establishing a primafacie case as there is an issue for trial.

The second principle for grant of interlocutory injunction is that the applicants must show that they are likely to ***suffer irreparable loss***. This court understands irreparable loss as a loss for which the plaintiff cannot be compensated in monetary terms or otherwise. No evidence has been adduced by the plaintiff that the Government will be unable to compensate the plaintiffs in this matter in either monetary terms or alternative plot. The evidence on record indicates that there have been meetings between the plaintiff and Government representatives to discuss the issue of compensation which could be either in monetary terms or an alternative plot.

On this basis I do find that the plaintiffs have not satisfied the court that they will suffer irreparable injury if the restraining order is not issued.

Though I'm not in doubt on the two principles, however I would determine the matter on the third principle ***balance of convenience***, in the favour of the defendant as the structures being rehabilitated, save for the new ones have been in existence since 1980 as shown by the existing fence, moreover, the plaintiff has always been willing to be compensated by being given an alternative land. Lastly granting a restraining order will be against ***public interest*** as the building being rehabilitated is the lavatory for dental unit which is supposed to serve the general public.

The upshot of the above is that the Notice of Motion dated 9/3/2013 is dismissed with costs to the defendants.

Dated, signed and delivered at Nyeri this 22nd day of May 2013.

A. OMBWAYO

JUDGE