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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT & LAND CASE NO. 70 OF 2013

WILLIAM AGUKO WAKOYO.....1ST PLAINTIFF

ANDERICUS ODHACH AGUKO.....2ND PLAINTIFF

(Suing on behalf of the estate of

ELIAKIM AGUKO WAKOYO alias

AGUKO WAKOYO-deceased)

VERSUS

SAMWEL ONYANGO OKEYO.....1ST DEFENDANT

YASON ONDIEK OKEYO.....2ND DEFENDANT

ENOSH AWUOR SURE.....3RD DEFENDANT

JARED OMENDA.....4TH DEFENDANT

AGAI ODHIAMBO OKEYO..... 5TH DEFENDANT

RULING

1. The Plaintiffs are the administrators of the estate of ELIAKIM AGUKO WAKOYO, deceased (hereinafter referred to only as “**the deceased**”). The deceased is the registered proprietor of all that parcel of land known as LR No. **KANYAMKAGO/KAWERE I/268** which is situated in East Kanyamkago Location, Uriri District within Migori County (hereinafter referred to only as “**the suit property**”). The defendants are residing on the parcels

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of land known as, LR Nos. **SUNA EAST/ MANYATTA/ 730, 731 and 732**, which are situated in Manyatta Location, Uriri District within Migori County (hereinafter referred to as “**the defendants’ properties**”). East Kanyamkago Location and Manyatta Location, share a boundary and the suit

property and the defendants' properties are situated at the border of the two locations. The Plaintiffs have brought this suit against the defendants claiming that the defendants have encroached and/or trespassed into the suit property and caused damage thereon resulting in loss to the estate of the deceased. The particulars of the defendants' alleged acts of trespass as set out in the Plaintiffs' plaint dated 19th February, 2013 include; farming, grazing and/or rearing cattle unlawfully on the suit property, putting up structures on the suit property without permission, leasing out portions of the suit property to third parties without permission, cutting down trees, uprooting crops planted on the suit property by the Plaintiffs and,

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resisting eviction from the suit property. The Plaintiffs are seeking as against the defendants; an order of a permanent injunction to restrain the defendants from trespassing into or in any way interfering with the suit property, mesne profits, an order directing the provincial land surveyor and/or an independent or neutral surveyor to establish the boundaries of the suit property and the defendant's properties and, any other relief the court may deem fit to grant.

2. Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 19th February, 2013 under certificate of urgency seeking a temporary injunction to restrain the defendants from trespassing on, wasting, alienating, or in any other manner interfering with the Plaintiff's peaceful occupation and/or stay on the suit property pending the hearing and determination of this suit. The Plaintiffs' application was supported by a short 12 paragraph affidavit sworn by the 1st Plaintiff. The first plaintiff stated in

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the said affidavit that the deceased is the registered proprietor of the suit property which is situated in East Kanyamkago Location while the defendants are residents of God Jope Sub-location in Manyatta Location which borders East Kanyamkago Location. God Jope Sub-location which is in Manyatta Location is at the boundary of East Kanyamkago Location and Manyatta Location. The suit property and the defendants' properties are situated at this border with the suit property falling within East Kanyamkago and the defendant's properties falling within God Jope Sub-location in Manyatta Location. The 1st Plaintiff stated further in his said affidavit that the defendants had trespassed on the suit property and commenced cultivation thereon. The 1st Plaintiff contended that the estate of the deceased would suffer irreparable loss unless the injunction sought is granted to stop the said acts of trespass and that the Plaintiffs had established a prima facie case against the defendants. The 1st Plaintiff annexed to his affidavit in support of the application, a

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copy of a grant of letters of administration ad litem of the estate of the deceased dated 14th November, 2011 that was issued to the Plaintiffs to enable them file this suit and a copy of a certificate of official search dated 9th May, 2011 on the title of the suit property which shows that the same was registered in the name of the deceased.

3. The plaintiff's application came up for hearing before me ex parte on 20th February, 2013 when I directed that the same be listed for hearing inter partes at the registry on a priority basis. The application was listed for hearing at the registry on 25th April, 2013 when only the plaintiffs'

advocate appeared in court. After satisfying myself from the affidavit of service that was filed in court by the said advocate that the defendants were duly served with the application, I allowed the application to proceed in the absence of the defendants. The defendants did not file any grounds of opposition or replying affidavit in opposition to the application. In his submission in support of

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the plaintiffs' application, the plaintiffs' advocate relied entirely on the grounds set out in the body of the application and on the contents of the 1st Plaintiff's affidavit in support of the application. The Plaintiffs' advocate submitted that the deceased who was the father of the Plaintiffs is the registered proprietor of the suit property and that the defendants had trespassed on the same and were cultivating it while armed with dangerous weapons. Counsel submitted that it would only be fair and just in the circumstances if the injunction sought is granted so as to protect the interest of the Plaintiffs.

4. The principles for granting temporary injunction are well settled. The plaintiffs are not excused from satisfying the said principles merely because the application is not defended. As was stated in the case of **Giella –vs- Cassman Brown & Company Ltd. [1973] E.A. 358**, an applicant for the a temporary injunction

must prove that he has a prima facie case against the defendant with a probability of success and that unless the orders sought

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are granted, he will suffer irreparable harm. If the court is in doubt, the court will determine the application on a balance of convenience. The plaintiffs have placed evidence before this court which shows that the Plaintiffs' deceased father is the registered proprietor of the suit property. The Plaintiffs claim that the defendants have trespassed on the suit property and should be restrained from committing further acts of trespass on the same. For the Plaintiffs to establish the tort of trespass, the Plaintiffs must prove in addition to their ownership of the suit property, the fact that the defendants have without any lawful cause entered the suit property. From the averments contained in the plaint filed herein by the Plaintiffs, the dispute between the parties herein seems to me to be inter-clan boundary disagreement pitying the residents of Arambe Sub-location in East Kanyamkago Location and those of God Jope Sub-location in Manyatta Location both in Uriri District (*It is not very clear from the pleadings, witness statements and*

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affidavits filed herein whether God Jope is a sub-location or a location. The same applies to Manyatta. It is also not clear whether; the suit property is situated in South Kanyamkago or East Kanyamkago). In his Witness Statement dated 19th February, 2013 filed herein, the 1st Plaintiff stated as follows at paragraph 6,

“ THAT there has been a long standing dispute involving the boundaries of these parcel Nos. i.e the clear boundary between Kawere I in South Kanyamkago and Manyatta Sub-location in God-Jope location has been a long standing dispute that has always defeated the area administrative authorities of the two locations and the two districts to solve amicably.”

In paragraph 7 of the said statement, the 1st Plaintiff stated as follows,

“THAT for the dispute to be resolved once and for all, it is important for the honourable court to appoint independent surveyors to assist in establishing the correct boundary.”

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These averments in the 1st Plaintiff’s statement are in accord with the main relief sought in the Plaintiff namely, that the court do issue an order directing the provincial land surveyor and/or an independent neutral surveyor to establish the boundaries of the suit property and the defendants’ properties. The foregoing leaves no doubt that this is primarily a boundary dispute. Now that the boundaries of the suit property and the defendant’s properties are unknown, can it be said on the material before this court that the defendants have trespassed on the suit property? I don’t think so. The Plaintiffs have made mere allegations of trespass without any material to back it up. This court has no jurisdiction in the first instance to determine boundary disputes. That jurisdiction is conferred upon the Land Registrar by section 19 of the Land Registration Act, 2012.

There is no evidence before me that the Land Registrar has determined the boundary between the suit property and the defendants’ properties. There is completely no evidence before

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me on where the boundary of the suit property starts and ends so as to be able to form a preliminary view on whether or not the defendants have trespassed on the suit property. Due to the foregoing, I am not satisfied that the Plaintiffs have established a prima facie case of trespass against the defendants.

5. The Plaintiffs have failed to satisfy the first condition for granting a temporary injunction, I am not obliged to consider the other conditions. The plaintiff’s application dated 19th February, 2013 is therefore not for granting. The same is dismissed accordingly. The costs shall be in the cause.

Dated, signed and delivered at KISII this 30th day of August, 2013.

S. OKONG’O,

JUDGE.

In the presence of:-

No appearance for plaintiffs

No appearance for defendants

Bibu Court Clerk.

S. OKONG’O,

JUDGE.

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