REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)

Environmental & Land Case 12 of 2012

MICHAEL MURIITH NJERU…….....……...PLAINTIFF

VERSUS

EVANS ONZERE ENDUSA…. …..…….....……DEFENDANT

RULING

1. By a Notice of Motion dated 13/1/12 the plaintiff/applicant Michael Muriithi Njeru has sought the following orders against the respondent Evans Onzere Endusa.

i. That the defendant his servant or agent be restrained from entering, trespassing, interrupting, remaining there or in any other way interfering with the plaintiff's parcel of land No. Nairobi Block 111/1624 and Nairobi Block 11/1973 pending the hearing and determination of this suit.

ii. This Honourable Court do issue an order directing the surveying, demarcation delineation of boundary of No. Nairobi Block 11/1624 and Nairobi Block 11/1973 by the registrar of title Registered Land Act under Cap 300.

iii. That this Honourable Court does order the eviction and ejection of the defendant his servants or agents from Nairobi Block 111/1624 and/or otherwise be restrained from interfering with the plaintiffs/applicant quiet and peaceful enjoyment of his property pending the hearing and determination of this suit.

iv. That the officer commanding Kayole police station and/or provincial administration Kayole Location be directed to enforce compliance with the Court orders.

v. That cost of this application be awarded to the plaintiff/applicant.

The application is premised on the five (5) grounds (a) to (e) set out on the face of the application.

The application is supported by the affidavit of Micheal Muriithi Njeru the plaintiff/applicant.

2. The application was opposed by the defendant /respondent. The defendant filed a replying affidavit dated 27/1/12.

Briefly these are the undisputed facts in the affidavits of the plaintiff and the defendant. The plaintiff and the defendant entered into a contract of sale of parcel No. 111/1624 measuring 0.0207 Hectares in May 2005. After the plaintiff bought the said suit property he moved in. Before that he had been taken round the property. The plaintiff continued to stay in the said property after he took vacant possession.

3. The disputed facts are as follows; according to the plaintiff when he bought the property it consisted of the main house, social hall and shop both of which had connecting doors to the main house and that he has been living there with his family since December 2005. That in December 2011, the defendant took construction materials to his property. This is after his lawyers wrote him the letter dated 18/9/08 where the defendant claimed that he was occupying parcel block No. 111/1973.

The plaintiff claims that the defendant claimed that the shop and part of the wall on his property were part of block Nairobi /Block 111/1973. That the defendant proceeded and demolished and destroyed them to clear way for his construction. That after he confronted the defendant, the defendant claimed he was the legal owner of parcel No. 111/1973 measuring 0.0069 hectares and he produced a certificate of lease which he was seeing for the first time. As per the plaintiff he did not buy this as he bought his property and it measured 0.0207 Ha. That if the certificate of lease No. 111/1973 is valid which he opposes then the same should have came after his certificate of lease Nairobi Block 111/1624 which has been demarcated, delineated and surveyed to cover 0.0207 Ha. Therefore if the defendant 0.0069 is hived off from his property then he will remain with 0.0138 hectares which is not the property the defendant sold to him.

4. The defendant argued that at the time he sold the property Nairobi Block 111/1624 to the plaintiff he owned the said property together with Nairobi Block 111/1973 which were adjacent to each other but partially separated by a permanent wall. The 2 properties were registered in his name and later on he offered the plaintiff Block 111/1624 which comprised a terraced double storied massionate a detached wall extension or its rear and that he showed the plaintiff the beacons for the plot. That he retained title for Block 111/1973 which had a shop that was leased out to his tenant. That in 2008 the plaintiff encroached into his plot through the open area in the wall and after he instructed his lawyers to stop him from the illegal activities. The plaintiff apologized and removed the structures that had erected and his piece of land and even repaired part of the wall separating the 2 plots which had collapsed. That he had no problems with the plaintiff thereafter until December 2011 when the tenant left and he decided to develop his property either then plaintiff started claiming that the measurements of his plot as indicated in his title was more than the size on the ground and that his plot is accommodated in the plaintiff's title. The defendant claims that the 2 properties are clearly demarcated. The plaintiff is the owner of Block 111/1624 and he is the owner of block111/1973. That the plaintiff has no basis for the injunction sought as he is developing his property that he bought it the same way and sold it to the plaintiff the same way and he cannot claim his property, that he has not entered or remained in the plaintiff's plot, he is developing his plot. Parties filed annexures to support their statements in the affidavits. Counsel made oral submission in Court. Counsels reiterated what is in the affidavits. Counsel from the respondent brought up an issue on the application. He argued that when the applicant came to Court his original plaint filed with the application under consideration had no prayer of injunction. That subsequently the plaintiff file an amended plaint dated 1/2/12 on the 6/2/12. That the plaintiff thereafter did not file an amended notice of motion or a fresh one and therefore there is no application before the Court. That the Court will have problems in framing the orders as the suit was filed after the application. Counsel submitted that on the order of demarcation the parties can request the registrar to resurvey the plot. But the applicant has failed to show that he has asked the registrar to do so and that the Court is being asked to enter into an arena that is not its.

5. In reply the applicant Counsel submitted that the applicant occupied the plot, that the respondent has not exhibited any evidence of tenancy. The beacons covered even the stops, that they followed the Court directions to amend the plaint and there was no need to amend the application since it was not defective and that the issue of going to the registrar, they have chosen to move the Court under section 21(1) RLA Cap 300 now repealed which allows an aggrieved party to move to Court where there is a dispute and that the applicant simply wants what is his.

6. I have carefully considered what is deponed in the affidavits submitted by counsel and the provisions of the new Act The Land Registration Act 2012 which repealed the RLA Cap 300. The plaintiff has a title to Block 1624. It is apparent that he is dissatisfied with his acreage as he claims that the defendant has encroached into his property and that the defendant is destroying his property. Each party seems to have a title to a plot each claim is theirs. None of the parties got a surveyor's report to

enable this Court decide on what is on the ground. Section 19(2) of the Land Registration Act provides that

"**The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel."**

7. I agree with the respondent's counsel that the applicant should have applied to the office of the registrar to have the survey done. The defendant's title has not been challenged to be irregular or an illegal by the applicant. Without the survey plan I am unable to decide if the defendant is encroaching or constructing in the plaintiff's plot so as to restrain him as sought.

8. The applicant should move to the Registrar's office as provided in the Act. I find further that this Court cannot grant orders of eviction or election as sought. These I find are final orders mandatory orders that can only be granted after a full hearing.

9. The plaintiff I find has failed to establish a prima facie case on the reasons given. He has failed to show the irreparable loss he will suffer. It would appear that they had an incident in 2008 which he did not rebut after the defendant filed his replying affidavit. The balance of convenience tilts as of now in favour of the defendant/respondent.

Lastly on the application before me procedure requires that if a party files an amended plaint their procedurally the applicant or party should file either an amended notice of motion or a fresh notice of motion. I chose however to deal with the application bearing in mind the provisions of article 159 (2) (d) of the constitution. I find no merit in the application. I decline to grant the orders sought and I dismiss the application dated the 13/1/12 with costs to the respondent.

Dated, Signed and delivered this 25th day of July 2012

R. OUGO
JUDGE

In the Presence of:-

…….. For the Plaintiff/Applicant

…… For the defendant/respondent

…… Court Clerk