



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

ENVIRONMENTAL & LAND CASE 731 OF 2011

DOROTHY NJUMBI.....PLAINTIFF

- VERSUS -

DANIEL GICHURU NJOROGE.....DEFENDANT

RULING

1. This is the plaintiff's notice of motion dated 19th December 2011. The application is expressed to be brought under orders 40 and 51 of the Civil Procedure Rules 2010 and section 3A of the Civil Procedure Act. The plaintiff has annexed a deposition sworn on even date. She prays for an injunction to restrain the "plaintiff" from interfering or destroying the "defendants" property LR Nairobi/Block/119/3277. It is clear to me that the prayer has a serious error. The plaintiff cannot be seeking to restrain herself or to be admitting that the defendant is the owner of the disputed land. It is a scrivener's error. It is poor and negligent draftsmanship. Sadly, there has been no attempt to amend it, even orally, in court. The discrepancy appears in both prayers 1 and 2 of the motion.
2. There are other prayers in the motion to order the District Land Surveyor and District Land Registrar Nairobi to establish and fix the boundaries between LR No 14225/83 and LR 119/3277 Nairobi. The plaintiff is the legal representative of Joseph Gitau Muchina (deceased) who is the registered owner of LR Nairobi/Block 119/3277. The property is said to be adjacent to LR No 14225/83 owned by the defendant. At the heart of the claim in the plaint is a dispute over the boundary between the two properties. The plaintiff's case is that the defendant has trespassed on her land, removed beacons and erected structures on it. That is why she prays for injunctive relief and for an order to the District surveyor and District Land Registrar to demarcate the boundary.
3. The motion is contested. There is a replying affidavit sworn by Daniel Gichuru on 27th February 2012. He claims that from the deed plan, the two properties do not share a common boundary. He avers there is a road on either side and a river on one side. The deed plan and a survey map are annexed. The defendant avers that he is the registered owner of LR 14225/83. He contends that there is thus no boundary dispute.
4. I have heard the rival submissions. I take the following view of the matter. When a litigant approaches the court for injunction, he must rise to the threshold for grant of interlocutory relief set clearly in *Giella Vs Cassman Brown and Company Limited* [1973] E.A 358. Those principles are first, that the applicant must show a *prima facie* case with a probability of success; secondly that he stands to suffer irreparable harm not compensable in damages; and thirdly, if in doubt, the court must assess the balance of convenience. Being a discretionary remedy, there is also ample authority that a party, who has

misconducted himself in a manner not acceptable to a court of equity, will be denied the remedy. See Kenya Hotels Limited Vs Kenya Commercial Bank and another [2004] 1 KLR 80. See also the Public Trustee Vs Nicholas Kabucho Murimi HCCC ELC 610 of 2011 [2012] e KLR, George Munge Vs Sanjeev Sharma & 3 others HCCC ELC 677 of 2011 [2012] e KLR.

5. When I juxtapose the principles of law and the evidence before me, I find as follows. The property known as Nairobi/Block 119/3277 is registered in the names of Joseph Gitau Muchina (deceased). The plaintiff has an interim grant of letters of administration intestate. The plaintiff has attached a letter dated 19th June 2011 from the Ministry of Lands who agreed to visit the suit property on 22nd June 2011 to resolve the boundary dispute. The plaintiff does not say whether the visit took place. She says the defendant refused to cooperate

6. I then compare her rendition of events with those of the defendant. I am satisfied the defendant is the registered owner of LR No 14225/83 from the certificate of title annexed marked “DGN 1”. I note that his property is registered under the legal regime of Registration of Titles Act (Cap 281), now repealed. The plaintiff’s is a certificate of lease issued under a different legal regime, the Registered Land Act (Cap 300) also now repealed. If the plaintiff’s claim that the properties share a boundary is true, then it is a perplexing matter to have two legal regimes of property next to each other. But it is possible. I only say it is highly improbable. But that will be the true province of the trial court on tested evidence. I have then studied the deed plan produced by the defendant together with the survey plan or map. The defendant’s property is bordered on one side by a river. The boundary is the centre of the river. On the opposite side, it is bordered by a road. The properties bordering it on the other two sides do not answer to the plaintiff’s property. The plaintiff has not controverted those assertions. I am thus doubtful that the two properties are adjacent or share a common boundary. The trial court will disentangle the truth from evidence. In that regard, the plaintiff has not established a strong *prima facie* case.

7. There is also another matter that caught my attention. Ground 3 of the motion states;

“That the defendant has completely trespassed (sic) the plaintiff’s plot and is now putting structures on (sic) in pursuant (sic) to enjoying the court order”.

That means there is another suit. At paragraph 4 of her deposition the plaintiff concedes and says “there were injunctive orders against both parties restraining trespass.....”. No pleadings or a copy of the order is annexed by either party. The defendant’s reply makes no reference to the suit at all. I have then looked at the pleading at paragraph 10 of the plaint. The plaintiff states;

“There is no any (sic) other suit pending in any court between the parties herein except the concluded Milimani Chief Magistrates case number 5167 of 2010”.

In the plaintiff’s statement filed contemporaneously with the plaint, she states that in September 2010 her son was served with a court order by the defendant in that suit.

8. The questions that beg answers are: how was it concluded, and why does the plaintiff wish to leave the court in a blind spot? There, I reach the inescapable conclusion that there is material non-disclosure. That in turn prejudices the applicant’s rights to a discretionary remedy. I have already stated that there is a paucity of evidence at this stage to support the plaintiff’s claims. And I have stated that the plaintiff has not established a *prima facie* case. The prayer for injunctive relief is thus dismissed.

9. Prayers (iii), (iv), (v) and (vi) of the motion are for an order directed to the District Land Surveyor and District Land Registrar to “fix” the boundary. There is then a prayer that they provide a court with a report in 30 days and that costs be shared by the parties. There is also the prayer that either party be at liberty to engage a private surveyor to accompany the District Land Surveyor. Those prayers have cost implications for the defendant. The court has expressed doubts whether the suit properties share a common boundary. They are registered under separate legal regimes. The plaintiff’s counsel in his written submissions says one property is in an area called Ting’ang’a and the other in Kamuthi which neighbour each other. But those are remarks from the bar that find no support in sworn evidence. It may as well be

that that is the case. I think the plaintiff's prayers in that regard are premature. She is jumping the gun. It will be for the trial court to grant such directions. Under the Law of Evidence Act (Cap 80) and order 11 of the Civil Procedure Rules 2010, the District Land Surveyor or District Land Registrar can be called as witnesses or to provide expert reports. A basis has to be laid. At the present stage, this court is ill placed to grant the remainder of the orders in the motion.

10. For all the above reasons, the plaintiff's notice of motion dated 19th December 2011 lacks merit. I order that it be dismissed with costs to the defendant.

It is so ordered.

DATED and DELIVERED at NAIROBI this 19th day of July 2012.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

Mr. Laichena for the Plaintiff.

Mr. Njogu for Mwaniki for the Defendant.