INJUNCTION
Must temporary injunction be granted only if the suit is for a permanent injunction?

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO.184 OF 2010

JAMES NDUNGU WANJIKU.....APPLICANT/ PLAINTIFF

VERSUS

REUBEN MWANGI NGURI.....RESPONDENT/ DEFENDANT

RULING

The applicant in the instance notice of motion seeks a temporary injunction to restrain the respondent from entering or in any way interfering with the applicant's parcel of land NO.SUBUKIA/SUBUKIA BLOCK 1/325 (TETU) (the suit property) pending the hearing and determination of this suit.

It is the applicant's case that the suit property is registered in his name; that the respondent, who is the registered owner of the neighbouring property SUBUKIA/SUBUKIA BLOCK 1/326 (TETU) has trespassed upon the suit property and has destroyed crops. Previously, when he trespassed, he was charged in court with the offence of **tempering with survey marks** contrary to **section 29(a) & (b)** of the **Survey Act, Cap 299 Law of Kenya** whereupon he was convicted and sentenced to a fine; that if the respondent is not restrained, he will continue to trespass on and interfere with the suit property.

The respondent on his part has averred that the portion of land he is accused of interfering with was sold to him when he purchased SUBUKIA/SUBUKIA 1/326 (TETU) in 1994. That on the land, was a water pump left behind by the previous owner; that the matter was referred to the Land Disputes Tribunal but the applicant refused to submit to its jurisdiction when summoned and instead has resorted to using the provincial administration to intimidate the respondent; that when this court made an order to restrain the respondent by a temporary injunction, the applicant once again, using the police and the area chief erected a fence along that of the respondent thereby evicting him partially from his land without an eviction

order.

I have considered these averments. It is common ground that the suit property which no doubt belongs to the applicant neighbours the respondent's parcel. The dispute, it is apparent, relates to the portion fronting a river where a water pump is installed. Both the applicant and the respondent are claiming this portion, with each accusing the other of damage to the land, the water pump and the pump house.

It has been submitted by learned counsel for the respondent, among other things that the dispute being that of boundaries between the two parcels of land ought or can only be determined by the Land Disputes Tribunal; that the application is incompetent for the reasons that the provisions of the law upon which it has been brought are incomplete; that the application has been brought by way of Notice of Motion instead of Chamber Summons and finally; that in the absence of a prayer in the plaint for a permanent injunction, the temporary injunction sought in this application cannot be granted.
Starting with the last ground, no authority was cited by counsel for the respondent to support the proposition that there must be a prayer for a permanent injunction in the suit for a prayer for a temporary injunction to succeed. If there is any such authority, then I respectful disagree. The provisions of **Order 39(1)** and **(2)** of the **Civil Procedure Rules**, now reproduced in the same terms as **Order 40** in the **2010 Civil Procedure Rules** make no such a requirement. **Rule 1** states in the relevant part that:

"1. Where <u>in any</u> suit it is proved by affidavit or otherwise –

a) that any property in dispute is in danger of being wasted, damaged, or alienated by <u>any party to the</u>
<u>suit</u>……

b) …….....
the court may by order grant a temporary injunction……..."
(Emphasis supplied)

Rule 2, further stipulated:

"2. In <u>any suit for restraining</u> the defendant from committing <u>a breach of contract</u> or <u>other injury of any kind</u>, whether compensation is claimed in the suit or not <u>the plaintiff may</u>, at any time <u>after the commencement</u> of the suit, and either <u>before</u> or <u>after judgment</u>, apply to the court for a temporary injunction…….. "

(Emphasis supplied)

I need not add anything to these clear provisions save to reiterate that they do not make any mandatory requirement that a temporary injunction can only be granted where the suit seeks a permanent injunction. Indeed the Court of Appeal has categorically said so in the case of **<u>Mansukhlal S. Patel</u>** Vs. **<u>Brian Hune Naylor & 3 others,</u>** Civil Appeal No.10 of 2000. The judges emphasized the law thus:

"According to Mr. Lumatete, an interim injunction can only be granted where there is an equivalent prayer in the main suit. We can find no basis, either in law, or in common sense, for that proposition..…….....

The purpose of an interim or interlocutory injunction is to preserve a disputed property and if the

courts were powerless to prevent their alienation or disposal during the pendancy of litigation, claims by way of adverse possession would be simply defeated by alienating property. That is contrary to common sense."

Having disposed of that ground, I find no merit on the other grounds relating to the wrong procedure and incomplete provisions of the law, as no court of law and equity can claim to have done justice to the parties by striking out an application on the ground that the wrong, incomplete or even no provision of the law has been cited. The three players in this matter, namely, two lawyers and the judge know the law. **Order 50 rule 12** of the **Civil Procedure Rules**, like its equivalent in **Order 51 rule 10** of the **2010 Rules** simply state that ordinarily the order, rule or other statutory provision under or by virtue of which any application is made need to be stated. But no objection shall be taken and no application shall be refused merely by reason of a failure to comply with the requirement to state the order, rule etc.
It is time judicial time is expended on real issues. The age of *"technical knockouts"* in civil litigation was buried by the enactment of **section 1A** and **1B** of the **Civil Procedure Act.**

Turning to the crux of the application, the court must be satisfied that there is a *prima facie* case in order to confirm the earlier orders. It must also be remembered that a temporary injunction does not normally issue unless the applicant may suffer irreparable loss. However, if the court is in doubt, the dispute will be decided on a balance of convenience. See **Giella** Vs. **Cassman Brown & Co. Ltd**. (1973) EA 358.

Looking at the claims by the opposing parties, it is difficult at this stage to come to the conclusion that the applicant has made out a *prima facie* case. Neither the applicant nor the respondent has shown any right superior to the other over the portion in dispute.
For these reasons, this matter must be decided on a balance of convenience, in the following terms:

(i) The *status quo* in respect of the disputed portion of the suit land to be maintained so that the parties or their agents do not cause damage to it or anything on it. But the parties can access and use the river pending (iii) below

(ii) This court's injunctive order of 22nd July, 2010 which has been abused by the applicant by interfering with the original boundary is vacated and it is ordered that none of the parties shall interfere with the boundary further.

(iii) While nobody can claim that the High Court does not have jurisdiction in any civil or even criminal matter, it may amount to an abuse of the process of the High Court for matters required by law to be instituted in any particular forum to be filed in the High Court. Parties cannot dictate where to take their disputes. The law by dint of **Section 159** of the **Registered Land Act** is clear that disputes involving land registered under the **Registered Land Act** but which come within the provisions of **section 3(1)** of the **Land Dispute Tribunal Act** must be determined by the Tribunal.
The **Land Dispute Tribunal Act** donates clear jurisdiction to the Tribunals, the Appeals Committees and the High Court. This dispute ought to have been
referred to the tribunal.

For the above reasons, it is ordered that either party is at liberty to institute proceedings before the relevant Land Disputes Tribunal as soon as practically possible to resolve this dispute without further delay.

Dated, Signed and Delivered at Nakuru this 23rd day of February, 2011.

W. OUKO

JUDGE