



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 368 OF 2008

JANE WANGARE.....1ST PLAINTIFF
DORKAS NJERI MWANIKI.....2ND PLAINTIFF

VERSUS

THUKU WAIRINDI.....DEFENDANT

RULING

The Notice of Motion dated 12/4/2011 was filed by Oumo Advocate on behalf of Jane Wangari Mwaniki and Dorkas Njeri Mwaniki (suing as the administrators to the estate of the late Mwaniki Kungu. The applicants seek an order of injunction to restrain Thuku Wairindi, the defendant herein, his servants or agents from cultivating, ploughing, cutting trees, leasing or transferring or in any way whatsoever interfering with Land Parcel Nyandarua/South Kinangop/491.

The applicants herein are the administrators of the estate of Mwaniki Thuku (now deceased) who was the proprietor of L.R. Nyandarua/South Kinangop/491. Their complaint is that the defendant, has encroached on 0.57 Ha of the said land and has threatened to cut trees from thereon thus frustrating the fair determination of this matter. They exhibited photographs of some of the cut trees (JWM 2A & B). They also exhibited a surveyor's report (JWM1) as evidence of the encroachment. It is the applicants' contention that if the order of injunction is not granted they will suffer irreparably.

Thuku Wairindi who was represented by Mr. Muchoki filed a replying affidavit dated 3/6/2011. He deponed that he is the proprietor of Plot 490 which borders the plaintiff's land (TW-1) and they have a boundary dispute where the plaintiffs allege that a portion of their land falls in his land. He deponed that he bought the land in 1970 from Antony Odhiambo, who had acquired it in 1963 and he has since been in occupation of the disputed land. That the applicants inherited the land from their deceased father when it was already fenced off and it was not till 1992, after their father's death that the boundary dispute was raised, more than 29 years since the respondent started living on the said land. A dispute was filed with the Land Registrar who rendered his decision on 2/2/1993 (TW2) in which he observed that the genesis of the dispute was the Registry Index Map and directed parties to maintain the boundaries in the same way

they had fenced them and the Registry Map be amended to conform with the ground. The Registrar also directed that the dissatisfied party was at liberty to appeal within 30 days but no appeal was preferred by either party meaning they were satisfied with the decision; that the applicants have continued to harass him and he has made efforts by approaching the Registrar to try and resolve the matter but no solution has been forthcoming. He has been waiting for the Land Registrar to correct the Map which would facilitate the proper determination of the boundaries. He denies encroaching on the plaintiff's land and that since the dispute had already been referred to the Land Registrar, it should be left to him to resolve it; that the applicants by coming to this court are trying to circumvent the Registrar. The respondent blames the applicants for coming to court with unclean hands in that they did not disclose all material facts and that in any event, they will not suffer any irreparable loss.

From the pleadings herein, the applicants were very vague and did not disclose when the respondent encroached on their piece of land. It is the respondent who has given details of what has transpired in this matter. The applicants have not controverted the respondent's contention that this matter was referred to the Land Registrar who rendered a decision on 2/10/1992. The applicants did not disclose the existence of the Registrar's findings. He who comes to equity must come with clean hands. The applicants' hands are tainted with falsehoods and they would not be entitled to the exercise of this court's discretion and hence the orders sought.

The alleged encroachment has been subsisting since 1992. The applicants filed this suit in 2008 seeking a declaration that they are the owners of Nyandarua/South Kinangop/491 and a permanent injunction restraining the respondent from interfering with the suit land. However, no interim order of injunction was ever sought. The interim orders have been sought in this application in 2011. The applicants have not shown what has changed since 2008 to warrant the grant of interim orders. They were seeking to restrain the applicant from cutting trees in 2008 but never moved the court for grant of interim orders. Interim orders are not deserved.

Further to the above, the applicants have not exhausted the remedy issued by the Land Registrar. Under Section 22 of the Registered Land Act, it is the Land Registrar to determine such disputes. The Land Registrar already made a determination which the parties should comply with before seeking other reliefs.

For all the above reasons, I find that the applicants have not established a prima facie case for the grant an order of injunction as prayed. The balance of convenience tilts in favour of the respondent, based on the decision of the Land Registrar, that he has been in occupation and trees were on the disputed portion which were over 18 to 20 years old. I accordingly dismiss the application with the costs abiding the hearing of the main suit.

DATED and DELIVERED this 23rd day of September 2011.

R.P.V. WENDOH
JUDGE

PRESENT:

Mr. Oumo for the applicants

Mr. Moseti holding brief for Muchoki for the respondents.

Kennedy - Court Clerk.