



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Case 159 of 2009

GEORGE GICHARU MWAURA PLAINTIFF /APPLICANT

versus

JOHN GITU CHEGE.....DEFENDANT/RESPONDENT

RULING

1. The Plaintiff/Applicant, George Gicharu Mwaura by his Chamber Summons dated 20.5.2009 seeks orders that pending the hearing and determination of the suit herein, a temporary injunction under Order XXXIX Rules 1, 2, and 3 of the Civil Procedure Rules should be issued restraining the Defendant, his servants, agent, employees and/or nominees from entering, cultivating, trespassing into, alienating, depositing materials, constructing or in any other way interfering with land parcel No. Ngong/Ngong/7230.
2. I have read the Supporting Affidavit sworn on 20.5.2009 and the Defendant's Replying Affidavit sworn on 16.7.2009. What emerges is that the Plaintiff is the registered proprietor of land parcel number Ngong/Ngong/7230 while the Defendant is the registered proprietor of Ngong/Ngong/5939. The sketch attached to the mutation dated on 9.5.1985 would point to that fact. However, it is also clear that land parcel no. 7230 is part of what was originally a larger parcel of land known as Ngong/Ngong/5938 which was sub-divided into nos. 7222-7230 and no. 7230 bordered no. 5939, according to the said mutation. In any event parcel, no. 5939 was later sub-divided into plots Nos 17436-17441 and according to the extract of survey map exhibited by the Defendant, plot no. 17441 is the one that immediately borders plot Nos. 7230 on the lower side.
3. The question that now confronts me is which party has encroached onto the other's land, if at all. The Plaintiff/Applicant states that the Defendant/Respondent entered his land and uprooted his crops while the Defendant/Respondent denies that fact and instead depones that the Plaintiff is the one who in April 2008 entered his land with a surveyor, Moses Gitonga and with the area Assistant Chief in January 2009 and attempted to move the Defendant's beacons to create "**room**" for plot no. 7230.

4. Having anxiously considered the matter, my decision is as follows:
5. To grant an injunction as prayed would amount to pre-determining what is clearly a dispute as to whether in fact plot No. 7230 exists on the ground or as part of plot no. 17441. I say this because in the mutation dated 9.5.1985, the Land Registrar noted that plot no. 5938 (*parent plot of plot no. 7230*) was found to be “***smaller than the one registered***”. Only a proper survey based on the history of plots no. 5938 and no. 5939 can resolve the issue.
6. I will therefore order as follows;
 - i. Let each party remain on the portion of land they presently occupy until further orders of this court.
 - ii. Let the District Land Registrar, Kajiado and the District Surveyor, Kajiado jointly visit the disputed portion of the land at the cost of the Plaintiff and Defendant equally and determine;
 - a. How plot no. 5938 and how plot no. 5939 were originally situated on the ground and their true size(s).
 - b. where on the ground plots no. 17230 and 17441 are situated and whether plot no.17230 is in any way superimposed on plot no. 17441.
 - c. A report to be filed in this court within 60 days.
 - d. Each party at liberty to apply.
 - e. Costs shall abide the final orders in the suit.
7. Orders accordingly.

ISAAC LENAOLA

JUDGE

Countersigned and delivered at **Machakos** this **19th** day of **March 2010**.

H.P.G. WAWERU

JUDGE