



Meta & another ((Suing as the administrator of the Estate of Joseph Kibiku Githinji (Deceased)) v Mwathi (Environment & Land Case E023 of 2022) [2022] KEELC 13634 (KLR) (12 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13634 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E023 OF 2022**

BM EBOSO, J

OCTOBER 12, 2022

BETWEEN

F. GATHUNGU META 1ST PLAINTIFF

CECILIA WARINGA KIBIKU 2ND PLAINTIFF

**(SUING AS THE ADMINISTRATOR OF THE ESTATE OF JOSEPH KIBIKU
GITHINJI (DECEASED))**

AND

NGUGI MWATHI DEFENDANT

RULING

1. The plaintiffs initiated this suit through a plaint dated 3/3/2022. They contend that Celina Waringa Kibiku is the administrator of the estate of the late Joseph Kibiku Githinji. Their case is that Fredrick Gathungu Meta [the 1st plaintiff] and the late Joseph Kibiku Githinji are the co-proprietors of Plot No 27 located in Wangige Market, Kikuyu Sub County, Kiambu County. They were allocated the said plot by the Kiambu County Council way back in 1987. The defendant owns an abutting piece of land surveyed and registered as Kabete/Kibichiku/393/58. The plaintiffs allege that in 1992, the defendant encroached onto their land and occupied a portion of it for his business activities. They have set out the particulars of encroachment. Among the reliefs they seek in the suit is a declaration that the defendant is a trespasser on their land. Further, they seek an order directing the defendant to demolish the structures that he may have developed on their land.
2. Together with the plaint, the plaintiffs brought a notice of motion dated 3/3/2022, in which they seek the following interlocutory orders:
 1. Spent



2. That pending the hearing and determination of the main suit and the application herein, an order for injunction be and is hereby issued restraining the defendant from conducting any further developments on Plot No. 58 and by extension, Plot No 27 Wangige Market.
 3. That pending the hearing and determination of the main suit herein, an order for joint survey of Plot No 27 Wangige Market be and is hereby issued to ascertain the level of encroachment by Plot No. 58.
 4. That an order be and hereby issued directing the District Lands Surveyor Kabete Sub-County to take part in the joint survey under prayer (3) above.
 5. That an order be and is hereby issued directing the surveyors to file before this honourable court their respective survey reports upon conducting of the joint survey under order 3 and 4 above.
 6. That an order be and is hereby issued directing the defendant to grant access to the surveyors through the boundary wall of plot no. 58.
 7. That in the alternative to prayer (6) above, an order be and is hereby issued sanctioning the demolition of a section of the wall on the boundary of plot No 58.
 8. That the OCS Kingero Police Station be and is hereby directed to provide security for the implementation of orders (3), (6) and (7) above.
 9. That the costs of this application be borne by the defendant.
3. The application is supported by an affidavit sworn on 3/3/2022 by the 1st plaintiff. He deposes that Samuel Kibuku William, the late Joseph Kibuku and himself were allocated plot No 27 in 1987. He subsequently purchased Samuel Kibuku's share in the plot. He adds that from 1992, the defendant has been encroaching on their plot and has "grabbed and annexed a portion" of their plot to form part of his plot, Number 58. He urges that this court orders for the appointment of a licensed surveyor by each party herein, to conduct a joint survey alongside the District Land Surveyor and an independent survey report be filed for the purpose of guiding this court in the determination of the dispute in this suit. He adds that it is imperative that this court issues an injunction against further developments on the defendants' plot, number 58, which he contends has encroached onto their plot.
 4. The defendant filed a statement of defence dated 17/3/2022, witness statement dated 17/3/2022, and a replying affidavit sworn on even date. He denies the allegation of encroachment and the particulars of encroachment set out in the plaint. He contends that his plot was surveyed as Kabete/Kibichiku/393/58 and he was issued with a certificate of lease dated 12/5/1993. He has exhibited the certificate of lease together with a lease issued to him by the County Council of Kiambu, registered on 17/5/1993. He is opposed to the plea for interlocutory injunction and the plea for the other orders set out in the application.
 5. The application was canvassed through written submissions dated 25/4/2022, filed by M/s Wanam Sale Advocates. The defendant responded through written submissions dated 30/5/2022, filed by M/s Kiania Njau & Co Advocates. I have considered the rival submissions.
 6. Two questions fall for determination in the application. The first question is whether the plaintiffs have satisfied the criteria for grant of an interlocutory injunction. The second question is whether the plaintiffs have laid a proper basis for the grant of the other orders sought in the application. I will make brief sequential pronouncements on the two questions in the above order.



7. The principle upon which our trial courts exercise jurisdiction to grant interlocutory injunctive reliefs was outlined in *Giella v Cassman Brown & Co Ltd* [1973] EA 358, and is well settled. First, the applicant is required to demonstrate a *prima facie* case with a probability of success. Second, the applicant is required to demonstrate that if the interlocutory injunctive relief is not granted, he would stand to suffer irreparable damage that cannot be adequately indemnified through an award of damages. Third, if the court has doubts on either or both of the above two limbs, the application is to be determined on the basis of the balance of convenience. Fourth, at the stage of disposing an application for interlocutory injunctive relief, the court does not make conclusive or definitive pronouncements on the substantive issues in the suit. The focus of the court is to establish whether the criteria has been satisfied.
8. In the written submissions filed in opposition to the application, counsel for the defendant cites the provisions of section 18 of the [Land Registration Act](#) and describes the plaintiffs suit as a none-starter. Counsel contends that what is disclosed in the plaintiff's suit is a boundary dispute and argues that the boundary relating to the two properties should be ascertained in accordance with the provisions of section 20(2) of the [Land Registration Act](#) before this court is seized of jurisdiction.
9. I have on my part considered the plaintiffs' application alongside the pleadings on which the application is anchored and the relevant legal framework. It does emerge that the dispute in this suit is a boundary dispute relating to the two abutting parcels of land owned by the plaintiffs on one part and the defendant on the other part. The defendant's land was surveyed and was registered in 1993. The plaintiffs have not exhibited any evidence relating to survey or registration of their land. They have not explained why they have not procured survey and registration of their land since 1987 when they were allocated the land.
10. Section 18 of the [Land Registration Act](#) expressly bars this court against exercising jurisdiction over boundary disputes until the boundaries of the concerned parcels of land have been fixed. The procedure for procuring the fixing and demarcation of boundaries is spelt out in sections 19 and 20 of the [Land Registration Act](#). The jurisdiction to fix and demarcate boundaries is vested in the Land Registrar in conjunction with the Director of Surveys as mandated under section 23 of the [Survey Act](#).
11. Given that section 18 of the [Land Registration Act](#) expressly bars this court against exercising jurisdiction over boundary disputes until the boundary of the concerned parcel has been determined and demarcated by the Land Registrar in conjunction with the Director of Surveys, I do not think, in the absence of a prior determination and demarcation by the Land Registrar, the plaintiffs can be said to have demonstrated a *prima facie* case with a probability of success. Further, I do not think at this point this court is seized of jurisdiction to grant the injunctive relief that is sought.
12. For the same reasons, the answer to the second question in this application is in the negative. The result is that the plaintiff's notice of motion dated 3/3/2022 is rejected on the ground that, *prima facie*, this suit appears to offend the mandatory provisions of sections 18, 19 and 20 of the [Land Registration Act](#).
13. That will not be the end. Given that section 18 (2) of the [Land Registration Act](#) expressly bars this court against exercising jurisdiction over boundary disputes unless the boundaries have been determined in accordance with the provisions of the Act, I will give this matter an early mention date when the plaintiffs will be expected to show cause why this court should not down its tools by striking out this suit in tandem with the principle in *Owners of Motor Vessel Lillian "S" v Caltex Oil (Kenya) Ltd* [1989] eKLR.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 12TH DAY OF OCTOBER 2022



B M EBOSO

JUDGE

In the Presence of: -

Mr Oningo for the Plaintiffs/Applicants

Mr Kiania for the Defendant

Court Assistant: Sydney

