



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

CIVIL SUIT 93 OF 2007

GRACE T. BELSOI.....1ST PLAINTIFF

THOMAS KIPLANGAT ARAP SOI.....2ND PLAINTIFF

VERSUS

KAMAU NJOROGE.....1ST DEFENDANT

NJOGU KIHONGU.....2ND DEFENDANT

KINYUNGU KIHUNGU.....3RD DEFENDANT

MUGO KARIUKI.....4TH DEFENDANT

WAGONJO.....5TH DEFENDANT

MEJA KIHUNGU.....6TH DEFENDANT

JOSEPH KAMAU KIMANI.....7TH DEFENDANT

RULING

The plaintiffs have filed an application under **Order XXXIX rules 1, 2, 3 and 9** of the **Civil Procedure Rules** and **Section 63 (e)** of the **Civil Procedure Act** seeking the orders of this court to restrain the defendants jointly and severally from entering, encroaching, cultivating, mining stones, trespassing or in any manner whatsoever from interfering with the plaintiff's peaceful ownership, possession, occupation and enjoyment of **L.R. No. 11309** or any portion thereof and specifically along the common boundary pending the hearing and determination of the suit. The grounds in support of the application are on the face of the application. The application is supported by the annexed affidavit of Thomas Kiplangat Arap Soi and Grace T. Belsoi. The application is opposed. Kamau Njoroje, the 1st defendant and Waiganjo, the 5th defendant have sworn replying affidavits in opposition to the application.

At the hearing of the application, this court heard the submission made by Mr. Kurgat on behalf of the plaintiff. He submitted that on diverse occasions the defendants had trespassed and destroyed the common fence that defines the boundaries between the plaintiffs' and the defendants' parcels of land. He

submitted that according to the maps of the area, the said boundary is in the position as identified by the plaintiffs and not by the defendants. He submitted that the affidavits in support of the application clearly establishes that the plaintiffs have a prima facie case and should be granted interim orders of injunction pending the hearing and determination of the suit.

Mr. Waiganjo for the defendants opposed the application. He submitted that the dispute between the plaintiffs and the defendants relate to a boundary. He submitted that the dispute was referred to a surveyor who visited the disputed area and prepared a report which confirmed that the boundary between the plaintiffs' and the defendants' parcels of land were in the middle of the river. He submitted that the boundary between the said parcels of land had been fixed as per the annexures which were annexed to the affidavit in opposition to the application. He submitted that the plaintiffs had not established that the defendants had encroached into their parcel of land. He reiterated that once the boundary was fixed by the surveyor, the defendants abided by the said fixed boundary. He submitted that the plaintiffs had therefore not established a prima facie case that would entitle this court to grant the order of injunction sought.

I have carefully considered the rival submission made by the counsel for the plaintiffs and the counsel for the defendants. I have also read the pleadings filed by the parties to this application in support of their respective positions. The issue for determination by this court is whether the plaintiffs have established a prima facie case as to entitle this court to grant the order of injunction sought. The principles to be considered by this court in determining whether an injunction ought to issue or not are well established. The applicant must establish that he has a prima facie case with a likelihood of success; he must establish that he would suffer irreparable damage which would not be compensated by an award of damages if the order of injunction is not granted; and where the court is in doubt, it will decide the case on a balance of convenience. (*See Giella vs Cassman Brown [1973] E.A. 358*).

The plaintiffs' complaint is that the defendants have encroached into this parcel of land known as **L.R. No. 11369**. The 2nd plaintiff has deponed that the defendants have on various occasions trespassed into his said parcel of land either to mine stones, plant crops or to graze animals. The defendants' response is that they were undertaking economic activities on their side of the boundary between their parcels of land and that of the plaintiffs'. It is the defendants' contention that the issue in dispute between the plaintiffs and the defendants is a boundary dispute which was resolved when the District Surveyor, Nakuru visited the dispute boundary and established the said boundary.

I have read the said report together with the annexed survey plan. It is clear that the said Surveyor pointed out the beacons that defined the boundary between the plaintiffs' and the defendants' parcels of land. At some point, the boundary between the two parcels of land is a river. The Surveyor identified the boundary at that point to be the middle of the river. The surveyor was not however categorical on who owned the quarries on both sides of the river. It is clear to this court that the plaintiffs have established a *prima facie* case that the defendants have taken advantage of the ill-defined boundary between the two parcels of land where stones are being excavated to encroach on the plaintiffs' parcel of land.

The Surveyor did not confer any proprietary rights on the defendants other than that which existed before his visit to the said parcel of land. It is apparent that the defendants interpreted the Surveyor's report to mean that they had established their claim over the disputed parcel of land. I have perused the pleadings filed by the parties to this suit. It is clear that the dispute over the contested land cannot be resolved without the court hearing this case on its merits and taking further technical evidence relating to the said disputed boundary.

The evaluation of the affidavit evidence and the submissions made has convinced this court that the plaintiffs have established a prima facie case. The disputed portion of land will be wasted if this court does not restrain the defendants from mining stones or trespassing into it pending the hearing and determination of the suit.

In the premises therefore, this court restrains the defendants jointly and severally from interfering or trespassing into parcel No. **L.R. No. 11369**, and specifically at the common boundaries as prayed by the

plaintiffs in paragraph (c) of their application pending the hearing and determination of the suit. The plaintiffs shall have the costs of the application.

DATED at NAKURU this 18th day of October 2007.

L. KIMARU

JUDGE