



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT MACHAKOS  
CIVIL CASE NO. 100 OF 2003**

**FLORENCE KATHAMBI MUTISO ::::::::::::::: PLAINTIFF**

**VERSUS**

**MERCY NJAMWEA ::::::::::::::: DEFENDANT**

**R U L I N G**

By the chamber summons dated 2.12.2003 the plaintiff/appellant prays for an order of injunction to restrain the Defendant/Respondent her agents, or servants, employees from entering, removing or trespassing or erecting a permanent structure or in any other way dealing with portion of land excised from Land Registration No. 337/1682 situate at Mavoko Municipality measuring 0.0141 Hectares. The application is brought under Order 39 Rules 1 (a) and 3 of Civil Procedure Rules and S. 3A Civil Procedure Act.

The Plaintiff contends that she is the owner of plot No. 337/1682 having purchased it from Chal Developers Limited and the transfer registered on 16.10.1998; that in September – November 2003 the Defendant encroached on the said land and started to construct a permanent structure and that the said portion is likely to be wasted. The application is also supported by the affidavit of the applicant Florence K. Mutiso and a supplementary affidavit by the same deponent.

The application was opposed by the defendant and she filed an affidavit in opposition in which she depones that she owns LR No. 337/1683 measuring 0.450 hectares purchased from Chal Developers Limited in 1999 as evidenced by S1 a copy of certificate of title. That in 2002 plaintiff the applicant removed beacons from the common boundary and respondent wrote to Mavoko County Council asking the surveyor to come and re establish the beacons as per letter dated 29.8.2003 and when the Municipal Surveyor went to the site he claimed there to have been a problem with Plaintiffs plot on the ground and survey plan. Her contention is that Plaintiff has encroached on her land by about 9.4 metres and that the acreage of Plaintiffs land on paper is more than on the ground.

That the plaintiffs brought surveyors in her absence who placed new beacons on the land. It is the defendants contention that it is the plaintiff who has trespassed on her land and she prays that the court do restrain her from trespassing on defendants land and also court do order the seller of the plots to go and put the boundaries back. The plaintiff and defendant are neighbours. Their plots border each other. Each has a certificate of title in their names. The plaintiff's is marked FKM I whereas the defendant's is marked SI. The plaintiffs plot is NO. 337/1682 whereas the defendants is 337/1683.

From Annexure S2 a letter written by the defendant to Town Clerk Mavoko Municipal Council it seems that the defendant was the first to complain about beacons on their common boundary having been interfered with and by annexure S3 an alleged letter by the plaintiff to the Town Clerk in response to defendant's letter Plaintiff denied having made changes to the boundaries but acknowledged that the beacons were missing and she did not mind the suggestion that a surveyor comes to the site. It is therefore apparent from the evidence on record that there is a boundary dispute between the 2 parties each blaming the other for trespassing onto the others plot.

Unfortunately the parties did not seek out the sellers of these plots to assist them identify the boundaries. Instead the plaintiff came to court. I believe the parties should have sought the help of Chal Developers Limited first before coming to court.

Since there is dispute over the boundary and the defendant was constructing a house I do find that it would be improper for her to continue doing so without the boundaries being ascertained and the

construction should be put on hold pending the hearing of this matter. The court will order that there be status quo pending hearing of this suit.

In the meantime the parties to seek the assistance of Chal Developers to come to the site to identify the boundaries for them and place fresh beacons. The costs of that exercise will be borne by both parties.

The court will mention the matter to find out the outcome of the survey by Chal Developers. Costs will be in the cause.

Dated, read and delivered at Machakos this 25th day of March, 2004.

**R. V. WENDOH**

**JUDGE**