

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 30 OF 2003

FRANCIS G. WAHOME

ANNE G. WAHOME PLAINTIFFS

- VERSUS -

MR. NG'ANG'A (ALSO KNOWN AS)

MATHAI NG'ANG'A DEFENDANT

R U L I N G

The plaintiffs filed suit as against the defendant on 13.2.2002 seeking orders both restrictive and mandatory in nature. The plaintiffs are the Registered proprietors of property known as plot No. 1700/Sec.III/Mainland North in which they have developed a Four Storey building fenced in Chainlinked wire. Next to it is Plot 1699?Section III/Mainland North which is registered in the name of SHOMARI JUMA MOHAMED on which development commenced on 10th February, 2003 with the excavation of the foundation trench along the common boundary with Plot 1700. The plaintiffs then realized that the said excavation had encroached onto their property. The next day, the 11th February, 2003 the 1st plaintiff instructed his Advocate to address the issue. Consequently a letter of the same date was addressed to Mr. Mathai Ng'ang'a who is the defendant herein and who is the person directing the works on Plot 1699. The letter demanded that he desists from continuing to excavate or break and entering upon or carrying out any construction on Plot 1700. The Defendant failed to oblige and consequently the suit was filed on 13.2.03. Simultaneously, the plaintiffs filed an application by Summons of the same date under the provisions of Order 39 rule 1,2,3, and 9 of the Civil Procedure Act. This was under a certificate of urgency, and the matter was placed before the court for the hearing of the application ex-parte for the grant of Interim injunctive orders, and to certify the application as urgent. The court on being satisfied that the plaintiffs had made out a case to warrant the grant of the orders exparte, certified the application as urgent and dispensed with service of the same in the first instance. A further order of an injunction restraining the Defendant by himself his servants, workmen or agents from encroaching or trespassing on Plot 1700 was issued for a period of 14 days. On 20.2.03 when the said application came up for hearing inter-party Mr. Kimani, Counsel for the plaintiff pointed out that the process server had faced difficulties in serving the defendant with a hearing Notice as he was reported not be at his place of work and only went back to his house late at night and left early the next day. He therefore applied and was granted leave to serve by the hearing Notice by Affixing a copy on his residence door and slipping another one under the door.

On 26.2.03, the Defendant again failed to appear or file any papers despite having been served. The application is supported by an Affidavit by the 1st plaintiff Francis G. Wahome and a second one by Mr. EDWARD M. J. KIGURU. Mr. Wahome has exhibited a copy of his Title document in respect of Plot 1700 and deponed that he had constructed a concrete slab bed passage leading to a stairway to the upper floors of his building. The said passage bends on the border between plot 1700 and 1699. The

Defendant however excavated a building foundation which encroached onto the Plot 1700 damaging the said pathway on one end and encroaching further to a maximum of 0.9 metres. This was confirmed by Mr. Edward Kiguru who is a Land Surveyor and depones that he has carried out a re-establishment of the boundary between Plots 1700 and 1699 on 12.2.03 and he established that the development commenced on Plot 1699 did indeed encroach onto Plot 1700 between 0.2 to 0.9 meters. He further depones that he has in his custody Original Title to Plot 1699 which he holds on behalf of the Registered owner Mr. Shumari Juma Mohamed and that the Defendant was not the owner. Mr. Kimani further submitted that even at the time of coming to court, the proprietary interest of the Defendant in the Plot 1699 had not been established.

It is for the said reasons that both restrictive and mandatory injunctions were sought. He said damages in this case may not be appropriate as even despite the temporary injunction, the Defendant defiantly continued with the construction and his ability to compensate the plaintiff if damages were to be awarded was doubtful.

Before the orders sought can issue, the plaintiff need first to show that the ingredients set out in the GIELLA case (1073) E.A.238 have been satisfied. There is no doubt in my mind that the plaintiffs have shown they have a prima-facie case with a probability of success. Can they therefore be compensated by Damages? The plaintiffs have provided evidence that the Defendants proprietary. Interest is in doubt as a Third party is in possession of the Title document and the developments being carried don't appear to have his blessings. The plaintiffs have further stated that the construction is going on day and night in spite of a court order barring the Defendant from so doing. The plaintiffs may in the circumstances not benefit from Damages once the building is completed. The Defendant has shown open defiance to court orders and wonder what he intents to gain should it transpire at the end of it all that indeed he has no proprietary interest nor any authority to deal with Plot 1699 in the manner he has. In the circumstances, I am compelled to grant the orders sought of an injunction in terms of paragraph (ii) and (iii) of the Chamber Summons. Costs of the application shall be to the plaintiffs.

Dated and Delivered at Mombasa this 21st day of March, 2003.

P.M. TUTUI

COMMISSIONER OF ASSIZE