



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MAKUENI

ELC CASE NO. E 8 OF 2020

KALONDU MASILA MUTIE

MUTIE MASILA MUTIE (*Suing as the administrators*

and legal representatives of

THOMAS MASILA MUTIE).....PLAINTIFFS/APPLICANTS

-VERSUS-

MUTULU SINGI.....DEFENDANT/RESPONDENT

RULING

Introduction

1. The application for determination is dated 12th November, 2020 and was filed under certificate of urgency. It is brought under Sections 1A, 1B & 3A of the Civil Procedure Act, Order 40 Rules 1(a), 2, Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the Law. It seeks;

a) Spent.

b) Spent.

c) THAT this honorable Court be pleased to issue interim orders that the defendant/respondent by himself, agents or servants be restrained from entering into and/or trespassing on, remaining on, and/or erecting/constructing houses or buildings, cutting down trees, grazing, making bricks and further procuring and/or supplying to the site construction materials or anyone claiming through him and/or any other manner whatsoever interfering with the land parcel number Kibauni/Kalawa/386 pending the hearing and determination of the main suit.

d) THAT the cost of this application be borne by the defendant/respondent.

2. The application is supported by the grounds on its face and the supporting affidavit of Mutie Masila Mutie sworn on the same day. The primary ground is that land parcel No. Kibauni/Kalawa/386 (*suit land*) is registered in the name of Thomas Masila Mutie (*deceased*) but the respondent has been intermeddling with it to their exclusion and detriment as beneficiaries. The certificate of official search and letters of administration *ad litem* are exhibited as **MMM-1(a)** and **(b)** respectively. Photographs to illustrate the intermeddling are exhibited as **MMM-2(a-c)**. The applicants have deposed that demands to cease the intermeddling were sent to the respondent and ignored. A copy of the demand letter is exhibited as **MMM-3**.

3. The application is opposed through the replying affidavit sworn by the respondent on 2nd December, 2020. The gist of the opposition is that he has not intermeddled with the deceased's land and that it is actually the applicants who want to excise part of the land that he beneficially owns *to wit* Kibauni/Kalawa/81. A copy of title deed is exhibited as **MS-1** to show that this parcel is registered in the name of his late mother, Mumbua Nzungi Munywoki.

4. He has deposed that the suit land was formerly Kibauni/Kalawa/80 and was owned by Thomas Mung'alu Munywoki who then sold it to the deceased in 1980. The sale agreement is exhibited as **MS-2**. Further, he has deposed that the suit land and parcel 81 are separated by Kalawa-Syotuvalli road and the boundaries of each parcel extend upto the road. He deposed that no part of the suit land crosses the road to border parcel 81 as per the applicants' allegations. An extract of the area land map is exhibited as **MS-3**.

5. It is also his deposition that in July 2020, the applicants took a surveyor to parcel 81 secretly but ran away upon seeing him. He reported the matter to Kalawa Police post. He deposed that at the time of beaconing the Government land *to wit*, parcel Kibauni/Kalawa/83, the owners of parcels 81, 84 and 386 attended the exercise and the applicants did not raise the boundary issue. The letter to that effect is exhibited as **MS-4**.

6. Further, he deposed that he in the process of constructing a kiosk on his parcel and has therefore been making bricks and depositing other building materials for that purpose. He deposed that the applicants have exhibited misleading photographs which actually show the activities on parcel 81. He deposed that a surveyor agreed upon by the parties should visit the site and establish whether he has interfered with the suit land.

7. Directions were given that the application be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.

8. The applicants have structured their submissions into the following heads;

- a) Whether there is a *prima facie* case,
- b) Whether they stand to suffer irreparable harm,
- c) On which side does the balance of convenience lie?

9. On the first head, they submit that a *prima facie* case is evident from the fact that they are the legal representatives of the deceased who in turn is the registered owner of the suit land.

10. On the second head, they submit that the exhibited photos are indicative of an ongoing construction which will cause them irreparable harm.

11. On the third head, they submit that the balance of convenience lies in their favour because they have demonstrated that there is wanton wastage on their land. They rely on the case of **Robert Mugo was Karanja –vs- EcoBank (K) Ltd & Anor (2019) eKLR** where the Court stated that;

“Where any doubt exists as to the applicants right or if the right is not disputed, but its violation is denied, the Court in determining whether the interlocutory injunctions should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant on the other hand might sustain if the injunction was refused and he should ultimately turn out to be right...thus, the Court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The Court will seek to maintain the status quo in determining where the balance of convenience lies.”

12. The respondent submits that when a land boundary extends across a road, the mark of a hook is put on the area land map. He contends that no such hook exists on annexure MS-3 with regard to the suit land and parcel 81.

13. He submits that it is actually the applicants who are interfering with his land by secretly taking surveyors to illegally excise a portion therefrom.

14. He submits that the applicants have not demonstrated any of the factors set out in the case of **Giella –vs- Cassman Brown & Co. Ltd (1973) E.A 358**.

Analysis and determination

15. In my view the exhibited evidence points to a boundary dispute between the parties. The applicants claim that the respondent is intermeddling with the deceased’s land but the respondent has denied the same and asserts that he is dealing with his own land. This Court has no expertise in interpretation of cadastral maps hence is unable, at this juncture, to determine whether or not the respondent’s activities are on his land or the deceased’s land.

16. From the foregoing and in line with the principles enunciated in the *locus classicus* of **Giella –vs- Cassman Brown (supra)**, the balance of convenience tilts towards maintaining the *status quo* until the full trial is conducted.

17. The upshot is that the application is allowed. The costs to abide the outcome of the suit.

Signed and delivered at Makeni this 2nd day of March, 2021

MBOGO C.G

JUDGE