



**Wanjala v Nyongesa (Land Case E016 of 2024)
[2024] KEELC 13585 (KLR) (3 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13585 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
LAND CASE E016 OF 2024
BN OLAO, J
DECEMBER 3, 2024**

BETWEEN

HEDWICK ATHIENO WANJALA PLAINTIFF

AND

NAPOLEON NAMDI NYONGESA DEFENDANT

RULING

1. What calls for my determination is the Notice of Motion by Hedwick Athieno Wanjala (the Applicant) dated July 31, 2024 and premised under the provisions of Sections 1, 1A, 3 and 3A of the [Civil Procedure Act](#) as well as Orders 40 and 51 of the Civil Procedure Rules. It seeks the following orders against Napoleon Namdi Nyongesa (the Respondent):
 1. Spent.
 2. Spent.
 3. That this Honourable Court be pleased to issue a temporary order of injunction restraining the Respondent, the Land Registrar Busia and the County Surveyor Busia and/or their agents from visiting the Applicant's parcel of land namely Bukhayo/Kisoko/8241 with a view to surveying the same and confirming it's boundaries pending the hearing and determination of this suit.
 4. That the costs of this application be provided for.
2. The application is based on the grounds set out therein and supported by the affidavit of the Applicant.
3. The gravamen of the application is that the Applicant is the proprietor of the land parcel No Bukhayo/Kisoko/8241 measuring 1.20 Hectares (3 acres) as reflected in the title deed, register and cadastral map of Kisoko Registration Section Diagram 26. That on 29th March 2024, the Respondent trespassed onto the suit land and viciously attacked her yet she had purchased the suit land and obtained the title



thereto on 18th March 2014, fenced it and has been using it without any dispute with the Respondent who is her neighbour.

4. The Respondent's actions made her suspicious and so she applied for the cadastral map from Kakamega and was surprised to discover that the suit land had completely been obliterated. She instructed her Advocate to take up the issue with the Respondent and the Regional Surveyor with copies to the Land Registrar. The Land Registrar Busia has served her with a Notice of Intention to ascertain and fix boundary yet the boundary to her land has been intact from 2014 and there is no reason to ascertain the same. She is apprehensive that the exercise is intended to rubberstamp a fraudulent interference and she will not get justice because even the letter written by the District Criminal Investigations office [DCIO] asking the Land Registrar to place a restriction on the suit land has gone unheeded. She has a prima facie case and stands to suffer irreparable loss hence this application.
5. Annexed to the application are the following documents:
 1. Copy of title deed to the land parcel No Bukhayo/Kisoko/8241 issued on 18th March 2014.
 2. Copy of Green Card to the land parcel No Bukhayo/Kisoko/8241.
 3. Copy of Certificate of Official Search for the Land Parcel No Bukhayo/Kisoko/8241.
 4. Copies of medical notes from Nambale Sub-county Hospital.
 5. Copy of Medical Report.
 6. Letter dated 29th May 2024 addressed to the Regional Surveyor Kakamega by Obwoge Onsongo & Co. Advocates.
 7. Notice of Intention to ascertain and fix boundaries.
 8. Notice to the Attorney General
 9. Letter by the DCIO Busia dated 1st July 2024 and addressed to the Land Registrar Busia requesting that restrictions be placed on the land parcels No Bukhayo/Kisoko/8065, 8066, 8040 and 8241.
6. The application is opposed and the Respondent filed a replying affidavit dated 3rd September 2024 in which he has deposed, inter alia, that he purchased a portion of land measuring 7.17 Hectares out of the land parcel No Bukhayo/Kisoko/13 from one Payilet Nabwire Matswa. His portion was registered as parcel No Bukhayo/Kisoko/8065 which negibhours the parcel No Bukhayo/Kisoko/8066 belonging to the said Payilet Nabwire Matswa. The boundaries between the two parcels of land are clearly demarcated on the ground by concrete beacons. That the Applicant purchased a portion of land measuring 1.20 Hectares out of the land parcel No Bukhayo/Kisoko/8066 from Payilet Nabwire Matswa which is registered as Bukhayo/Kisoko/8241 but she has destroyed the common boundary between the land parcels No Bukhayo/Kisoko/8065 and 8241 and encroached onto his land.
7. On 20th May 2024, he made a report to the Chief Bukhayo Central Location who referred the matter to the County Land Registrar for determination. That he was advised to pay the sum of Kshs.3,500 on account of fees for hearing the boundary dispute and Kshs.25,000 on account of fees for survey which he paid. Notices were then issued to all concerned parties and the survey was scheduled for 1st August 2024 but the Applicant moved to the DCIO to stop the exercise. He was summoned to the office of the DCIO where he explained how he acquired the land parcel No Bukhayo/Kisoko/8065. The Applicant is abusing the process of this Court and Section 19 of the [Land Registration Act](#) gives the Land Registrar the power to ascertain and fix the boundary. That the Applicant who is his biological



sister has been interfering with the boundary since 2021 but attempts to settle the issue at family level have not yielded any fruits since she has been violent and wanted him arrested. That it is not correct that the suit land has been obliterated.

8. The following documents are annexed to the replying affidavit:
 1. Copy of title deed to the land parcel No Bukhayo/Kisoko/8065.
 2. Copy of letter dated 20th May 2024 from the Chief Bukhayo Central Location addressed to the Land Registrar Busia.
 3. Copy of receipts for Kshs.3,500 and Kshs.25,000.
 4. Copy of Notice of Intention to Ascertain and Fix Boundaries.
 5. Copy of letter dated 1st July 2024 addressed to the Land Registrar Busia by DCIO Busia.
 6. Copy of Requisition by the DCIO Busia to compel attendance of the Respondent.
 7. Copy of Map for Kisoko registration Section Diagram No. 26.
9. When the application was placed before me for direction on 1st August 2024, I directed that it be canvassed by way of written submissions.
10. Submissions were subsequently filed both by Mr Onsongo instructed by the firm of Obwoye Onsongo & Company Advocates for the Applicant and by Mr Bogonko instructed by the firm of Bogonko Otanga & Company Advocates for the Respondent.
11. I have considered the application, the rival affidavits and annexures thereto as well as the submissions by counsel.
12. This application is founded on Order 40 of the Civil Procedure Rules which provides for an order of temporary injunction. The locus classicus on such an order is the case of Giella -v- Cassman Brown & Company LTD 1973 E.A. 358 which set out the following principles to guide a Court considering such an application. These are:
 1. The Applicant must show the existence of a prima facie case with a probability of success at the trial.
 2. A temporary injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which cannot adequately be compensated by an award of damage, and;
 3. If in doubt, the Court will determine the application on the balance of convenience.

A prima facie case was defined in the case of MRAO Ltd -v- First American Bank of Kenya 2003 KLR 125 as follows:

“ A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

The Court went on to add that:

“ A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success



of the Applicant's case upon trial. That is clearly a standard which is higher than an arguable case."

In the case of *Nguruman Ltd -v- Jan Bonde Nielsen & Others C.A. Civil Appeal No 77 of 2012* [2014 eKLR] the Court went on to add that:

"The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from that invasion. We reiterate that in considering whether or not a prima facie case has been established, the Court does not examine the merits of the case closely. All that the Court is to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The Applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as is otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the Applicant's case is more likely than not to ultimately succeed."

Finally, as was held in the case of *Films Rover International Ltd -v- Cannon Films Sales LTD* 1986 3 ALL ER 772, a Court considering such an application should take the course that appears to bear the lower risk of injustice should it turn out to have been wrong.

13. Guided by the above, and having looked at the remedies sought by the Applicant in her plaint which is the subject of this suit, she seeks under paragraphs 14 and 15 the following orders;
 - 14: "The Plaintiff's claim against the Defendant is for a permanent injunction restraining the Defendant, his agents or servants from bringing the County Surveyor or Land Registrar Busia to survey the Plaintiff's land and / or the boundary between the Plaintiff's land namely L.R Bukhayo/kisoko/8241 and the Defendant's L.R Bukhayo/kisoko/8065 or in any manner whatsoever interfering with the Plaintiff's said parcel of land."
 - 15: "The Plaintiff's further claim against the Defendant is for correction an order directing the Defendant to sign relevant documents to correct and revert the position of the Plaintiff's land parcel No Bukhayo/Kisoko/8241 to its proper position in the cadastral map for Kisoko Registration Section Diagram 26 as it was before the Defendant's fraudulent interference."

Granted that under Section 18 of the *Land Registration Act*, the jurisdiction to determine boundary disputes is vested in the Land Registrar, I am not persuaded that the Applicant has disclosed a prima facie case as defined in the cases cited above. The survey of the land in dispute will in fact go along way in determining the exact locations and acreages of the parcels of land belonging to the litigants and therefore assist both parties as they prosecute their respective cases. It is instructive also to note that at this stage, the Land Registrar and County Surveyors are not even parties in the suit.

14. On the issue of irreparable injury or harm, the determination of the boundary is not an end in itself. Any aggrieved party has recourse to appealing the decision of the Land Registrar. It cannot therefore be correct for the Applicant to claim that any survey between the boundary to her land and that of the Respondent will cause her irreparable harm or injury. The Notice of Motion dated 31st July 2024 is therefore for dismissal.



15. On the issue of costs, the parties are siblings. Each shall meet their own costs.
16. Ultimately therefore and having considered all the matters herein, this Court makes the following disposal order with respect to the Notice of Motion dated July 31, 2024.
 1. The application is dismissed.
 2. I notice from paragraphs 18 and 19 of the replying affidavit that the parties are siblings and there have been attempts to settle the dispute amicably. I implore them with the aid of their counsel to pursue that route relentlessly in the interest of family cohesion.
 3. Each shall meet their own costs.

BOAZ N. OLAO

JUDGE

3RD DECEMBER 2024

RULING DATED, SIGNED AND DELIVERED ON THIS 3RD DAY OF DECEMBER 2024 BY WAY OF ELECTRONIC MAIL.

BOAZ N. OLAO

JUDGE

3RD DECEMBER 2024

