



**Njugunah v Maluka & 4 others (Environment & Land Case
E438 of 2021) [2023] KEELC 18522 (KLR) (6 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18522 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E438 OF 2021**

OA ANGOTE, J

JULY 6, 2023

BETWEEN

PETER KAHUNYO NJUGUNAH PLAINTIFF

AND

MULI MALUKA 1ST DEFENDANT

CATHERINE NYOKABI GAKARA 2ND DEFENDANT

NAOMI WAIRIMU NJUKI 3RD DEFENDANT

DIRECTOR OF SURVEY 4TH DEFENDANT

ATTORNEY GENERAL 5TH DEFENDANT

RULING

1. Before this Court for determination is the Plaintiff's Notice of Motion application dated December 20, 2021 brought pursuant to the provisions of section 1A, 1B, 3A of the *Civil Procedure Act*, Cap 21 Laws of Kenya, Order 40 Rules 1, 2, 3 and 4 of the *Civil Procedure Rules, 2010* seeking the following orders:
 - i. That pending the hearing and determination of this suit, the Court do issue an injunction to restrain the 1st, 2nd and 3rd Defendants or their agents or servants of employees or anyone acting under their authority or mandate or their instructions or directions from entering, trespassing, occupying, demolishing, damaging, destroying structures or interfering with the Plaintiffs ownership, use, occupation, possession and quiet enjoyment of all that parcel of land known as LR 21350/45.
 - ii. That the OCS Kiambu Police Station do ensure compliance with the orders of this Court.



- iii. That the Court do grant another order that it deems fit in the circumstances of this case.
 - iv. That the costs of this Application be provided for.
2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of the Plaintiff who deponed that he is the registered owner of all that parcel of land known as LR 21350/45 measuring approximately 0.2023Ha (the suit property) and that plot 45 and other parcels of land adjacent thereto originally belonged to Kama Agencies Limited who sub-divided the land and sold out the same to different people including him.
 3. According to the Plaintiff, he acquired plot 45 from Kama Agencies vide a Sale Agreement dated July 15, 2016; that upon payment of the purchase price, plot 45 was transferred to him on October 20, 2016; that he took possession thereof in 2016 and in 2017 fenced off the property with a permanent perimeter wall to mark the boundary and for security purposes and that in 2020, he built a residential house thereon where he lives with his family.
 4. The Plaintiff deponed that before entering into the sale agreement of July 15, 2016 aforesaid, the Directors of Kama Agencies Company pointed out the beacons that marked the boundaries of plot 45 pursuant to which he erected the perimeter wall; that the beacons pointed out to him were in line with the Deed Plan of plot 45 and had been put in place during the sub-division of the mother title that gave rise to plot 45 and other parcels of land; that the 1st, 2nd and 3rd Defendants are the owners of all that parcel of land known as 21350/44 measuring approximately 0.2023Ha and that plot 44 and 45 are adjacent to each other and share a common boundary on one side.
 5. It is the Plaintiff's case that the Deed Plans for the sub divisions were prepared in 2009 long before he bought his property as shown in the respective deed plans; that the 1st -3rd Defendants acquired plot 44 in the year 2018 and found the perimeter wall of plot 45 already built and they lived peacefully as neighbors from 2018 to 2021 and that sometime in 2021, he received a letter from the 1st-3rd Defendants claiming that he was trespassing and encroaching on plot 44.
 6. According to the deponent, on or about April 1, 2021, he was informed that a group of 50 men descended on his property and started demolishing the permanent perimeter wall upon which he went to Kiambu Police Station and reported the matter under OB-18/01/04/2021 and that upon their arrest, they stated that they had acted under the instructions of the 1st - 3rd Defendants.
 7. In response, the 1st -3rd Defendants, through the 1st Defendant, filed a Replying Affidavit, in which the 1st Defendant deposed that she, together with the 2nd and 3rd Defendants, are the legal registered owners of all that parcel of land known as LR No 21350/44; that they bought the land from Kama Agents Company Limited who were the registered owners vide a sale agreement dated June 6, 2018 and that prior to purchasing the land, they were taken to the property by the Directors who pointed out to them all the beacons after which they commenced the process of purchasing the plot.
 8. It was the deposition of the 1st Defendant that at the time they purchased the property, plot no 21350/45 belonging to the Plaintiff was empty with no development thereon and all the beacons were visible from the ground and that upon completion of the transfer and registration of the property in their names on August 17, 2020, they visited the land with a view to fencing off the same and discovered that the Plaintiff had commenced development on his property.
 9. It is the Defendants' case that the owners of plot 21350/43 had put up an electric fence on the northern side; that they engaged some workers to fence their plot only to be informed that the workers had been arrested; that they immediately reported the matter to the DCI(Land Fraud Unit) who commenced



investigations and called the Kiambu file and that they thereafter engaged a surveyor who recorded all the beacons save for one beacon on the eastern side next to the Plaintiffs property covered in debris and that he confirmed the Plaintiff's encroachment.

10. According to Ms Maluki, the Plaintiff requested that they sell him their property but they declined to do so; that the Plaintiff then asked that the survey plan be adjusted but the same was not possible as all the other parcels were independently owned; that it was then agreed that the parties would have a joint survey and the parties would abide by the findings and that the surveyors confirmed and re-established the beacons.
11. It was deposed by the 1st Defendant that it was clear that the Plaintiff had encroached into their plot and he requested to be given some time to remove the materials on their side and relocate the fence; that notwithstanding the report, the Plaintiff went ahead to erect an electric fence along the encroached portion and that the Plaintiff has come to Court with unclean hands and seeks to buy time as he continues encroaching on the property.
12. In response to the Replying Affidavit, the Plaintiff filed a Supplementary Affidavit dated March 2, 2023 in which he deposed that the persons hired by the Defendants were not employees but hooligans who descended on his property and destroyed the perimeter wall and that some of the hooligans were arrested upon his complaint under OB/No 18/01/04/2021.
13. The Plaintiff deposed that it is untrue that the Defendants were unaware of his permanent perimeter wall; that it is equally untrue that the Defendants found his property vacant when they purchased their plot in 2018 having constructed the permanent perimeter fence in 2017 and planted trees thereon, which trees are now big and mature and that contrary to their assertions, the 1st -3rd Defendants have visited the site severally and found the permanent wall intact.
14. The 4th and 5th Defendants did not participate in the application.

Submissions

15. The Plaintiff's advocate submitted there is a danger that the Defendants will cause more destruction which may be physical in nature; that the costs of repairs to the damaged portion of his property is Kshs 586, 445 although loss of life cannot be compensated and that the balance of convenience lies in favour of granting the orders as there is no greater inconvenience than having a family home destroyed or having to seek alternative accommodation due to fear of attack by the 1st -3rd Defendants.
16. The 1st -3rd Defendants submitted that the Applicant has not proven irreparable loss; that in this case the only structures on the disputed land is a temporary fence and that not granting the orders will cause not cause the Plaintiff any injury.

Analysis and Determination

17. The present application is founded on Orders 40 Rule 1-4 of the [Civil Procedure Rules](#) dealing with the grant of interlocutory injunctions. Order 40 Rule 1 provides as follows:

“Where in any suit it is proved by affidavit or otherwise-

- (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be



obstructed or delayed in the execution if any decree that may be passed against the defendant in the suit,

The court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging alienation, sale, removal or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

18. The principles on which the Courts will grant an injunction are well known. They were set out in the *locus classicus* case of *Giella v Cassman Brown* [1973] EA 358 as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

19. The Plaintiff in this case is expected to meet those three principles and surmount them sequentially. This was stated by the Court of Appeal in *Nguruman Limited vs Jan Bonde Nielsen & 2 Others* [2014] eKLR where the Court stated thus:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to:-

- (a) Establish his case only at a prima facie level,
- (b) Demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) Alleviate any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. (See *Kenya Commercial Finance Co Ltd v Afraha Education Society* [2001] Vol 1 EA 86) If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”

20. The Court will be guided by the foregoing principles as well as by the general principle that no definitive findings on law or facts should be made at this interlocutory stage.
21. Vide the present application, the Plaintiff seeks, inter-alia, for a temporary injunctive order restraining the 1st-3rd Defendants from interfering with the suit property. It is his case that he has at all material



times been the proprietor of the suit property-LR 21350/45 on which he constructed a perimeter wall, while the 1st -3rd Defendants are the proprietors of LR 21350/44, a neighboring plot.

22. It is the Plaintiff's case that the 1st -3rd Defendants demolished his perimeter wall alleging encroachment and that they have further issued a notice to "cease encroachment and trespass," and he is apprehensive that they will destroy his property; that survey reports by three surveyors have issued conflicting reports and that there is need for the 4th Defendant to carry out a re-survey of the affected properties.
23. The Plaintiff adduced in evidence a copy of the Sale Agreement dated July 15, 2016, a Transfer and title to the suit property, Kama Agents Limited Certificate of Incorporation, photographs of the perimeter wall, a demand letter from the 1st -3rd Defendants dated February 23, 2021, a notice to cease encroachment and trespass issued by the 1st -3rd Defendants and assessment of the wall repair dated April 6, 2021, amongst other documents.
24. In response, the 1st -3rd Defendants assert that the Plaintiff has by his perimeter wall encroached on their property. They adduced vide Affidavit evidence the sale agreement and title to their property LR 21350/44 and the survey report dated November 3, 2021.
25. To begin with, it is not in dispute that the Plaintiff is the registered proprietor of the parcel of land known as LR No 21350/45 whereas the 1st -3rd Defendants are the registered proprietors of LR No 21350/44. The two properties adjoin each other. The dispute between the parties is whether or not the Plaintiff has by his perimeter wall encroached onto the 1st -3rd Defendants property. This is essentially a boundary dispute.
26. Before venturing into the matter, it is crucial to determine whether the boundary dispute is one which this Court is mandated to determine or one which falls under the purview of the Land Registrar. Section 18 and 19 of the [Land Registration Act](#) are instructive in this respect. Section 18(2) provides that;

“(2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.”

27. Whereas Section 19 states;

“19.

- (1) If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.
- 2) The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.



- (3) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section”

28. It can be seen from the foregoing that whereas this Court is precluded from determining disputes in respect of general boundaries, it has the mandate to determine disputes regarding fixed boundaries. The Court of Appeal in the case of *Azzuri Limited vs Pink Properties Limited* [2018] eKLR, stated as follows:

“Boundary disputes pertaining to lands falling within general boundary areas must be referred to the Land Registrar for resolution...From this analysis of the law, it should be clear from the above that, we are in agreement with the learned Judge’s conclusion that the dispute ought to have been heard by the Land Registrar as stated in the statute. Jurisdiction is everything. It has been said many times before, that, without it a court has no powers to make one more step, irrespective of the strength and nature of evidence in the parties’ possession.”

29. This Court in *Abdalla Mohammed Salim & Another vs Omar Mohamud Shallo & Another* (2014) went into an indepth exposition on the difference between a fixed and a general boundary stating as follows;

“A distinction has to be made between the “general boundaries” as defined under the repealed Registered Land Act and “fixed boundaries” which are applicable in land registered under the repealed Registration of Titles Act. Under Section 18 of the repealed Registered Land Act, the Director of Surveys was required to prepare and maintain a series of maps for every registration district. The type of survey that generated the registry index maps is what was known as “general boundaries” which has been defined in section 18(1) of the Land Registration Act, 2012 to mean “the approximate boundaries and the approximate situation only of the parcel.” Indeed, most of the titles under the repealed Registered Land Act were issued on the basis of the general boundaries, meaning that such parcel of land had no fixed beacons.

On the other hand, land registered under the Registration of Titles Act required a cadastral survey to be prepared, which is based on a fixed boundary survey principle. Such a survey has an accurate linear and angular measurements to aid the registration of a title of on plot. The boundaries of land registered under the Registration of Titles Act can easily be identified by any surveyor because of the fixed nature of its beacons.”

30. Guided by the foregoing and noting that the properties herein were registered under the repealed *Registered Titles Act*, the court finds that it has the mandate to determine the dispute.

31. What constitutes a prima facie case was defined by the Court of Appeal in *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others* [2003] eKLR thus;

“...So what is a *prima facie* case? I would say that in civil cases it is a case in 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.”



32. The Court of Appeal in the case of *Nguruman Limited vs Jan Bonde Nielsen & 2 Others*(supra) while agreeing with the definition of a prima facie case in the *Mrao Case (supra)* went ahead to further expound as follows;

“We adopt that definition save to add the following conditions by way of explaining it. 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 the invasion. We reiterate that in considering whether or not a *prima facie* case has been established, the court does not hold a mini trial and must 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 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.”

33. The Court has considered the evidence in respect to the allegations of encroachment by both parties. In this regard, there are three survey reports produced by the Plaintiff. The report by Epitome Surveys Limited dated January 14, 2021 provides as follows;

“... There was an encroachment of plot no 21350/44 at point F69 and F70 by a distance of 3.0 M and 2.5M respectfully from plot 21350/45. To conclude the process, the correct positions of the said boundaries were monumented with iron pins so as to demarcate the two pieces of land”

34. The report by Earthscope Company Limited dated February 27, 2021 stated as follows:

“We discovered a 3m shift to the south affecting all the plots ground positions. The survey plans need to be adjusted to reflect the ground situation noting that some plots have permanent developments and that the properties were acquired independently from one entity/family.”

35. The report by the Government surveyor dated November 3, 2021 states as follows:

“LR No 21350/44 and LR No 21350/45 were positively re-established on the ground in the presence of all the invited parties and marks established. After beacon re-establishment it was realized that the location conforms with the Survey Plan FR 355/8. Neighbouring LR 21350/46 and LR 21350/52 were found to have encroached 4 metres into the 9M access road hence changing the ground location of the road. Subsequently, LR No 21350/45 was found to have encroached 3M into parcel LR 21350/44.”

36. A keen consideration of the aforesaid reports reveals that prima facie, there are conflicting reports as to which plot encroaches on the other. In one of the reports, it has been stated that the survey plans need to be adjusted to reflect the ground situation noting that some plots have permanent developments and that the properties were acquired independently from one entity/family.



37. In view of the conflicting reports, and considering that the owners of the two plots acquired their respective plots with the existing dimensions which may have to be re aligned taking into consideration the existing fixtures, including the perimeter walls, the most appropriate order is the maintenance of the prevailing status quo pending the hearing of the suit.
38. In the circumstances, the court makes the following orders:
- a. The Prevailing *status quo* in respect of the existing perimeter wall separating plot numbers LR 21350/45 and LR 21350/44 to be maintained pending the hearing and determination of the suit.
 - b. Each party to bear his/her own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 6TH DAY OF JULY, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Kamau holding brief for Thuku for Plaintiff

Mr. E. Kamau for 1st, 2nd and 3rd Defendants

No appearance for Attorney General

Court Assistant - Tracy

