



REPUBLIC OF KENYA

IN THE ENVIROMENT AND LAND COURT AT MAKUENI

ELC NO E015 OF 2021

JOYCE MWIKALI NYAMAU.....PLAINTIFF

VERSUS

JOSHUA KYUNGUTI MAKUMI.....1ST DEFENDANT

LAND REGISTRAR MAKUENI.....2ND DEFENDANT

DISTRICT LAND SURVEYOR MAKUENI.....3RD DEFENDANT

ATTORNEY GENERAL.....4TH DEFENDANT

RULING

1. Before this court is a Notice of Motion dated 19th of May 2021, brought under Article 50 of the Constitution of Kenya, section 3A of the Civil Procedure Act, order 51 rule 1 of the Civil Procedure Rules and all enabling provisions of the Kenyan Law. The Applicant sought for the following orders;

1. Spent.

2. That pending the hearing and determination of this Application inter partes, the Honourable Court be pleased to issue an injunction order restraining the 1st Respondent herein by himself or any other person acting on his behalf from selling, disposing, transferring, charging, pledging, leasing, developing or in any manner interfering or dealing with the suit property Makueni/Kiteng'ei Scheme "B" 1259.

3. That pending the hearing and determination of the suit, the Honourable Court be pleased to issue an injunction order restraining the 1st respondent herein by himself or any other person acting on his behalf from selling, disposing, transferring, charging, pledging, leasing, developing or in any manner interfering or dealing with the suit property Makueni/Kiteng'ei Scheme 'B'1259 pending the hearing and determination of this suit.

4. That any other order that the Court may deem necessary for the ends of justice.

5. That the costs of the Application be provided for.

2. The Application is premised on the grounds on the face of the Application and on the Applicant 's supporting affidavit sworn on the 19th of May 2021. These grounds are:

a) That the Applicant is the registered owner of LR NO. Makueni/Kiteng'ei Scheme B/1259.

b) That the Respondent is the registered owner of Makueni/Kiteng'ei scheme B/155 which the surveyors have established overlaps the Applicant 's property.

c) That there is a real threat to the Applicant 's right to ownership by the 1st Respondent who together with his sons invaded her property.

d) That there is a threat of disposal of the suit property held by the Applicant as the 1st Respondent is claiming a big share as per the surveyor's report.

3. The Application is supported by the supporting affidavit of the Applicant sworn on the 19th of May 2021.

4. The Applicant avers that she is the registered owner of Makueni/Kiteng'ei Scheme B1259 while the Defendant is the registered owner of LR Title No. Makueni/Kiteng'ei Scheme B/155. She avers that after she purchased the suit property, the Defendant invaded her property on the grounds that she had constructed on his land. She further avers that after she lodged a complaint with the Kibwezi land Survey office, the Sub County Surveyor visited the suit land on the 22nd of September 2021 and later prepared a report which established that the Defendant's land No Makueni/Kiteng'ei Scheme B155 overlaps her land. She further averred that she was living in constant fear as the 1st Defendant may use the title to dispose of her land.

5. The 1st Respondent opposed the application vide his replying affidavit sworn on the 17th of June, 2021. He averred that he was the registered owner of land parcel Makueni/Kitengeli scheme B155 and that he had been in possession of the land since 1975 when the land was allocated to him. He further averred that his land was surveyed in 2002, and that he had lived without any interference up to 2020 when the Applicant trespassed on his land and built a semi- permanent house.

6. He contends that the Plaintiff trespassed on his land as a result of the sub division of the suit land which resulted in the creation of plot no 1257, 1258, 159 and 303.

7. He avers that during the field visit the surveyor confirmed that his land did not overlap the Plaintiff's land. That being dissatisfied with the outcome of the field visit, the Plaintiff brought in other surveyors who came up with the version of overlap. He urged the court to dismiss the application with costs.

8. The Application was canvassed by way of written submissions. The Plaintiff's written submissions were filed on 22nd of July, 2021 while the 1st Defendant 's written submissions were filed on the 21st September, 2021 which I have read and considered.

ANALYSIS AND DETERMINATION

9. The issue for determination is whether the Applicant has met the threshold for grant of an injunction. The principles applicable in an application for an injunction were laid down in the case of **Giella Vs Cassman Brown & Co Ltd 1973 EA 358** where the court held that in order to qualify for an injunction;

- **First the 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 harm which would not be adequately compensated by an award of damages.**
- **Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.**

10. The first issue for determination is whether the Plaintiff has established has a *prima facie* case with a probability of success.

11. In the case of **Mrao Ltd Vs First American Bank of Kenya Ltd & 2 Others (2003) eKLR** the Court of Appeal described the meaning of a *prima facie* case and stated 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.”

12. The Applicant in her grounds in support of the application stated that she had established a *prima facie* case. It is not in dispute that the Applicant is the registered owner of land parcel No. Makueni/Kiteng'ei Scheme B 1259 while the Defendant is the registered owner of land parcel No. Makueni/Kiteng'ei Scheme B 155. The Applicant stated that she purchased the suit property from Danson K. Mutava, Julius N. Kyongo, Christina N. Kimolo and Priscila M. Mwelu. She annexed a copy of the sale agreement annexure JMN3 and a copy of the title deed as annexure JMN1 deed to confirm that she was the registered owner of the suit land.

13. The Defendant does not deny that the Applicant is the registered owner of the suit land. The Applicant has demonstrated that she is the registered owner of land parcel Makueni/Kiteng'ei Scheme B 1259.

14. Both parties confirmed that the Kibwezi/Makindu Sub County Surveyor conducted a field visit on the 22nd September 2020. The Applicant in her supporting affidavit annexed a report by the Kibwezi/Makindu Sub County Surveyor dated 7th of October 2020 which established that the 1st Defendant 's land falls right into the Plaintiff's land.

15. The Defendant alleged that the Plaintiff colluded with the surveyor to doctor the report in her favour and that another Government Surveyor should be appointed. The Respondent averred that the *status quo* should be maintained to enable another surveyor to visit the ground. No *prima facie* evidence was tabled before the court to demonstrate that the Applicant colluded with the surveyor or brought in other surveyors to doctor the report in her favour. I find that the Plaintiff has established that she has a *prima facie* case with a probability of success.

16. On whether the Applicant will suffer irreparable loss which cannot be adequately compensated by damages, the Applicant must establish that she will suffer irreparable loss if an order for injunction is not granted.

17. Irreparable loss was described in the case of **Paul Gitonga Wanjau Vs Gathuthi Tea Factory Co. Ltd & 2 Others Nyeri HCC NO. 28 of 2015** as simply injury or harm that cannot be compensated by damages and would be continuous.

18. In order to show irreparable harm the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured.

19. The Plaintiff submitted that she was in physical occupation of the suit land since 2013 and that she was apprehensive that the 1st Respondent would sell the land and thus suffer irreparable damages. The 1st Defendant submitted that the Plaintiff had not tendered any evidence to demonstrate that the 1st Defendant was likely to dispose of the land or charge it. From the Applicant's pleadings and annexures it is evident that the Applicant is the registered owner and is in occupation of the suit land. The Defendant in his replying affidavit stated that the Applicant had put up a semi-permanent house and had leased out the land to camel grazers. Having demonstrated that she is in occupation of the suit land, I find that the Plaintiff has established that she is likely to suffer irreparable loss which cannot be adequately compensated by way of damages.

20. The Plaintiff submitted that the balance of convenience was in her favour as she was in occupation of the land.

21. The Defendant submitted that the Plaintiff had a duty to demonstrate that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater which is likely to arise from granting. He relied in the case of **Pius Kipchirchir Kogo Vs Frank Kimeli Tenai 2018 eKLR** in support of his submission.

22. He urged the court to maintain the *status quo*. Since the Plaintiff has been in occupation since 2013, I find that the balance of convenience tilts in her favour.

23. I have considered the application, the submissions by the parties and the authorities annexed thereto and I find that the Applicant has met the threshold for the grant of temporary injunctions. The application is allowed as prayed. Parties to comply with order 11 within the next 30 days.

RULING DATED, READ AND DELIVERED VIRTUALLY AT MAKUENI THIS 27TH DAY OF OCTOBER 2021.

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HON. T. MURIGI

JUDGE

IN THE PRESENCE OF: -

Court Assistant – Kwemboi.

Ms. Mwinzi for the Plaintiff/Applicant.

Ms Mutuku for the 1st Defendant.