



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

E.L.C CASE NO 46 OF 2019

JANE NYABOKE MATOKE.....APPLICANT

VERSUS

CLIVE NYAANGA OGWORA.....RESPONDENT

RULING

INTRODUCTION

1. The Applicant commenced suit by way of Originating Summons dated 11th December 2019 seeking to be declared as the proprietor of all that parcel of land known as L.R No. WEST KITUTU/BOGUSERO/930 measuring one acre by virtue of adverse possession. Together with the Originating Summons, the Applicant filed a Notice of Motion dated 11th December 2019 seeking that a temporary injunction do issue restraining the defendant by himself, his agents, servants and/or any persons whomsoever from encroaching upon, trespassing onto, remaining thereon and/or in any way whatsoever interfering with land parcel number WEST KITUTU/ BOGUSERO/930 situated in Kisii county, pending the hearing and determination of this suit. She further prayed that the O.C.S Mosocho be directed to assist and ensure compliance by the Defendant/Respondent.

2. The application is based on the grounds stated on the face of the Notice of Motion and the Applicant's Supporting Affidavit sworn on the 11th December 2019.

3. The applicant deposes that she lives on land parcel no. WEST KITUTU/ BOGUSERO/929 which is registered in the name of her sister Dorcas Monyenche Matoke and she has lived there for a period of over 20 years and carried out a number of developments. She further deposes that the Respondent claims that he owns the adjacent property known as WEST KITUTU/BOGUSERO/930 and claims that part of land parcel no. WEST KITUTU/BOGUSERO/929 belongs to him. It is the applicant's contention that sometime in the month of February 2019, the Respondent trespassed onto the Applicant's parcel of land, destroyed her house and felled down trees pursuant to a court order obtained in CMELC Case No. 23 of 2019 authorizing the Respondent to fence off his land. The applicant avers that neither herself nor her sister were parties to the said suit nor were they aware of the said court order. Upon learning of the said order, the applicant's sister obtained an order dated 30th October 2019 restraining the respondent from interfering with the applicant's property but the said order was disobeyed as the respondent continued with his acts of destruction thereby occasioning her loss and damage.

4. The application is opposed by the Respondent through his Replying Affidavit sworn on the 20th January 2020. In the said affidavit the Respondent gives a background of the dispute between the parties with respect to land parcels no. 929 and 930 which is as follows: That on or about the 11th day of February 2019 a company known as Third Engineering Bureau of China City Construction Group Company trespassed onto his land parcel no. 930 and started excavating, digging out and scooping soil and murrum from his land. When he wrote a demand letter to the said company, he received a response from the firm of Njagi Nyaboke and Company Advocates indicating that the excavation was taking place on land parcel no. 929 which belonged to their client pursuant to a contract between the company and their client. The Respondent then filed Kisii CMELC Case No. 23 of 2019 **Clive Nyaanga Ogwora V The Third Engineering Bureau of China City Construction Group Company** and obtained an order of injunction to restrain the company from interfering with his land. When the company was served with the order of injunction, they filed a Replying affidavit annexing a lease agreement between the applicant's sister one Dorcas Matoke and the said company. The agreement authorized the company which was constructing the Kisumu –Ahero road to utilize 2.3 acres of the portion of land parcel known as West Kitutu/Bogusero /929 for the excavation of murrum and soil.

5. The parties subsequently entered into a consent for the Land Registrar and County Surveyor Kisii to visit the two parcels of land and determine if there was any encroachment on land parcel no. 930. Upon visiting the site, the Land Registrar and County Surveyor filed a report in court indicating that part of the excavation had taken place on land parcel no. 930 as parcel no. 929 had extended its boundaries by 39 metres. The parties thereafter entered into another consent dated 22nd August for the Land Registrar and County Surveyor to go and fix the beacons on the two parcels of land and this was done on the 9th September 2019. Upon learning of the said order, Dorcas applied to be enjoined in the suit and obtained an order restraining the Respondent from interfering with land parcel no. 929 and fencing land parcel no. 930. The said order was set aside on 30.9.2019. Dorcas also filed Kisii CM ELC Case No. 136 of 2019 **Dorcas Matoke v Clive Nyaanga Ogwora & 2 Others** claiming that the Respondent had trespassed onto her land parcel no. 929, dug trenches and placed beacons thereon. In

the said suit she is seeking an order of injunction and damages for trespass. She subsequently obtained an order directing the Land Registrar to go and pinpoint the boundaries of land parcel no. 929.

6. In addition to the Replying affidavit the Respondent filed a Notice of Preliminary Objection that the suit herein is sub-judice to Kisii CM ELC Case No. 136 of 2019 and the same is incompetent, defective, bad in law and an abuse of the process of the court as it does not disclose any cause of action. The court directed that the application and Preliminary Objection be argued together and that the same be canvassed by way of oral submissions.

7. Learned counsel for the applicant submitted that the Defendant was interfering with the land parcel known as West Kitutu/Bogusero/929. He argued that the interference was as a result of a court order dated 1.10.2019, which directed the Land Registrar and County Surveyor to go to the ground and determine the boundary of land parcel no. West Kitutu/Bogusero 930. In the course of implementing the said court order the said officers erroneously curved out a portion of land parcel no. 929 measuring 0.27 hectares and alleged that it was part of land parcel no. 930. As a result of the erroneous assumption, the Respondent entered the applicant's land parcel no. 929 dug up holes, destroyed buildings and prevented the applicant from accessing her house.

8. In his response learned counsel for the Respondent relied on the Replying affidavit and submitted that this matter is sub-judice to Kisii CMELC Case No. 136 of 2019 which relates to the same subject matter and where the Plaintiff is the Applicant's sister while one of the defendants is the Respondent herein. He submitted that it was the applicant's sister who obtained the order in CMELC Case No. 136 of 2019 as she wanted to know the boundaries of her land. He took issue with the fact that the applicant and her sister were both laying claim to land parcel number 929 yet the applicant herein had not annexed any title document to her affidavit. He was therefore of the view that one of them was lying.

9. Counsel submitted that the Respondent had fenced his land pursuant to a court order in Kisii CMELC Case No. 23 of 2019. The applicant's sister was enjoined in the said suit and if the applicant had any interest in the subject matter, she ought to have applied to be enjoined in the said case. He submitted that the applicant only filed this case claiming that she is entitled to a portion of land parcel no. 930 by way of adverse possession after the Land Registrar pinpointed the boundary and dimensions of land parcel no. 929. He submitted that allowing the application would have the effect of overruling the orders issued in Kisii CMELC Case No. 23 of 2019 yet the applicant is not a party thereto. He urged the court to dismiss the application as it lacked merit. In a brief response counsel for the applicant submitted that the dispute was over the portion of land measuring 0.26 hectares which the Land Registrar erroneously awarded to land parcel no. 930 after establishing that land parcel number 929 was more on the ground by 0.26 hectares. He was of the view that the beacons should have been fixed on land parcel no. 930 and not on the disputed portion.

ISSUES FOR DETERMINATION

10. Having considered the Notice of Motion, affidavits and rival submissions, the following issues fall for determination:

- i. Whether the application is sub-judice
- ii. Whether the applicant has met the conditions for injunctive relief.

ANALYSIS AND DETERMINATION

11. With regard to the first issue, the principle of *res sub-judice* is found in the provisions of section 6 of the Civil Procedure Act, 2010 which states as follows:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”

12. This principle requires the court to stay any suit or application where a previous suit or application is pending determination by a court of competent jurisdiction. It is not in dispute that the suit herein and CMELC Case No 136 of 2019 both relate to land parcels number West Kitutu/Bogusero/929 and 930 as the two land parcels share a boundary. The defendant herein has been sued in both suits while the applicant's sister one Dorcas Monyenche Matoke who is the registered owner of land parcel no. 929 is the plaintiff in CM ELC Case No. 136 of 2019. While Dorcas has sued the Defendant for trespass upon her land parcel no. 929 in CMELC Case No. 136 of 2019, in the instant suit the applicant claims that she is entitled to a portion of land parcel no. 930 by way of adverse possession. The said portion of land was found to form part of land parcel no. 929.

13. In both suits the plaintiffs have filed applications for injunction to restrain the defendant (Clive Nyaanga Ogwora) from interfering with land parcel no. West Kitutu/Bogusero/930. The Plaintiff's claim against the Defendant is that after the beacons for land parcel no. 930 were fixed by the Land Registrar pursuant to a court order, the Respondent entered her land (which ostensibly forms part of land parcel no. 930), dug up trenches, felled her trees, destroyed part of her house and thus prevented her from accessing her house. The plaintiffs in the two cases are sisters and are therefore claiming under the same title. The only difference is that the applicant in the instant suit is raising a claim of adverse possession in respect of the disputed portion of land since she claims she has been in occupation thereof for a period of 20 years. Whereas I sympathize with the applicant's predicament, I am of the view that the applicant's application is sub-judice as the lower court is also dealing with the issue of injunction in respect of the same subject matter between the applicant's sister and the defendant herein and there is the danger of the two courts issuing conflicting orders in respect of the same subject matter.

14. In the case of **Kiama Wangai V John N. Mugambi & Another (2012) eKLR** it was held that where the court finds that the suits in question fall within the four corners of section 6 aforesaid, the court has no discretion in the matter but to stay the subsequent suit or suits.

15. In the circumstances I have no option but to stay the instant application and I hereby direct the same be stayed pending the hearing and determination of Kisii CMELC Case No. 136 of 2019. Having arrived at the finding that the application is sub-judice, I will not delve into the merits of the application.

Dated at Kisii this 20th day of February 2020.

J.M ONYANGO

JUDGE