



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISII**

**E.L.C CASE NO. 34 OF 2019**

**JOHN OSORO OMBESE.....PLAINTIFF/APPLICANT**

**VERSUS**

**JOHN KUMENDA.....DEFENDANT/RESPONDENT**

**RULING**

**BACKGROUND**

1. This ruling disposes of the Plaintiff/Applicant's Notice of Motion dated the 29<sup>th</sup> day of October 2019 brought pursuant to order 40 Rule 1 and 2 and order 51 Rule 1 of the Civil Procedure Rules, 2010 and section 63 (e) of the Civil Procedure Act. In the said application the Plaintiff seeks the following orders:

**i. Spent**

**ii.** That pending inter-parties hearing of the Application a temporary injunction do issue against the Respondent to restrain the Respondent by himself, servants, agents or any person acting under his instructions from carrying on with any constructions, digging, excavating, charging, disposing of, trespassing or in any other manner interfering with the Plaintiff's ownership of parcel title No. **KISII MUNICIPALITY /BLOCK 1/350**.

**iii.** That pending the hearing and determination of this suit a temporary injunction do issue against the Respondent to restrain by himself, servant, agent or any other person acting under his instructions from carrying on with any constructions, digging, excavating, charging, disposing of, trespassing or in any other manner interfering with the Applicant's ownership of land parcel title No. **KISII MUNICIPALITY/ BLOCK 1/350**.

**iv.** That the costs of this application be provided for:

2. The Application is anchored on the grounds stated on the face of the application and the supporting affidavit of John Osoro Ombese, the Applicant herein sworn on the 29<sup>th</sup> day of October 2019. In the said affidavit, he depones that he is the holder of a certificate of lease in respect of Land Parcel No. **KISII MUNICIPALITY/ BLOCK 1/350** having been so registered after obtaining a grant of letters of administration in respect of his wife Agnes Nyanganyi Osoro (deceased) who was the initial registered lessee.

3. He contends that the deceased bought the suit property from the National Housing Corporation in 1990 through their site and service scheme administered by the Municipal Council of Kisii. After she paid all the dues, she was issued with a certificate of lease. He further depones that he subsequently filed a case against the National Housing Corporation vide Kisii ELC Case No. 741 of 2016 whereupon the court issued an order that the Land Registrar and County Surveyor visit Land Parcel No. **KISII MUNICIPALITY/ BLOCK 1/350** and **351** for purposes of establishing their boundaries.

4. The land Registrar and County Surveyor visited the suit property on 28<sup>th</sup> May 2019 and fixed the said boundaries. He contends that on the 15<sup>th</sup> day of October 2019 the Defendant wrongfully moved to the suit property and started excavating the said land with a view to constructing thereon.

5. The application is opposed by the Defendant through his Replying affidavit sworn on the 14<sup>th</sup> November 2019. He contends that the Applicant has failed to disclose to the court that the late Agnes Osoro whose interests the Applicant is advancing had filed Kisii CMCC No. 742 of 1999 against the previous registered owner of land parcel No. **CENTRAL KITUTU/ DARAJA MBILI/789** alleging that they had encroached on her land. The said suit was dismissed for want of prosecution. He depones that he bought Land Parcel No. **CENTRAL KITUTU/ DARAJA MBILI/789** in 2010 and has been in occupation thereof since then. He denies that he has encroached on the Applicant's

land and states that the Applicant appears not to be aware of the boundary of his land as he has been accusing various persons in Nyanchwa area of encroaching on his land including those he sued vide Kisii ELC case no. 741 of 2016.

6. He contends that the Applicant deliberately failed to enjoin him in ELC Case no. 741 of 2016 so that he could secretly collude with the National Land Commission to have his title superimposed on the Respondent's title. He states that he only learnt of the said case herein on 31.5.2019 when the Plaintiff visited his land in the company of the Land Registrar and surveyor and purported to fix beacons pursuant to an order issued in the said case. He denies having encroached on the Applicant's land and states that the boundary limits of his land were demarcated by a Surveyor prior to the issuance of his title and no objection was raised at the time. The said boundary was re-established in 1997 pursuant to an order of the court issued by Justice Mbaluto in Kisii HCCC No. 282 of 1989.

7. He contends that the use occupation and location of land parcel no. CENTRAL KITUTU/ DARAJA MBILI/789 has remained intact for the more than 37 years as the register of the said parcel was created in 1981 while the register in respect of the applicant's land was created in 2014. The Respondents therefore reads mischief in the applicant's suit and contends that it is an abuse of the process of the court.

8. The application was canvassed by way of written submissions and both parties filed their submissions reinforcing what was stated in their affidavits.

#### 9. ISSUES FOR DETERMINATION:

1. Whether the court has jurisdiction to hear and determine this suit
2. Whether the applicant has met the requirements for a temporary injunction set out in **Giella v Cassman Brown. and Company Limited (1973) EA358**

#### ANALYSIS AND DETERMINATION

10. With regard to the first issue, counsel for the Respondent submitted that the application is predicated on the Applicant's allegations that the Respondent has encroached on Land Parcel No. KISII MUNICIPALITY/ BLOCK 1/350 though the gist of the matter is a boundary dispute between the plaintiff's land parcel no. KISII MUNICIPALITY/ BLOCK 1/350 and the Defendant's land parcel no. CENTRAL KITUTU/DARAJA MBILI/789. It was his submission that since this is a boundary dispute, section 18 (2) of the Land Registration Act comes into play.

The said section provides as follows:

Section 18 (2)

*"The courts shall not entertain any action or other proceedings relating to a dispute as to boundaries of registered land unless the boundaries have been determined in accordance with this section."*

11. He cited the case of **George Kamau Macharia v Dexka Limited (2019) eKLR** for the proposition that the office of the Land Registrar is the one mandated to deal with general boundary disputes before the same can be escalated to the court.

12. Having looked at the pleadings and the averments made by the parties in their affidavits I am inclined to agree with counsel for the Respondent that this suit is in fact a boundary dispute in respect of land parcel no. KISII MUNICIPALITY/ BLOCK 1/350 and land parcel no. CENTRAL KITUTU/DARAJA MBILI/789. Before the court can issue any injunctive orders, it will be necessary for the court to know whether Respondent has encroached on the Applicant's land. As correctly submitted by counsel for the respondent the mandate to determine boundary disputes is in the first instance vested in the Land Registrar and therefore this court lacks the jurisdiction to grant the orders sought.

13. Turning to the second issue, the applicant must demonstrate that he has met the conditions set out in the case of **Giella V Cassman Brown & Company Ltd 1973 EA 358** which are as follows:

*"First, the applicant must show that he has 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 damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience."*

14. In the case of **Mrao V First American Bank of Kenya Limited (2003) eKLR** Bosire JA (as he then was) stated as follows:

*"A prima facie case is one 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"*

15. The Applicant has stated that the boundary of land parcel number KISII MUNICIPALITY/ BLOCK 1/350 was determined by the Land Registrar pursuant to the order made by court in Kisii ELC case no. 741 of 2016, the same was in relation to the boundary dispute with land parcel no. KISII MUNICIPALITY/ BLOCK/351 and not the respondent's parcel of land which is known as CENTRAL KITUTU/ DARAJA MBILI/789. Without determining the boundary dispute between the Applicant and the Respondent, it would be impossible for the court to arrive at the conclusion that the Applicant has established a prima facie case with a probability of success. In the premises, it is my finding that the Applicant herein has not established a prima facie case with a probability of success. I therefore need not examine whether the Applicant has met the other conditions. In **American Cyanide v Ethicon Limited (1975) AC 396** the court held as follows:

*“if there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant’s proposed activities, that is the end of any claim to interlocutory relief.”*

**16.** In view of the foregoing, I find no merit in the application and I dismiss it with costs to the Respondent.

**Dated, signed and delivered electronically via zoom this 23<sup>rd</sup> day of April, 2020.**

**J.M ONYANGO**

**JUDGE**