



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**E.L.C CASE NO. 59 OF 2016**

**ELMELDA KERUBO MECHA.....PLAINTIFF**

**VERSUS**

**CHARLES MORIRA MOCHERE.....1<sup>ST</sup> DEFENDANT**

**DORICA OSORO NYABICHA.....2<sup>ND</sup> DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Plaintiff/Respondent instituted this suit against the Defendants/Applicants seeking inter alia an order that the Defendants remove a fence erected on the Plaintiff's land parcel No. WEST KITUTU/BOGUSERO/3894, eviction of the Defendants and an injunction to restrain the Defendants from interfering with the Plaintiff's land.
2. The 1<sup>st</sup> Defendant filed a defence denying that he had fenced the Plaintiff's land and stated that he owns plots known as Mosoch market plot No. 18B and 35 which border the Plaintiff's home though there is an access road separating the Plaintiff's land and the Defendant' plots.

**BRIEF BACKGROUND**

3. On 17<sup>th</sup> May 2017 the court directed the Kisii Land Registrar and County Surveyor to visit the disputed parcels of land and establish the boundaries thereof. On 6<sup>th</sup> July 2017, the said officers visited the disputed parcels of land and filed their report dated 17<sup>th</sup> July 2017. According to the said report, land parcels No. WEST KITUTU/BOGUSERO/3894 and WEST KITUTU/BOGUSERO/656 are separated by a 6 metre road from each other. Land parcel No.656 is registered in the name the Gusii County Council now known as Kisii County Government. The said plot is sub-divided into plots which have been allocated to individuals. Plots No. 18B and 35 are within Mosoch Market and have been allocated to the Defendants. It was further established that land parcel No. 3894 has been sub-divided into two parcels known as WEST KITUTU/BOGUSERO/9601 and 9603. The report concluded that the disputed portion of land is within parcel No. WEST KITUTU/BOGUSERO/656 and not 3894 as alleged by the Plaintiff.
4. The court adopted the Land Registrar's report as the judgment of the court and dismissed the Plaintiff's case on 9.3.2018. Following the dismissal of the case, the Defendants made arrangements to fence his plots No. 18B and 35 but the Plaintiff's agents barred him from doing so.
5. It is against this background that the 1<sup>st</sup> Defendant filed an application dated 15<sup>th</sup> October 2019 under section 1, 1A, 1B and 3A of the Civil Procedure Act seeking an injunction to restrain the Plaintiff from barring the Applicant's contractors from fencing and constructing on his plots no. 18B and 35 Mosoch Market. He also seeks an order that the OCS Mosoch Police Station provides security during the intended construction on plots no. 18B and 35 Mosoch Market.
6. The application is supported by the Applicant's affidavit sworn on the 15<sup>th</sup> October in which he deposes that he purchased plots No. 18B and 35 from Jane Nyanchoka Alois and J. Mwebi and H. Obutu respectively vide the Gusii County Council Minutes numbers 5/2008 and 17 /2008 dated 1<sup>st</sup> October 2010. He further depones that the Plaintiff filed this suit against him claiming that he had trespassed on his plot. The case was dismissed on 9.3 2018 and the Plaintiff has never appealed against the court's decision. He depones that on 14.10.2019, they hired contractors to fence and construct permanent buildings on the said plots by the Respondent, her agents went to the site and stopped them claiming that the said plots belonged to her and therefore no development should take place. The Respondents called police officers from Mosoch Police Station who ordered him to stop any developments on the plot unless he had a court order. The Applicant fears that unless the Respondent is restrained, she is likely to cause violence during the intended construction.
7. The Plaintiff opposed the application through her replying affidavit sworn on the 21<sup>st</sup> November 2019, in which she deposes that the Applicant failed to fence his property at the time the boundaries were fixed by the Surveyor and he now wants to encroach on her land under

pretext that he is fencing his plots. She claims that she only repulsed the Applicant's workers when they placed building materials inside her parcel of land.

8. The application was canvassed by way of written submissions and even though the parties were given time to file their submissions, only the Applicant's counsel filed his submissions.

### ISSUES FOR DETERMINATION

9. Having considered the Notice of Motion, affidavits and the Applicant's submissions, the issues that fall for determination are:

- i. Whether the court has jurisdiction to issue a post-judgment injunction under sections 1, 1A, 1B and 3A of the Civil Procedure Act.
- ii. Whether the Applicant is entitled to a post-judgment injunction.

### ANALYSIS AND DETERMINATION

10. It is not in dispute that this matter has been determined by the court through the adoption of the joint report of the Land Registrar and County Surveyor Kisii dated 17<sup>th</sup> July 2017. The said report clearly established the boundaries between the Applicant's land and the Respondent's plots. Both parties know where the boundaries are and there should be no question about encroachment by either party at this stage. Ordinarily, once the court has rendered its decision it becomes functus officio save for matters relating to the pre-appeal stage such as stay of execution or injunction pending appeal. There is no indication that either of the parties intends to appeal against the court's decision in order to warrant the granting of an injunction pending appeal.

11. I note that the Applicant has avoided any reference to Order 40 or order 42 Rule 6 of the Civil Procedure Rules which give the court the power to grant injunctions so as to preserve the subject matter either pending the hearing of the suit or pending appeal. The application is deliberately brought under sections 1, 1A, 1B and 3A of the Civil Procedure Act.

12. Sections 1A and 1B of the Civil Procedure Act contain the doctrines of overriding objective. The doctrine of overriding objective was legislated into the Act in 2009. It provides that the overriding objective of the Act and the rules made thereunder is to facilitate the **just, expeditious, proportionate and affordable resolution** of civil disputes. The Act enjoins the courts, litigants, and advocates to give effect to the overriding objective. Lastly, the Act sets out a framework for the actualization of the overriding objective. This framework sets out the principles upon which the courts exercise civil jurisdiction under the Act. It is not a jurisdictional framework in itself. Jurisdiction is donated under separate legal frameworks within the Act and Rules.

13. The doctrine of inherent power of the court is contained in Section 3A of the Act. The statute gives the court inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. The doctrine is invoked whenever the statutes and the rules do not provide a clear framework or mechanism on an issue. Where the statute and the rules provide a clear mechanism or framework, the doctrine cannot be invoked. As mentioned earlier there is no appeal contemplated by the parties herein and therefore there is no clear framework for granting a post-judgment injunction unless the court invokes its inherent jurisdiction under section 3A.

14. The question that I must grapple with is whether the Applicant has made out a case for grant of the orders sought in the application under the inherent powers of the court. In answering this question, I have to revisit the judgment that was rendered by this court. The court adopted the report of the Land Registrar and ordered that the same be implemented. In particular, the court directed that the road of access serving the Plaintiff's land parcel number WEST KITUTU/ BOGUSERO/3894 which has been sub-divided into land parcels number 9601 and 9603 and the Mosocho Market plots be established and opened to obviate disputes such as the present one.

15. It is clear that none of the parties sought to implement the judgment as directed and it is no wonder that the Applicant is now back in court seeking an injunction against the Respondent. Whereas an injunction may provide some temporary relief for the Applicant, the court has already provided a permanent solution which must be implemented. In the circumstances and in the interest of justice, I will exercise my discretion under section 3A and grant an injunction for 90 days pending the opening of the road of access by the County Surveyor as ordered by the court.

16. The upshot is that I find merit in the application and I grant the following orders:

- a) An injunction is hereby issued restraining the Respondent by herself, her agents, servants, employees or anybody acting on her behalf from barring the Applicant's contractors from fencing and contracting on his plots known as Mosocho Market plot no. 18B and 35 pending the opening of the road of access serving land parcel No. WEST KITUTU/ BOGUSERO/3894 which has been sub-divided into land parcels number 9601 and 9603 and the Mosocho Market plots.
- b) The OCS Mosocho Police Station shall provide security during the opening of the road of access and the construction works on Mosocho market plots No. 18B and 35.
- c) This order will remain in force for a period of 90 days only, unless extended by this honourable court.
- d) The costs of this application shall be borne by the Respondent.

**Dated, signed and delivered** at via **email** this 28<sup>th</sup> day of May, 2020.

**J.M ONYANGO**

**JUDGE**