REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

Elc 188 Of 2014

ESBON SIFUNA MUKWANA.....PLAINTIFF

VERSUS

ALFRED BARASA MATEO

BENSON BARASA

BOAZ EKESA.....DEFENDANTS

RULING

1. The plaintiff – **ESBON SIFUNA MUKWANA** (hereafter the applicant) – filed this suit here against the defendants – **ALFRED BASASA MATEO, BENSON BARASA** and **BOAZ EKESO** (respondents hereafter) – on 6/6/2014 claiming that the respondents have invaded his land parcel No. **BUNYALA/NAMBACHA/1053.** He required various reliefs.
2. The applicant's felt need for intermediate justice impelled him to file an inter-locutory application, which he fashioned as a Notice of Motion and brought it together with the suit.

3. The Notice of Motion was brought under Section 3A of Civil Procedure Act, Order 40 rules 1 & 2 of Civil Procedure Rules and other provisions of law. Crucial at this stage are restraining orders required to be issued against the respondents, their agents or any other person from further trespass, destruction of common boundary, sale of the land or any other form of interference that is prejudicial to the plaintiff's quiet possession and rights of use of parcel No.**BUNYALA/NAMBACHA/1053** (hereafter the suit land) pending the determination of this suit.
4. It is also desired that the **O.C.S NAVAKHOLO POLICE STATION** be enjoined to ensure compliance with the order while costs of the application are urged to be borne by the respondents. All these are styled as prayers 3,4 and 5 in the application. It appears clear that prayers 1 and 2 had been dealt with earlier and are therefore not for consideration at this stage.
5. The motion is premised on the grounds that the applicant is the registered owner of the suit land. He has not authorized the respondents to work on the suit land; and will suffer irreparably as the respondents have invaded the suit land, destroyed the existing boundary as well as crops and mature trees and have even threatened harm on the person of the applicant or even eliminate him.
6. There is a supporting affidavit accompanying the application in which the applicant reiterates some of the averments in his claim and also in the grounds spelt out in the application. He states too that his land abuts on the 1st Respondent's land.
7. The application was opposed. The 1st and 2nd Respondents filed their replying affidavit on 13/6/2014. According to these two, the entire application and suit are meant to deny them peaceful use and occupation of land parcel NO. **BUNYALA/NAMBACHA/1052**. The applicant is accused of dishonestly annexing a portion of **BUNYALA/NAMBACHA/1052** and making it

part of the suit land. The two respondents also deny ever threatening the applicant and term the applicant's allegations of threat as aimed at humiliating and intimidating them from claiming the portion of land illegally annexed by the applicant.

8. Further, the applicant is said to be without clean hands as he has fraudulently registered himself as owner of a much larger portion of land than he actually bought.
9. The affidavit further talks of rectification of boundary to correct the wrong committed by the applicant. This was done on 8/5/2014 when the land surveyor delineated the boundary separating parcel No.**BUNYALA/NAMBACHA/1053** and the suit land.
10. The 3rd Respondent's replying affidavit was filed on 27/6/2014. The 3rd respondent said he owns **L.R.No. BUNYALA/NAMBACHA/229** and denied ever encroaching, trespassing, or interfering with the suit land.
11. He said further that it is the applicant himself who has a habit of trespassing into his land. In one such instance in the past, the applicant, second respondent deponed, had encroached as alleged and the issue was settled by village elders invited by the applicant himself.
12. The 3rd respondent also referred to boundary rectification exercise conducted on 8/5/2014.
13. Overall, it appears from the responses made by all the respondents that it is the applicant himself who has been trespassing into their parcels of land. Infact, some of the respondents urge that the applicant should be restrained.
14. The 1st and 2nd Respondents even filed a further replying affidavit in which they intimated that the 2nd respondent has building materials on site and there is risk of wastage of such materials by continued operation of the restraining order already in force and/or issuance of the one now being urged for. Photographic evidence of such material was availed (annexture A,B M I a, b, and c).
15. The court entertained the application interpartes on 30/7/2014. M/s Oron appeared for the applicant. M/s Khasoa appeared for 1st and 2nd Respondents while the 3rd Respondent was in person.
16. Oron argued that the applicant will suffer irreparable loss and asserted that by virtue of being the registered owner of the suit land, the plaintiff has made out a primafacie case. Oron also availed to the court for guidance the decided authorities in **QUICK HANDLING AVIATION SERVICES LIMITED VS ADAN NOOR ADAN: HCC NO49/2014, NAIROBI, MILIMANI and KENYA CONSORTIUM TO FIGHT AIDS, T.B & MALARIA & ANOTHER VS BRIGITTE MUKOI KITENGE & 4 OTHERS: HCC NO.363 OF 2012, NAIROBI.**
17. The first authority (**QUICK HANDLING AVIATION SERVICES LIMITED CASE**) is chosen because it articulates the principles enunciated in the case of **GIELLA VS CASSMAN BROWN & CO. LIMITED (1973) EA 358.** This latter case encapsulates the principles applicable to granting of temporary restraining orders. The second authority (**KENYA CONSORTIUM's** case) is no different. It highlights too the principles in **GIELLA's** case. But this case too examines a seemingly different principle put forward by Ojwang J (as he then was) in the decided case of **SULEIMAN VS AMBOSELI RESORT LIMITED (2004) 2KLR 589** where he observed that the Court should opt for the lower rather than the higher risk of justice should it ultimately turn out that it was wrong.
18. The applicant's counsel said that the applicant has been in occupation of the suit land for 24 years. He bought the land from 1st defendant, she said, and that was at a time when 2nd and 3rd respondents were either unborn or were small children. The longevity of that occupation makes the applicant the one bound to suffer the greater rather than the lower risk of injustice, Oron said.
19. Fraud is denied on the part of the applicant. And there has been credible threats to his life, it was alleged.
20. Khosoa for 1st and 2nd respondents asked the court to vacate the restraining orders already in force. She argued that it is the two respondents, rather than the applicant, who have a primafacie case. She further urged the Court to look at the annextures availed by the two respondents. The matter, she said, is essentially a boundary dispute which the court should not entertain until the land's office is through with it.
21. According to Khosoa, the applicant failed to file the surveyor's report. By filing this suit, the applicant, she said, is trying to twist things.
22. The court was urged to dismiss the application. The court was informed too that what the plaintiff bought from 1st Respondent was about 0.05Ha but he went ahead to register 0.07ha. The

rest of Khosoa's arguments are largely similar to the averments made in the replying affidavits of the 1st and 2nd Respondents.

23. The 3rd Respondent took beef with the assertion that he is 1st respondents son. He said that the 1st Respondent is his uncle. He disputed the allegation that he was a small child when the applicant bought the land. He asserted that he was in the same class with the applicant in 1965. He said too he has his portion on parcel No. **BUNYALA/NAMBACHA/229**. The applicant, he said, is the one who has encroached onto his portion but surveyors were called and they fixed the boundary between the 1st Respondent and the applicant. According to the 3rd Respondent, there is no boundary issue between him and the applicant.
24. A short reply by Oron pointed out the possibility of compounding the problem or clouding issues by introducing parcel No.1052. And the issues are not about boundary dispute, she said, but about trespass. According to Oron, the applicant has met the requirements laid down in Giella's case (supra) and it is wrong to assert, as Khosoa did, that the requirement favour the respondents. Further, the annextures availed by the respondents should be for the main suit, not the application, Oron continued to say.
25. I have considered the application, the respondents' responses and the annextures availed. And in order to understand better the argument of both learned counsel during interpartes hearing, I have also read the pleadings that concern the main case viz the plaint, the defences , the counter-claim, and the reply to defence and defence to counter-claim. I have also looked at what was availed as accompaniment to the pleadings.
26. It appears to me that the applicant bought his piece of land from the 1st Respondent. One of the annextures availed by the 1st and 2nd respondents (ABMI) is a land sale agreement showing such sale. It is clear from the agreement that the sale was for 50X100ft plot for Kshs.16,000/=.

27. According to 1st and 2nd Respondents, the area of the plot would translate to 0.05Ha but the applicant stealthily or fraudulently registered it as 0.07Ha. The 1st and 2nd Respondents want to get back what they lost. The applicant seems not ready to budge. And while the applicant would have the court believe that his suit is one for trespass only, it is clear that the boundary between parcel No.1052 and 1053 is a contentious issue.
28. Indeed, such boundary issue led to boundary fixing exercise on 8/5/2014. Records availed (**See "ABM2")** show that the applicant was part of that exercise. Essentially, the exercise seems to have led to adjustment of boundary positions.
29. It seems likely that this suit is an off-shoot of that exercise. It was filed about a month after the boundary fixing exercise. The two respondents counter-claim is not only a logical consequence of the applicant's suit but also has a direct nexus with the boundary fixing exercise. In the counter claim, the two respondents would like official documents, such as applicant's title, cancelled or amended to reflect the new reality of adjusted boundary.
30. It is not clear to me whether the applicant has based his suit on the new boundary as adjusted or the old boundary reflecting the area or size of land shown in his title deed. But it would appear that the applicant is still beholden to the old boundary. And if this is the case a dispute, such as the one herein, is bound to arise as the two respondents recognize only the new adjusted boundary. I say the applicant is most likely beholden to the old boundary because during hearing, his counsel, despite obvious signs that boundary is a contentious issue, wanted the court to view the suit as one of mere trespass.
31. I note that the applicant has not bothered to explain how he acquired his land. But as one would expect, the defence would bring it to the attention of the court. It is clear that what the applicant bought, for he acquired the land through purchase, was 50X100ft plot. There is no allegation or evidence that he bought more. Yet the registered size of what he bought is 0.07ha. The applicant would be hard put to explain how such measurements would translate into that size.

I would not wish to delve into mathematical calculations at this interlocutory stage but I have to observe that the approximate area in hectares of such measurements would be more in accord with what the respondents have mentioned. (0.05 ha). This apparent anomaly in size constitutes the bedrock of the problem.

32. When I consider all this, the possible merits of the applicant's case elude me and I am unable to

say he has established a primafacie case. The applicant seems to continue to cling to the old boundary formation based on a likely miscalculated size. This position of the applicant seems untenable because there has been adjustments to the boundary and he has not preferred an appeal.

33. This being the scenario too, its not clear to me what uncompensable harm the plaintiff will suffer. Looking at all the pleadings as they stand, I expect that the applicant would give an undertaking as to payment of damages should the respondents ultimately be successful. Without such undertaking, granting a restraining order seems bound to visit more hardship on the respondents than the applicant himself. The balance of convenience would not lie in applicant's favour.
34. It also appears clear that the applicant's counsel focused more on what the 1st and 2nd Respondents presented and tended to ignore what the 3rd Respondent also said. According to 3rd respondents there is no boundary issue between him and the applicant.
35. Ultimately then, the applicant's application, given the circumstances prevailing, is without merit and the same is dismissed with costs.

A.K. KANIARU – JUDGE

7/10/2014

7/10/2014

A.K. Kaniaru – Judge

Diang'a G – C/C

No party present

Oron for applicant

Khasoa (absent) for 1st and 2nd defendants

Interpretation: English/Kiswahili

COURT: Ruling on application dated 5/6/2014 and filed on 6/6/2014 read and delivered in open **COURT.**

Right of Appeal – 30 days.

A.K. KANIARU – JUDGE

7/10/2014