



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
ENVIRONMENT AND LAND CASE NO. 395 OF 2013

SAMUEL KAMAU MUTURI (*suing through* JOYCE WANJIKU NJOROGE

***under a Special Power of Attorney*).....PLAINTIFF**

VERSUS

MICHAEL WARIO.....DEFENDANT

RULING

1. Before the Court is a Notice of Motion dated **30th May, 2013** filed by the plaintiff herein, seeking the following substantive order:

That this honourable court be pleased to issue a mandatory injunction compelling the defendant to forthwith demolish the encroaching stone wall fence erected between the plaintiff's land parcel No. Ngong/Ngong/18957 and the defendant's land parcel No. Ngong/Ngong/36832 at the defendant's cost, failing which the plaintiff be at liberty to demolish the fence at the defendant's cost.

2. The application is based on the grounds stated on the face thereof and is supported by the affidavit sworn by **Joyce Wanjiku Njoroge**, a Donee of a Power of Attorney by **Samuel Kamau Muturi** marked **EX1**. She depones that the plaintiff is the registered owner of land parcel **No. Ngong/Ngong/18957** while the defendant is the owner of land parcel **No. Ngong/Ngong/36832**; that these are adjoining parcels of land separated by a common boundary; that the defendant has erected a stone wall fence in total disregard of the boundary beacons thus encroaching on the plaintiff's parcel of land; that despite this matter having being reported to the Provincial Administration, the defendant had remained adamant and had refused to demolish the illegally erected wall.
3. The application was opposed vide the defendant's replying affidavit dated **10th July, 2013** in which he admits being the owner of **Ngong/Ngong/36832** and erecting the wall but denies encroaching onto the plaintiff's parcel of land. He depones that in erecting the wall, he had merely followed the boundary's beacons and the pre-existing barbed wire fence. He denied that the Provincial Administration had ordered him to demolish the wall and attached exhibit **MW4** to disprove that allegation.
4. On **20th November, 2013** the court gave directions that parties appoint a private surveyor to visit

the suit properties and determine the boundaries. The cost of this exercise was to be borne by the defendant and the report filed in court within 14 days.

5. Instead of a joint surveyor, each party appointed their own surveyors. On **17th December, 2013** both surveyors visited the suit parcels accompanied by the plaintiff, the defendant and their respective Counsels in compliance with the court order issued on 20th November, 2013. **Mugo Land Surveyors** and **Geo-Acres Surveyors Ltd** filed separate reports which both confirmed the status on the ground. The relevant parts of their report as per the court order is to be found in the findings. Geo-Acres Surveyors Ltd in their report stated as follows:

“i. The erected wall by parcel Ngong/Ngong/36832 is in parcel Ngong/Ngong/18957

ii. Parcel Ngong/Ngong/36832 has encroached parcel Ngong/Ngong/18957 by approx. 0.01 ha”

On the other hand, Mugo Land Surveyors Ltd under the subheading;

“Actual Ground observation,” stated,

“ - Area ABDJ= 0.30 Ha.

- **Beacons A, B, D, J were intact**
- **Dispute area J, C, & D**
- **Beacons = J, C, E and H**
- **Were replaced (NB) Not original as per the subdivision of NGONG/NGONG/8493.**
- **Between H and E there was an old barbed wire fence. Marking as boundary between the two parcels. (See the plan as drawn by the surveyor).”**

6. After reading the report and being satisfied that the court order had been complied with, I urged the two Counsels to consider settling the matter amicably between themselves in light of the surveyors' reports and their findings. However, fearing that their respective clients would blame them for recording a consent, they instead preferred to leave it to court to make the pronouncements, which I will now do.

7. Counsel for the Plaintiff had earlier filed submissions on **8th October, 2013** which I have read and taken into consideration together with the pleadings and affidavits. To my mind, there is only one issue for determination, which is whether the applicant is entitled to the orders of mandatory injunction sought at this interlocutory stage based on the facts and circumstances of this case.

8. The relief of a mandatory injunction is to be granted under special circumstances and in very clear cases as held in one of the cases relied on by the plaintiff, *Kenya Breweries Ltd & 2 Others v Washington Okeyo* (2002) eKLR, where the court held;

“The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 Halsbury’s Laws of England 4th Edition paragraph 948 which reads:

‘A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff a mandatory injunction will be granted on an interlocutory application.’

9. This had been echoed earlier in the case of **Shepherd Homes Ltd v Shadahu (1971) 1 Ch 34**

where **Megarry J** expressed himself as follows in relation to mandatory injunctions:

“It is plain that in most circumstances a mandatory injunction is likely other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will of course grant such injunction as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even if it is sought to enforce a contractual obligation.”

10. Similarly in the case of Locabail International Finance Ltd. V. Agroexport and others [1986] 1 All ER 901 at page 901, the court held:

‘A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in a clear case either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction’.

11. There is no doubt that granting a mandatory order or injunction may have the effect of bringing the litigation to an end at the interlocutory stage. For this reason, courts have been reluctant to grant mandatory injunctions at interlocutory stage and the same will only be granted exceptionally and in the clearest of cases as was held by the Court of Appeal in the case of Magnate Ventures Limited v Eng Kenya Limited, [2009] KLR 538, if the case was;

- “a) clear and one which the court thought it ought to be decided at once, or*
- b) if the act done was a simple and summary one which could be easily remedied,*
- c) or if the defendant attempted to steal a march on the plaintiff.”*

12. This position was adopted by the Court of Appeal in yet another local case, Trinity Prime Investment Ltd vs Savings & Loan and another (Civil Appeal No. 90 of 1998) that, **“where the Court has granted an interlocutory injunction prayed for, it should not grant a mandatory injunction whose effect shall bring the litigation to an end.”**

13. Do the circumstances of this case satisfy the criteria repeatedly reiterated by the above cases and others? In my view they do. Based on the surveyors report filed after visiting the suit properties in the presence of both parties and which reports neither party has challenged, it is clear that the defendant has encroached on the plaintiff’s land by approximately 0.01 hectares. The question that comes to the fore is this, should this court grant an interlocutory mandatory injunction at this stage? There is no doubt in my mind that the answer is in the affirmative. To allow the defendant to continue occupying the plaintiff’s land a minute longer will be an affront to the rights of the plaintiffs as conferred to him by Law.

14. I therefore allow the Notice of Motion dated **30th May, 2013** and issue a mandatory injunction compelling the defendant to demolish the stone wall fence erected between the plaintiff’s land parcel No **Ngong/Ngong/18957** and the defendant’s land parcel No **Ngong/Ngong/36832** within 60 days at his own cost, failing which the plaintiff be at liberty to demolish the fence at the defendant’s cost. Costs of the application are awarded to the plaintiff.

Dated, Signed and delivered at Nakuru this 10th day of October, 2014.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Michela holding brief for Mr. Murimi for the Applicant.

Mr. Ntabo holding brief for Mr. Ngetich for the Respondent.

Emmanuel – Court Assistant