



REPUBLIC OF KENYA

High Court at Nakuru

Environmental & Land Case 80 of 2012

**JANE WANGECHI KIGOTHO SUING AS A PROPRIETOR
MILIMANI ELITE SCHOOL.....PLAINTIFF**

VERSUS

SAMUEL O WAKHU.....1ST DEFENDANT

MOLO COUNTY COUNCIL.....2ND DEFENDANT

RULING

By Notice of Motions dated 23rd November, 2012 and 13th February, 2013 respectively, the Applicant Jane Wangechi Kigotho suing as proprietor of Milimani Elite School seeks the following orders:

- 1. That pending the hearing and determination of the suit there be an injunction restraining the 1st Defendant, his servants, agents or relatives from entering into the plaintiffs LR No. 533/469/42, tilling or in any way interfering with the said land and putting any beacons.**
- 2. That there be an order restraining the defendant by himself from interfering with the plaintiff's construction of a school kitchen on her parcel of Land 533/469/42 Molo Township.**
- 3. That costs of this application be provided for.**

The grounds upon which the two applications are premised are found in the body of the applications and supporting affidavits sworn by Jane Wangechi Kigotho, the plaintiff herein.

The applicant's case is that between the years 1998 and 2011 she bought various plots which were all amalgamated by the Molo County Council and named plot No.533/469/42: that she proceeded to build a school duly approved by Molo town Council and paid all the requisite rates and licenses. However, the 1st Defendant complained to the 2nd Defendant that the applicant was constructing on a road reserve: that as a result therefore, the 2nd Defendant ordered the plaintiff to stop further construction on the suit property and sent a private surveyor T.M Nyaga to identify the boundaries between the plaintiff's plot and the public open space: that upon visiting the site, the surveyor identified and marked the beacons and the plaintiff was advised and allowed by the 2nd defendant to continue with the construction and change the position of her fence which she did: that the 1st defendant rejected the report of the private surveyor and insisted on a Government surveyor who is yet to visit the site despite several letters to the District Land Registrar by the plaintiff: That the 1st Defendant has

now entered her land, planted crops and has incited some neighbours who have in turn demolished her school kitchen causing health concerns as cooking for the school is now done in a make shift kitchen.

Samuel Wakhu in his replying affidavit sworn on 8th January 2012, strenuously opposed the application and denied entering the plaintiff's land, planting crops or inciting neighbours to demolish the school kitchen and fence. He averred that a task force had earlier being established to look into the issue of boundary dispute and came up with some resolutions which the plaintiff rejected.

The two applications were argued before me on 11th March 2013. Counsel for the plaintiff reiterated that the plaintiff had not encroached on public land. She averred that the plaintiff had a sale agreement for the portion of land and a consolidation map to prove ownership.

In his submissions, the 1st Defendant who appeared in person gave a background of the land in Dispute. He stated that the plaintiff owned **LR.533/469/42** and he owned plot **20399/24** now renamed plot **116**. These parcels had beacons registered by survey of Kenya but the same were not reflected in the records of the County Council: that upon purchasing his portion of land from Mr S.K Njuguna, the vendor subdivided all his plots and left 17 feet between these plots which the vendor bequeathed to him to build a church: That he started cultivating this parcel of land until the year 2001 when the plaintiff laid claim on it and proceeded to erect a fence on 2/3^{rds} of the portion of Land leaving him with only 1/3rd of the portion.

I have considered the applications and submissions by the two parties. Being an application for a temporary injunction, the structures enumerated in the famous ***Giella Vs Cassman Brown & Company Limited (1975) E.A 358*** and later in ***the Kenya Commercial Finance Company Limited Vs Afraha Education Society (2001) I EA 8*** must be satisfied.

First, the applicant must show that she has a *prima facie* case with a probability of success. Secondly, it must be demonstrated that the applicant might suffer irreparable injury if the injunction is not issued and thirdly, should the court be in doubt, it will decide the application on a balance of convenience. These principles are to be applied sequentially in that the court need not consider the second and third principles if it finds that the applicant has a *prima facie* case.

In considering whether the applicant has established a prima facie case, I shall not dwell into the merits of the case but merely look to see whether the applicant's right has been violated by the respondent. In support of her case, the applicant has exhibited various letters between herself as proprietor of Milimani Elite School and various Government offices including the Officer Commanding Police Division Molo, District Commissioner Molo, Registrar of Lands Nakuru District, Town Council of Molo and a Surveyor appointed by the County Council, Molo, Mr Timothy M Nyagah.

I have considered the correspondence and have found no mention therein that the defendant has trespassed onto the plaintiffs parcel of land. Rather, the correspondence relates to complaints by the community that the plaintiff had encroached on public land. The plaintiff in response seeks for proper identification of beacons and boundaries on LR 533/469/42 and the public land.

Similarly, the 1st respondent has exhibited minutes and correspondence between Molo County Council and Milimani Embakasi Estate relating to encroachment of Public land by the Applicant and the damage caused on the water pipes due to this encroachment.

The minutes exhibited relate to a meeting held on 16/2/2012 between the District Administration Molo town, the community and Milimani Elite School. They reveal attempts to resolve the dispute over the public land. Further attempts were made by the County Council Molo when they sent a surveyor Timothy M. Nyagah to establish the beacons. In his letter to the County Council after the visit, the surveyor does not indicate whether the applicant had encroached on the public land but the county council's letter dated 14th February 2012 stopping the applicant from further construction gives some hindsight that the boundaries have still not been established.

I have carefully considered all the material that was placed before me but I am not satisfied that the Applicant has established a *prima facie* case as defined in ***Mrao Limited Vs First American Bank Kenya Ltd & 2 others(2003) KLR 125.***

The plaintiff has failed to show that the material presented to court will enable this court conclude that there exists a right which has been infringed by the defendant as to call for an explanation rebuttal from the latter. It is not clear how the 1st Defendant has encroached on LR533/469/42. It is also not clear that the portion referred to by the plaintiff occupied and cultivated by the 1st defendant is part of LR533/469/42.

The upshot is that the plaintiff's application for interlocutory injunction lacks merit and is dismissed with no costs to the defendant. However, although the plaintiff has not established a *prima facie* case, I am persuaded that the applicant might suffer irreparable injury unless status quo is maintained. Pursuant to powers conferred on this court under Order 40 Rule 1, for the purpose of staying and preventing the wasting, damaging, alienating, sale, removal or disposition of the suit property I order as follows:

- (1) **That status quo be maintained until the hearing and determination of this suit**
- (2) **That the District Land Surveyor, Molo establishes and marks the boundaries of LR No.533/469 and files a report to court within 60 days.**

Dated, signed and delivered this 3rd day of May, 2013.

**L N WAITHAKA
JUDGE**

PRESENT:

Ms Njoroge for Plaintiff
Mr. Wakhu – Defendant in person
Mwangi – Court Clerk