



NO.92

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CASE NO.146 OF 2013

NAFTAL MOENGA SINDIGA.....PLAINTIFF

VERSUS

ASHWIN GUDKA..... DEFENDANT

RULING

1. The application before me is the Plaintiff's Notice of Motion dated 3rd April, 2013. The application is supported by the affidavit of the Plaintiff sworn on 2nd April, 2013. The application is seeking an order of injunction to restrain the defendant by himself or through his agents from entering into, dealing with and/or doing anything of whatsoever nature with the parcel of land known as L.R.No. Nyaribari Chache/ B/ B/ Boburia/ 3467 owned by the Plaintiff (hereinafter referred to as "**the suit property**") pending the hearing and determination of this suit. The Plaintiff's case against the defendant as set out in his Plaint dated 2nd April, 2013 and the affidavit in support of the application herein is that, the Plaintiff is the registered proprietor of the suit property which measures 0.12 hectares. The Plaintiff has annexed to his affidavit in support of the application copies of, an extract of the register for the suit property, certificate of official search and the Plaintiff's national identity card as evidence of his ownership of the suit property. The Plaintiff was registered as the proprietor of the suit property on 13th June, 1984 and he has been on uninterrupted open and peaceful occupation of the suit property on which he has been growing nappier grass since then. The Plaintiff's occupation of the suit property was interrupted for the first time early this year when the defendant without the Plaintiff's consent or any lawful or justifiable cause forcibly entered the suit property destroyed the Plaintiff's nappier grass growing thereon and commenced the construction of a perimeter wall around the suit property which wall has completely blocked the entry and exit to and from the suit property. The Plaintiff served a demand letter upon the defendant to cease his alleged illegal activities but the defendant refused and/or neglected to comply. The Plaintiff has annexed to his affidavit in support of the application copies of a demand letter dated 14th March, 2013 addressed to the defendant by his advocates on record and other letters of complaint addressed by the said advocates to the O.C.S Kisii Police Station and the D.C.I.O Kisii, Central Police Division. The Plaintiff claims that he stands to suffer irreparable loss and damage as the defendant's said illegal acts have deprived him of his right to the suit property. In conclusion, the Plaintiff contends that he has a prima facie case against the defendant with absolute chances of success and that it would be proper fair and just in the circumstances to grant the injunction sought.

2. The Plaintiff's application is opposed by the defendant. The defendant swore a replying affidavit on 8th April, 2013 in opposition to the application. The defendant has objected to the Plaintiff's application on several grounds. The defendant has accused the Plaintiff moving this court for the orders sought on manufactured and deliberate falsehoods. The Plaintiff has been accused of misrepresentation and concealment of material facts to the court. The Plaintiff is accused of concealing to the court the fact that the activities complained of were being carried out by the defendant on his own parcel of land known as L.R. No. Nyaribari Chache/ B/B/Boburia/3085 (hereinafter referred to as "**Plot No. 3085**") which is separate and distinct from the suit property. The defendant has annexed to his replying affidavit a copy of a title deed for Plot No. 3085 which shows that the property was registered in the name of the defendant on 9th September, 2010. The defendant claims that when he purchased Plot No. 3085, it had boundaries which were clearly marked with a barbed wire fence. It is this fence that he removed and replaced with a perimeter wall that the Plaintiff is complaining about. The defendant claims that the construction of the said wall commenced in November, 2012 and was fully completed before the Plaintiff came to court. The defendant has denied that he has put up the said wall around the suit property and contends that if the Plaintiff feels that he has exceeded the boundary of Plot No. 3085, the proper arbiter in such a dispute is the District Land Registrar and not the court. The defendant claims that there has never been any dispute over the boundaries of the suit property and Plot No. 3085 and that the current dispute is of the Plaintiff's own making and seems to have been instigated by third parties. The defendant maintains that the perimeter wall has been put up within the boundaries of Plot No. 3085 and that the Kenya Police to whom the Plaintiff had lodged a complaint over the said wall had advised both parties to seek the assistance of the District Land registrar to determine the boundary between the two plots a fact that the Plaintiff concealed from the court. In conclusion the defendant contended that the Plaintiff has failed to establish a prima facie case against the defendant and that the Plaintiff's suit discloses no or any reasonable cause against the defendant and amounts to an abuse of the court process.
3. The application came up for hearing before me on 8th April, 2013 when Mr.Obure, advocate appeared for the Plaintiff while Mr.Oguttu, advocate appeared for the defendant. While arguing the application, the two advocates reiterated their client's positions as set out in their respective affidavits the contents of which I have highlighted herein above at length and which do not require any repetition. Mr. Obure submitted that the boundary of Plot No. 3085 is in dispute and as such the defendant should not have proceeded to put up the wall complained of until that dispute was resolved by the land registrar. Counsel submitted that the defendant was equally under a duty to have the boundary between the two parcels of land fixed. Counsel submitted that the suit property has been fenced off in its entirety and as such the dispute between the parties is not merely a boundary dispute. The defendant's title to the suit property is in question. Counsel denied that the Plaintiff had concealed any material fact to the court and submitted that the Plaintiff has established a prima facie case and has also shown that he will suffer irreparable loss unless the orders sought are granted. On behalf of the defendant, Mr.Oguttu submitted that neither the Plaintiff's title to the suit property nor the defendant's title to Plot No. 3085 is in dispute in this case. According to counsel, what is disputed is whether the wall complained of by the Plaintiff has been put up within the boundaries of Plot No. 3085 as contended by the defendant or around the suit property as maintained by the Plaintiff. This to counsel is a boundary issue which cannot be resolved by the court. Counsel relied on section 18 of the Land Registration Act, 2012 and submitted that the court has no jurisdiction to determine boundary disputes. Counsel submitted further that the Plaintiff came to court after the completion of the wall complained of and in the circumstances the orders sought cannot issue as the court cannot issue an injunction to restrain an act that has taken place. Counsel submitted further that the onus was upon the Plaintiff to prove his allegation that the perimeter wall has been constructed around the suit property. This counsel submitted that the Plaintiff has failed to prove. In conclusion, counsel submitted that the Plaintiff has failed to establish a prima facie case against the defendant and has also failed to show that he stands to suffer irreparable loss unless the orders sought are granted.
4. I have considered the plaintiff's application and the affidavit in support thereof. I have also considered the submission by the advocate for the plaintiff. I have equally, considered the

defendant's replying affidavit and submission by the defendant's advocate in opposition to the plaintiff's application.

5. The following is the view I take of the matter. The principles for granting interlocutory injunction are now well settled. As was stated in the case of **Giella –vs- Cassman Brown & Co. Ltd. [1973] E.A 358**, an applicant for interlocutory injunction must show that he has a prima facie case against the defendant with a probability of success and that unless the injunction is granted, he will suffer irreparable loss. If the court is in doubt as to the above, the court will determine the application on a balance of convenience. In the case of **Mrao Ltd. –vs- First American Bank of Kenya ltd (2003) KLR. 125**, which was cited by the defendant's advocate during his submission, it was held as follows;

“a prima facie case in a civil application includes but is not confined to “a genuine and arguable case”. It is a case which on the material presented to court a tribunal properly directing itself will conclude that there exist a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.

6. The question that I have to answer is whether the plaintiff has on the material placed before this court shown on a prima facie basis that the defendant has infringed on any of his rights? The plaintiff has shown that the suit property is registered in his name. This fact is not disputed by the defendant. The plaintiff's title to the suit property is therefore not in dispute. It is also not disputed by the Plaintiff that the defendant is the registered proprietor of Plot No. 3085 which shares a boundary with the suit property. The Plaintiff is therefore not disputing the defendant's title to this Plot No. 3085. What is disputed is whether or not the defendant has trespassed on the suit property and constructed a perimeter wall around it. The Plaintiff has not placed any material before this court to show or prove that the wall complained of is on or has been constructed around the suit property as alleged. The defendant has equally not placed any material evidence before the court to prove otherwise. However as was submitted by the advocate for the defendant, under sections 107 and 109 of the Evidence Act, Cap. 80 Laws of Kenya, a party who wishes the court to give a determination in his favour which is dependent on the existence of a certain fact has the onus of proving the existence of such fact. It follows therefore that the duty was not upon the defendant to prove that the perimeter wall complained of by the Plaintiff was not built around the Plaintiff's plot. The onus remained with the Plaintiff throughout to discharge this burden and I am not satisfied that he succeeded in doing so. What I have are unfounded rival contentions. Whereas the Plaintiff claims that the defendant has trespassed into the suit property and put up a perimeter wall around it thereby depriving him of the use and ownership rights over the suit property, the defendant insists that he put up the said wall around his Plot No. 3085. Since these two properties share a boundary, the issue that arises is the ground positions of each parcel which boils down to the boundaries of the two properties. Although the Plaintiff denied it, the dispute here is about the boundary of the two parcels of land. Even if I was to go with the Plaintiff's argument that the whole of the suit property has been taken away and as such this is not an issue of boundary but of title, I will still come back to the issue as to where the boundary of the suit property starts and ends so as to arrive at a finding that the defendant has encroached upon and taken over the whole of the suit property. Having reached a prima facie finding that the dispute between the Plaintiff and the defendant is one over boundary, the Plaintiff could only succeed in establishing a prima facie case for trespass by putting before the court a report from the land registrar on the boundaries of the two parcels of land. I believe that if such a report was to be made after the wall complained of had been put up, it would have a survey diagram or map showing the extent to which the defendant's wall has encroached upon the suit property. In a case like this where the Plaintiff claims that the entire property has been encroached upon and as such there is no boundary dispute between the Plaintiff and the defendant to be determined by the land registrar, the Plaintiff could have engaged a private surveyor to prepare a report and plot out on a survey map the extent of the alleged encroachment. This could have given the court a picture of

the alleged encroachment. I think that it is not enough for the Plaintiff merely to make statements that the defendant had entered into the suit property, destroyed nappier grass and commenced the construction of a perimeter. A claim by the defendant in response that the wall was being put up on his own parcel of land should have put the Plaintiff on his guard that more would be required of him to prove that the parcel of land the defendant is claiming to be part of Plot No. 3085 is actually the suit property. As submitted by the defendant's advocate, these are not issues which can be left for the court to assume or guess. A court must base its decision on a matter whether preliminarily or finally on the evidence placed before it. The court cannot make assumptions or hazard guesses. There must be proof for every issue raised and contested. As submitted by the defendant, this court has no jurisdiction to determine disputes over land boundaries in the first instance. That jurisdiction is bestowed upon the land registrar by section 18 of the Land Registration Act, 2012. I am unable to determine whether the defendant has encroached upon the suit property or not as there is no acceptable evidence before me on the basis of which I can reach that determination. Due to the foregoing, it is my finding that the Plaintiff has failed to establish a prima facie case against the defendant with a probability of success. I must add that this is one case in which even if I was to grant the injunction sought by the Plaintiff, the issue would still have arisen as to against which parcel of land on the ground such injunction will attach. This is because the Plaintiff is claiming that the wall has been put up around the suit property while the defendant has maintained that the wall has been put up around Plot No. 3085. There is no evidence regarding the boundaries of the two parcels of land and as such, one would be unable to place the said wall around the suit property as claimed by the Plaintiff or around Plot No. 3085 as claimed by the defendant with any measure of certainty. The court would therefore have issued the order in vain as it would not be capable of enforcement. No court would want to issue such an order.

7. The plaintiff having failed to satisfy the main condition for granting interlocutory injunction I am not obliged to consider other conditions such as whether or not the Plaintiff will suffer irreparable loss unless the orders sought are granted. The plaintiff's Notice of Motion application dated 3rd April, 2013 is therefore not for granting. The same is dismissed with costs to the defendant.
8. I have found it necessary in the interest of justice to make a further order in view of the unique circumstances of this case that, this suit should be listed for hearing without any further delay. In this regard I have pursuant to the provisions of order 11 rule 1 of the Civil Procedure Rules exempted this case from the provisions of that order.

Dated, signed and delivered at Kisii this 3rd day of July, 2013.

S. OKONG'O,

JUDGE.

In the presence of:

Mr. Obure for plaintiff.

Mr. Oguttu for defendant.

Mobisa Court Clerk.

S. OKONG'O,

JUDGE.