



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MAKUENI**

**ELC SUIT NO.19 OF 2020**

**EDITH MUENI MUINDE.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**MUTISO NASON MUNYASYA.....DEFENDANT/RESPONDENT**

**RULING**

1. The application before this court for ruling is the one dated 07<sup>th</sup> of August, 2020 and filed in court on 10<sup>th</sup> August, 2020 by the Plaintiff's/Applicant's Counsel under certificate of urgency. The application is expressed to be brought under sections 1A, 1B & 3A of the Civil Procedure Act and Order 40 Rule 2 of the Civil Procedure Rules 2010 and all enabling provisions of the law for orders: -

**1) Spent.**

**2) Spent.**

**3) THAT Temporary Injunction Orders be granted to restrain the Defendant, whether by himself, his agents, and/or servants from trespassing, wasting, constructing on, alienating, transferring/Disposing, selling, or interfering with the suit property, herein, MAKUENI/UNOA/2183 until the determination of the suit.**

**4) THAT costs of the Application be borne by the Respondent.**

2. The application is predicated on the grounds on its face and is further supported by the affidavit of Edith Mueni Muinde, the Plaintiff/Applicant herein, sworn at Nairobi on 07<sup>th</sup> August, 2020.

3. Mutiso Nason Munyasya, the Defendant/Respondent herein, has opposed the application vide his replying affidavit sworn at Nairobi on 03<sup>rd</sup> September, 2020 and filed in court on even date.

4. The application was canvassed by way of written submissions.

5. The Plaintiff/Applicant has deposed in paragraphs 1, 2, 4, 5, 6 and 7 of her supporting affidavit that she is the bonafide and legal owner of a land title number Makueni/Unoa/2183 which she purchased from Mr. Bernard Kyatha alias Nthenge Maitha in 2017, and before purchasing the aforementioned plot, she conducted a search to confirm the registered owner and affirmed that the same was registered under his names as at 2017, that she took possession and applied for Title Deed of the suitland and she currently holds a valid title of the suitland, herein, Makueni/Unoa/2183, that in light of the above, she has not been able to fully access and pursue various economic activities as she intended for the parcel of land, that the Defendant's plot is adjacent to hers, his being Makueni/Unoa/1899 and is even bigger than hers, that it is quite obvious that his intention is to as well annex her plot on the pretext that its part of his plot, that to shed light on the existence of the two (2) plots, she engaged the services of a private Surveyor and the Makueni County Government Surveyor to determine the boundaries and the area of the same.

6. On the other hand, the Defendant/Respondent has deposed in paragraphs 3, 4, 5, 6, 7, 8, 10, 11, 12, 13 and 14 of his replying affidavit that he is the lawfully registered owner of property LR. No.Makueni/Unoa/1899 and has been the registered proprietor of the said property since 2009, that he has never been an owner or showed any interest or claim over property LR No. Makkueni/Unoa/2183 purportedly registered in the name of the Plaintiff in the year 2017, that at all times he has been the registered proprietor of property Makueni/Unoa/1899, no person has ever laid claim over his property and he has further on different occasions charged the said property to financial institutions, that he is a stranger to the allegations made by the Plaintiff that he has encroached onto her land seeing as it is that he has his own parcel of land on which he is making his development, that the developments which the Plaintiff alleges he has made on her property Makueni/Unoa/2183 are actually development that he is making on his own property being Makueni/Unoa/1899 which he is the duly registered proprietor, that he lawfully acquired his property Makueni/Unoa/1899 through lawful purchases of two plots one measuring 20 x 100 and the other measuring 40 x 100 and it is these two properties that he prepared their title now known as Makueni/Unoa/1899 measuring 60 x 100, that in any event he was the first registered proprietor of property Makueni/Unoa/1899 and the Plaintiff has not claimed the same and if by any chance the

Plaintiff claims that her parcel bestrides his land that cannot be the case seeing as it is his parcel was registered in 2009 and an entry to that effect made on the map while the Plaintiff's property was ostensibly registered in 2017 and entered in the map in that year. His property being the first to be registered, there is no way her property could be registered in respect to a piece of land that was already registered in his name, that the Plaintiff should have ascertained the exact piece of land she was buying in the year 2017 way after he had been registered as the lawful proprietor of parcel LR No.1899 and duly issued with a title deed to that effect, that he had previously developed a portion of his land covering approximately 40 x 100 and was in the process of developing the other portion when the Plaintiff sought to stop his developments, that he has conducted a survey of the area where his registered land falls and confirmed that on the ground that is the actual location of his development and that he has not encroached on the parcel of any other person, the Plaintiff included, that in light of the above, it is his prayer that the application and suit against him should be dismissed with costs since it doesn't disclose any cause of action against him whatsoever.

7. The Counsel on record for parties are in agreement that in order to determine whether or not to issue the order of interlocutory injunction sought, the guiding principles are as enunciated by the celebrated case of **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358**. These principles are: -

**1) The Applicant must show a prima facie case with probability of success.**

**2) An interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages.**

**3) If the court is in doubt, it will decide the application on a balance of convenience.**

8. On whether or not the Plaintiff/Applicant has a prima facie case with probability of success, the Plaintiff's/Applicant's Counsel submitted that the Surveyor's report indicates that plot No. Makueni/Unoa/2183 measures 20 feet by 100 feet on the map and that the same is reflected on the ground. The Counsel went on to submit that the report further indicates that plot No. Makueni/Unoa/1899 measures 40 feet by 100 feet on the map as it appears on the ground and that the Surveyor has confirmed that construction is ongoing in plot No. Makueni/Unoa/2183 and guided by the above three factors, the court should make a finding that the Applicant has a prima facie case.

9. On the other hand, the Counsel for the Defendant/Respondent submissions were that there is no proof whatsoever that the Respondent has trespassed into what is the Applicant's land or in any way sought to interfere with what is known as Makueni/Unoa/2183. The Counsel added that the Respondent in his affidavit filed herein has demonstrated that he acquired his own piece of land known as Makueni/Unoa/1899 which measures 0.067 Ha or 60 x 100. It was also the Counsel's submissions that it is on this plot that the Respondent is making some developments and that he acquired the land in question way back in 2009 before the Applicant purported to acquire hers in the year 2018.

10. The Counsel further submitted that there is no serious issue for trial in this matter to warrant the grant of the orders sought since the Respondent has affirmed that he is not in occupation of Makueni/Unoa/2183 but is in occupation of his own registered property being Makueni/Unoa/1899.

11. The Counsel relied on the case of **Pius Kipchirchir Kogo vs. Frank Kimeli Tenai [2018] eKLR** where the Court held that: -

*"The existence of a prima facie case in favor of the plaintiff is necessary before a temporary injunction can be granted. **Prima Facie** case has been explained to mean that a serious question is to be tried in the suit and in the event of success, if the injunction be not granted the plaintiff would suffer irreparable injury. The burden is on the plaintiff to satisfy the court by leading evidence or otherwise that he has a **Prima Facie** case in his favor of him."*

12. The Counsel went on to submit that there is no evidence to demonstrate that the Respondent is in occupation and use of the Applicant's piece of land to warrant the issuance of orders sought and added that court orders are not issued in vain.

13. On the issue of an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable harm which would not adequately be compensated by an award of damages, the Plaintiff's/Applicant's Counsel submitted that the Plaintiff/Applicant has annexed a photo showing construction which is ongoing. The Counsel pointed out that the Plaintiff/Applicant stands to suffer irreparably should the Court fail to grant the orders sought. The Counsel was of the view that this is the kind of situation that the Court of Appeal had in mind while setting this principle in **Giella vs. Cassman Brown's** case (supra).

14. But according to the Counsel for the Defendant/Respondent, the Plaintiff/Applicant will not suffer any irreparable harm since the former is developing his own land and not the Plaintiff's/Applicant's. The Counsel further submitted that the subject matter of the dispute that the Plaintiff/Applicant has brought to court is a piece of land which can be quantified thus damages can repair any quantifiable harm that a party may suffer in the event. The Counsel was of the view that the Plaintiff/Applicant is merely speculative and not real.

15. Regarding the issue of if the court is in doubt, it will decide the application on a balance of convenience, the submissions by the Plaintiff's/Applicant's Counsel were that the same lies in favour of the Plaintiff/Applicant since she brought a copy of official search from the lands office and had also presented the Surveyor's report which is conclusive proof of the encroachment into her land. The Counsel further relied on the case of **Robert Mugo Wa Karanja vs. Ecobank (Kenya) Limited & Another [2019] eKLR** and **Mwaniki Kirika vs. Michael Nicholas Mwangi [2018] eKLR**.

16. The Counsel for the Defendant/Respondent submitted that the Respondent has bought construction materials and entered into contractual arrangements to develop his land. The Counsel went on to submit that the Respondent runs the risk of defaulting on those contracts and further his building materials going to waste if he is stopped from further developing his property Makueni/Unoa/1899.

17. The Counsel pointed out that the Respondent has brought to court a copy of an official search indicating that he is the registered proprietor of the property and has been in occupation for a longer period of time than the Plaintiff/Applicant. It was also the Counsel's submissions that the Plaintiff/Applicant has not incurred any costs and will not suffer any liabilities if the orders sought are not granted. Under those circumstances, the Counsel submitted, the party that stands to suffer most if the orders are granted is the Respondent.

18. The Counsel urged the court to find that the balance of convenience in this particular instance lies in favour of declining the application and not granting the orders sought. He relied on the case of **Ngong Butchers Co-operative Society Ltd. vs. Patrick Kabue Muchene [2018] eKLR** where the Court held that: -

*“In this particular suit, the party in possession of the suit property is the Defendant and the court acknowledges that the Defendant has been in occupation thereof for many years. The Defendant has had tenants on the suit property occupying temporary structures constructed by the Defendant and it is only recently that the Defendant commenced construction of a permanent building. Photos of the current construction activities by the Defendant have been produced to the court. The inconvenience to the Plaintiff seems minimal. The Plaintiff has allowed the Defendant to remain in possession of the suit property for many years. However, the Defendant would be greatly inconvenienced should he be removed from continued possession until this suit is determined”*

19. Arising from the above, the Counsel submitted that the latter authority sits squarely in all four corners of their case since the Respondent has been in occupation of his property claimed by the Plaintiff/Applicant since 2009.

20. Having read the notice of motion application, the replying affidavit and the rival submissions by the Counsel on record for the parties, herein, I do note that whereas the Plaintiff/Applicant relies on a Surveyor's report dated 07<sup>th</sup> August, 2020 from the Ministry of Lands, Housing and Urban Development and signed by one Gabriel Maingi EMM-5, the Defendant/Respondent relies on a survey report dated 03<sup>rd</sup> September, 2020 signed by one Benson M. Kathenge for Geomatics Services, Licenced Surveyors. Each of the two reports blame the rival party for trespassing onto the other party's plot. There is no doubt that both the Plaintiff/Applicant and the Defendant/Respondent own land parcels number Makueni/Unoa/2183 and Makueni/Unoa/1899 respectively. The two parcels of land are adjacent to each other save for the dispute as to which parcel of land has encroached onto the other. The above being the case, I am of the view that the most appropriate order to issue at this juncture is one of status quo so that neither the Defendant/Respondent nor the Plaintiff/Applicant can carry out further construction on their respective portions of land until this suit is heard and determined and/or until further orders.

21. In the circumstances, the above orders (i.e. order of status quo) are hereby granted with no orders as to costs.

**Signed, dated and delivered at Makueni via email this 16<sup>th</sup> day of November, 2020.**

**MBOGO C.G.,**

**JUDGE.**

**Court Assistant: G. Kwemboi**