



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. 27 OF 2018

MWENDWA NDUVA.....PLAINTIFF/APPLICANT

VERSUS

JEFFERSON MAWEU NTHEKY....1ST DEFENDANT/RESPONDENT

PETER MUSILI MALUKI.....2ND DEFENDANT/RESPONDENT

RULING

1. What is before this Court for ruling is the Notice of Motion application expressed to be brought under Sections 1A, 1B and 3A of the Civil Procedure Act, Order 40 Rules 1(a) and 2 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all enabling provisions of the law for orders:-

1. Spent.

2. Spent.

3. THAT this Honourable Court be pleased to make interim orders that the Defendants/Respondents by themselves, their agents and/or servants be restrained from entering onto, trespassing on and/or encroaching and/or remaining on and/or constructing on and/or in any other manner whatsoever interfering with land parcel No.1429 KINYOO ADJUDICATION SECTION pending the hearing and determination of the main suit.

4. THAT this Honourable Court be pleased to make interim orders restraining the Honourable Resident Magistrate from continuing hearing MAKINDU PMCR 36 OF 2018 over land parcel No.1429 KINYOO ADJUDICATION SECTION pending the hearing and determination of the main suit.

5. THAT the said orders be enforced by the O.C.S Emali Police Station.

6. The costs of this Application be borne by the Respondents.

2. The application is dated 29th March, 2018 and was filed in Court on 03rd April, 2018. It is predicated on the grounds on its face and is supported by the supporting and supplementary affidavits of Mwendwa Nduva, the Plaintiff/Applicant herein, sworn at Nairobi on the 29th March, 2018 and 16th November, 2018 respectively.

3. The 1st Defendant/Respondent has opposed the application vide his replying affidavit sworn at Emali on the 04th July, 2018 and filed in Court on even date.

4. The Court directed that the application be disposed off by way of written submissions.

5. The Plaintiff/Applicant and the 1st Defendant/Respondent filed their respective submissions on 18th November, 2018 and 18th December, 2018.

6. The Plaintiff/Applicant has deposed in paragraphs 1, 2, 3 and 8 of his supporting affidavit that he is the registered owner of land parcel number 1429 Kinyoo Adjudication Section as per the certificate of ownership annexed as MN-1. That sometime in the years 2016, 2017 and 2018 the Defendants/Respondents started to trespass and/or to encroach into the Plaintiff's/Applicant's land, constructed thereon semi-permanent structures and that they are in the process of constructing a house without the Plaintiff/Applicant's consent. That the issue of ownership of the land parcel number 1429 Kinyoo Adjudication Section was long settled by the Land officers from Makueni Land Registry and that the Defendants/Respondents were involved in the process as can be seen from a copy of a letter from the Director of Lands, Mining and Physical Planning annexed as MN-3. The Plaintiff/Applicant has further deposed that if the trespass continues, he will be unable to reclaim his land and thus he will suffer great loss which cannot be compensated by an award of damages.

7. The 1st Defendant/Respondent has deposed in paragraphs 3, 4, 5 and 6 that while the Plaintiff/Applicant owns plot number 1429 Kinyoo Adjudication area, the 1st Defendant/Respondent owns an existing site for business cum residential plot within Emali Town as shown by the allotment dated 20th November, 1998 annexed as "JMN1" to his replying affidavit. The 1st Defendant/Respondent is silent on the latter's plot's number. The same is not indicated in the allotment letter either. That he and the Plaintiff/Applicant have a long standing boundary dispute over their respective plots which border each other. That he has developed his plot as shown by the photos annexed in the Plaintiff's/Applicant's supporting affidavit. That he has never trespassed into the Plaintiff's/Applicant's plot but rather the latter is the one who has trespassed into his (1st Defendant's/Respondent's) plot.

8. In his submissions, the Plaintiff's/Applicant's Counsel has submitted that the Plaintiff/Applicant has met the three principles for the grant of injunctive orders as enunciated by the case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358**. I need not repeat those principles herein.

9. On the other hand, the Counsel for the 1st Defendant/Respondent has submitted that the Plaintiff/Applicant has not fulfilled the principles set out in Giella's case and urged the Court to dismiss the application with costs.

10. Having read the application together with the supporting and the supplementary affidavits as well as the replying affidavit and having read the submissions filed by the Counsel on record for both parties, I do note that the issue of ownership of the suit land is contested by the parties herein. The same cannot be determined at interlocutory stage as it will require the calling of evidence. The Plaintiff/Applicant relies on certificate of ownership dated 19th February, 2016 (MN-1) and another letter dated 01st March, 2016 (MN-3) both from the Ministry of Lands, Mining and Physical Planning, Makueni County. On the other hand, the 1st Respondent/Defendant relies on an allotment letter dated 20th November, 1998 (JMN1). As earlier on said, the allotment letter does not identify the 1st Defendant's/Respondent's plot number save for its description being indicated as "existing site for business cum residential plot-Emali."

11. The above being the case, my finding is that the most appropriate order to issue herein is one of status quo pending hearing and determination of the substantive suit. None of the parties herein should commence further development and/or construction on what each claims to be their respective plots until this suit is heard. For avoidance of doubt, if there is ongoing construction on the contested plots, same should also cease from the date of this order. Each party shall bear their own cost.

Signed, dated and delivered at Makueni this 22nd day of February, 2019.

MBOGO C.G

JUDGE

IN THE PRESENCE OF:

Mr. Muthiani for the Plaintiff/Applicant

Mr. Kituko holding brief for the 1st Defendant/Respondent

Ms. C. Nzioka – Court Assistant

MBOGO C.G, JUDGE

22/2/2019