



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC CASE NO.602 OF 2017**

**FREDRICK NGANGA THUO.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**PROF. PETER MUNGAI NJUHO.....DEFENDANT/RESPONDENT**

**RULING**

The matter for determination is the *Notice of Motion* application dated **15<sup>th</sup> June 2018**, by the Plaintiff/Applicant seeking for orders that:-

**1. That this Honourable court be pleased to issue a temporary injunction order restraining the Defendant by himself and his servants, agents and/or workmen from encroaching on, occupying, trespassing to, developing and/or dumping any building materials or in any other manner whatsoever interfering with the Plaintiff's peaceful occupation, ownership use and enjoyment of all that parcel of land known as Kikuyu/Kikuyu Block 1/820, pending the hearing and determination of this suit.**

**2. That costs of the application and of the suit be borne by the Defendant/Respondent.**

The Application is premised on the grounds that the Defendant/Respondent forcefully encroached and occupied part of the suit property and thereby started developing the same. However, the Plaintiff/Applicant never acquiesced in the said trespass by the Defendant/Respondent and expressed his displeasure by reporting the same to the Administration Police and other local administrators but the Defendant/Respondent continued his illegal occupation of the suit property and has continued to construct undeterred and to occupy the premises as a trespasser and unless restrained, the Plaintiff/Applicant will suffer irreparable harm and loss.

In his *Supporting Affidavit*, the Plaintiff/Applicant averred that he is the registered proprietor and owner of the suit property ***Kikuyu/Kikuyu Block 1/820***, entitled to exclusive possession and occupation which property is charged by Kenya Commercial Bank. He further averred that on **13<sup>th</sup> June 2017**, he received information that the Defendant/Respondent who is his neighbor had started to develop his land and encroached on Applicant's land and he confirmed that the Defendant/Respondent had dug trenches for construction and the trenches had crossed over to his land. It was then that he sought to have the matter resolved peacefully in vain. He alleged that the workmen on the ground had reliably informed him that the Defendant/Respondent intends to start the slab work and it is therefore necessary that the court steps in as the Defendant/Respondent is purposefully developing part of his land and failed to vacate. He averred that it was fair and just to have an order of injunction issued so as to protect, preserve and maintain proper status of the suit property pending the determination of the suit.

The application is opposed and the Defendant/Respondent filed a Replying Affidavit and averred that he is the registered owner of ***LR.Kikuyu/Kikuyu Block 1/819***. That around **March 2017**, he was informed by his caretaker that people were lurking around his property and when the caretaker inquired from them, they informed him that they were representatives from Kenya Commercial Bank. On further investigation he was informed that the Plaintiff charged ***LR.No.Kikuyu/Kikuyu Block 1/820 to Kenya Commercial Bank*** and defaulted on the payments which prompted the Bank to move to foreclose on the charged property including part on the Respondent's land in the foreclosed property. He averred that following the attempt by the Bank to foreclose on his property, he sought assistance from the District Land Registrar, who together with the County Surveyor invited parties including the area Chief on the ground to confirm the demarcation of the two pieces of land, with regard to the beacons delineating the boundaries. Surveyors were then sent on the ground on the **27<sup>th</sup> March 2017**.

He further alleged that upon conducting the survey, the County Surveyor restated the original boundaries as evidenced by annexure ***PMN-3***. That following the determination, he sought to erect a proper boundary fence around his rightful parcel of land in place of the previous kayapa live hedge on his side of the boundary and that there was along the same boundary already the trench dug on the Plaintiff's/Applicant's side of the land. It was his contention that the allegations pleaded by the Plaintiff go to the issue of boundaries which issue was determined by the County Surveyor and the District Land Registrar, Kiambu and if the orders sought are granted, they will directly affect the

development on his land adding money to and increasing his cost as it were. He averred that the application amounts to an abuse of the court process, lacks merit and should be dismissed with costs.

The parties were directed to file written submissions and in compliance with the said order, the parties filed their written submissions to which this court has now carefully read and considered.

It is evident that the Plaintiff/Applicant has brought this application under **Order 40 Rule 1** which provides that:-

**Where in any suit it is proved by affidavit or otherwise—**

**(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or**

**(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders”.**

Further the application is anchored under **Section 3A** of the **Civil Procedure Act** which grants the court the power to issue any orders that are necessary for the end of justice to be met or to prevent abuse of the court process.

Since the Applicant's application is anchored under the above **Order 40** of the **Civil Procedure Rules**, it is incumbent upon the applicant to establish that his property is in danger of being **wasted, damaged or alienated** by the Defendant/Respondent. Upon such prove, then the court would proceed to issue any necessary order to prevent such **wastage, damage, alienation, sale or disposal** for the end of justice to be met. See the case of **Noormohammed Jan Mohammed...Vs...Kassam Ali Virji (1953) 20 LRK 8**, where the Court held that:-

**“To justify temporary injunction there must be evidence of immediate danger to property or sale or other disposition.”**

In the instant suit, there is no doubt that the Plaintiff/Applicant herein is the registered owner of the suit land **Kikuyu/Kikuyu Block 1/820** as is evident from the Certificate of Official Search dated **1<sup>st</sup> July 2014**. There is also no doubt that the Defendant/Respondent is the registered owner of **Kikuyu/Kikuyu Block 1/819**, which parcel of land is adjacent to the Plaintiff's suit property. The Defendant/Respondent has attached his Certificate of lease which was issued on **10<sup>th</sup> August 2015**.

The Applicant's contention is that the Defendant/Respondent without any justification has forcefully encroached and occupied part of the suit property and started to develop it.

On his part, the Defendant/Respondent has denied the said allegations and averred that the Plaintiff/Applicant charged his suit property **Kikuyu/Kikuyu Block 1/820**, including part of the Defendant's parcel of land **Kikuyu/Kikuyu Block 1/819**, and when the Bank tried to foreclose the charged land, the Defendant decided to secure his parcel of land after the County Surveyor had restated the boundary as indicated by a letter dated **12<sup>th</sup> April 2017** by **Mr. L. K. Ngetich**.

From the above background, it is clear that the Applicant is alleging that the Respondent has encroached on his parcel of land, while the Respondent alleges that it is indeed the Applicant who has encroached on his part. The above contention can only be resolved by calling evidence of the County Surveyor being the person who visited the said parcels of land and allegedly restated the boundaries. A site visit to the *locus quo* would also be important.

The Applicant having sought for injunctive orders is only entitled to either grant of the same or denial of the same at this stage. The Court is not supposed to deal with the merit of the case at this stage. See the case of **Airland Tours and Travel Ltd...Vs...National Industrial Credit Bank, Milimani HCCC No.1234 of 2003**, where the Court held that:-

**“In an Interlocutory application, the Court is not required to make any conclusive or definitive findings of facts or law, most certainly not on the basis of contradictory affidavit evidence or disputed proposition of law”.**

In determining whether to grant or not to grant the orders sought, the court will be guided by the principles set out in the case of **Giella ... Vs... Cassman Brown Co Ltd (1973)EA 358**, and later repeated in various judicial pronouncements. See the case of **Kibutiri...Vs...Kenya Shell, Nairobi High Court, Civil Case No.3398 of 1980 (1981) KLR**, where the Court held that:-

**“The conditions for granting a temporary injunction in East Africa are well known and these are: First, the Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which might not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience. See also E.A Industries ..Vs...Trufoods (1972) EA 420.”**

Firstly, the Applicant needed to establish that he has a *prima-facie* case with probability of success. It is very clear that *prima-facie* case was described in the case of **Mrao Ltd...Vs...First American Bank of Kenya Ltd & Others (2003)KLR**, to mean:-

**“A case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.**

It is the duty of the Applicant herein to establish that he has a *prima-facie* case.

The Applicant has his own parcel of land **Kikuyu/Kikuyu Block 1/820**. The Respondent too has his own parcel of land **Kikuyu/Kikuyu Block 1/819**. Each of the party herein has his own title deed and the acreage of each parcel of land is given. The Plaintiff has alleged that the Defendant/Respondent has encroached on part of his suit property and has dug a trench and is ready to put up a huge development and part of the trenches for the said construction have crossed over to the Applicant’s land.

However, the Defendant’s contention is that he is only putting up a proper boundary to his rightful parcel of land after the County Surveyor restated the original boundaries. The court cannot determine whether the Defendant has encroached on the Plaintiff’s/Applicant’s land without the advantage of the evidence from the County Surveyor and/or a visit to the *locus quo*.

For the above reasons the court cannot determine with certainty that there is indeed encroachment of the Plaintiff’s/Applicant’s suit land without the above stated evidence. The court is therefore in doubt and when the court is in doubt, the best option is to determine the matter on the balance of convenience. The balance of convenience herein would tilt in favour of leaving matter as it is or maintaining the status quo. The status quo herein mean that the court will not grant any orders since it is not clear whether the said trenches that were dug by the Defendant/Respondent are on his part of the Applicant’s land or not. See the case of **Virginia Edith Wambui...Vs....Joash Ochieng Ougo, Civil Appeal No.3 of 1987 (1987) eKLR**, where the Court of Appeal held that:-

**“The general principle which has been applied by this court is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided on a trial”.**

On whether the Applicant will suffer irreparable loss which cannot be compensated by an award of damages, the Applicant did not allege that the Defendant/Respondent is intending to dispose off or alienate the disputed portion of land. All that the Applicant is alleging is that the Defendant is preparing to put up a huge construction on the part of Applicant’s suit land. As the court stated earlier, the application is anchored under **Section 3A** which grants the court power to issue any necessary orders for end of justice to be met. If indeed the Defendant/Respondent is found to have encroached on the Plaintiff/Applicant’s land, at the end of the trial, then the court has power to issue any necessary order including an order for demolition of the said development to ensure that end of justice is met. The Applicant has therefore not established that he will suffer irreparable loss which cannot be compensated by an award of damages. **‘Irreparable loss’** was described in the case of **Paul Gitonga Wanjau...Vs...Gathuthi Tea Factory Co. Ltd & 2 Others, Nyeri HCC No.28 of 2015**, as **simply injury or harm that cannot be compensated by damages and would be continuous**.

Having now carefully considered the available evidence, the court finds that the Plaintiff/Applicant has not established the laid down principles for grant of injunctive orders. For the above reasons, the court finds the Applicant’s **Notice of Motion** application dated **15<sup>th</sup> June 2017** not merited. For the above reasons, the said application is dismissed entirely with costs to the Defendant/Respondent. Let the disputed issues be determined on merit in a full trial.

It is so ordered.

**Dated, Signed and Delivered at Thika this 12<sup>th</sup> day of September 2019.**

**L. GACHERU**

**JUDGE**

**12/9/2019**

In the presence of

M/S Waigwa holding brief Mr Gachie for Plaintiff/Applicant

M/S Kiramane holding brief for M/S Okello for Defendant/Respondent

Lucy - Court Assistant

**Court** – Ruling read in open court in the presence of the above advocates.

**L. GACHERU**

**JUDGE**

**12/9/2019**