



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

ENVIRONMENT AND LAND COURT

CASE NO. 8 OF 2018

DAUDI DADO NYABOLA.....PLAINTIFF/APPLICANT

= VERSUS =

GEORGE WAMALWA ABUYA

LAND REGISTRAR, BUSIA COUNTY

THE HON. ATTORNEY GENERAL.....DEFENDANT/RESPONDENTS

R U L I N G

1. What is before the Court for determination is the Amended Notice of Motion amended on 15th May 2018. The Applicant - **DAUDI DADO NYABOLA** - seeks injunctive orders restraining the first Defendant/Respondent, - **GEORGE WAMALWA ABUYA** - from charging, amending or tampering with the records pertaining to the land parcels known as **BUKHAYO/EBUSIBWABO/79** and **81** pending the hearing and determination of the Application as well as the main suit. The Applicant also prays for the second Defendant to survey and ascertain the acreage of both the aforementioned suit parcels and that either party be allowed to engage private surveyors to ascertain the acreage of the properties.

2. The Application is supported by the Affidavit of the Plaintiff. This is essentially a boundary dispute. The Plaintiff depones that he is the registered owner of **BUKHAYO/EBUSIBWABO/79** while the first Defendant is the registered owner of **BUKHAYO/EBUSIBWABO/81**. The properties are adjacent to each other with a common boundary. He states further that sometime in February 2018 the Defendants planted a new boundary between the suit properties consequently encroaching on the Plaintiff's land. The 1st Defendant had alleged that the acreage of his property was not in consonance with its acreage on the ground and had suspected that the Plaintiff had moved it. The Plaintiff claims that the original boundary was demarcated during adjudication and has remained unchanged for the past 20 years and that the 1st Defendant acting in concert with the 2nd Defendant is in the process of changing the records of the suit properties so as to increase the acreage of his parcel.

3. The Defendant relied on his Replying Affidavit filed on 23rd February 2018 in response to the initial Notice of Motion Application filed on 8th February 2018. He depones that he is indeed the registered owner of **BUKHAYO/EBUSIBWABO/81** measuring 8.49 ha. Sometime in 2013, he decided to partition his property and engaged a private surveyor who discovered that the size of his property on the map did not tally with its acreage on the ground. He sought redress from the Lands Office, Busia in 2017 to rectify the same. The 2nd Defendant and Government surveyor then issued boundary dispute summons to the Plaintiff and the area Chief. As per the summons, the 2nd Defendant was to visit the site on 1st August 2017 to determine and indicate the position of the boundary. The Plaintiff, 1st and 2nd Defendants, the District surveyor, the area chief and two police men availed themselves at the site on the appointed date. They had a short meeting and the survey process was undertaken using a GPRS machine. Sisal was planted to indicate the boundary position. The process was however not completed and on 26th September 2017, the Plaintiff accompanied by two other persons uprooted the sisal. Boundary summons were issued again and this time the Plaintiff declined to attend. The survey was then re-done, beacons planted and the 1st Defendant put up a barbed wire fence alongside the beacons. The 1st Defendant presumed that that was the end of the matter but later received court summons pertaining to the current suit.

4. Parties elected to canvass the Application by way of written submissions The Plaintiff's submissions were filed on 15th October 2018. He basically rehashed his version of events as per the Affidavit to his pleadings. He contended that the 1st Defendant would suffer no prejudice if the orders sought were granted. The Defendant's submissions were filed on 25th July 2019. Counsel for the Defendant prayed for the Application to be dismissed arguing that the Plaintiff's Application did not meet the conditions for granting of an interlocutory injunction set

out in the case of **Giella Vs Cassman Brown & Co. Ltd (1978)EA 358**. He would not suffer irreparable loss that cannot be compensated by way of damages nor does the case have a prima facie chance of success. It was further submitted that the Plaintiff had approached the Court with unclean hands as he was present, involved and fully aware of the survey being conducted at the 1st Defendant's behest.

5. I have read the parties pleadings, submissions and considered the applicable law. The Amended Application bears glaring legal irregularities both in substance and form. It is filed under Section 8 Rule 3 of the Civil Procedure Rules. Therefore it should be an Application seeking the Court's leave to amend the initial Application dated 8th February 2018. However, on a closer reading of the same, the Applicant has presented his initial Application with amendments and annexed one page of the Supporting Affidavit identical to the one attached to the first Application without the *jurat* or attestation section. In effect, the Affidavit is an unsworn statement and the Amended Notice of Motion was filed without the Court's leave. The Court is cognisant of the fact that the Plaintiff is acting in person and does not have the benefit of the expertise of legal counsel. However, the irregularities go to the root of the Application which is hopelessly defective and violates the provisions of Order 8 Rule 3 of the Civil Procedure Rules as well as section 5 of the Oaths and Statutory Declarations Act.

6. Even if the Court were to overlook the glaring technical irregularities in the Application, the substance of the same is still in question. The Plaintiff seeks injunctive orders and must satisfy the essentials set in the celebrated case of **Giella Vs Cassman Brown [supra]** where Spry JA held thus:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an 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 would 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.”

7. The Plaintiff seeks injunctive orders against the Defendant from amending the official records of the suit properties to influence the positioning of the boundaries in effect altering their acreage. He however has not availed anything to show that the same is in the offing. It is trite law that he who alleges must prove. The 1st Defendant on the other hand has sought the assistance of the Lands Registrar whose mandate it is to fix boundaries in conjunction with the Government Surveyor. Sections 18(2) and 19 of the Land Registration Act enjoins the parties to first seek redress from the aforementioned authorities on boundary claims before proceeding to Court. The Plaintiff's issue seems to be that he was not involved in the exercise. But he is shown to have deliberately kept away from the exercise. He had been invited but refused to attend. He now wants the exercise to be done on his own terms. I find it difficult to agree with the Plaintiff. I opine that the first condition of a prima facie case with a probability of success has not been met.

8. The second requirement is that the Plaintiff will suffer irreparable harm that cannot be compensated by way of damages. The Plaintiff has not demonstrated how he shall so suffer if the orders sought are not granted. He has not stated if there is any impending threat of dispossession of a portion of his property in any way. The first two conditions have not been met. The balance of convenience is only resorted to if the court is in doubt regarding the position of the first two requirements. There are no such doubts in this case and the balance of convenience will therefore not be considered.

9. The upshot of the foregoing is that the Notice of Motion Application Amended on 15th May 2018 is hereby dismissed. Costs in the cause.

Dated, signed and delivered at Busia this 12th day of September, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff/Applicant: Present

1st Defendant/Respondent: Absent

2nd Defendant/Respondent: Absent

3rd Defendant/Respondent: Absent

Counsel of the Defendant/Respondents: Present

CA: Nelson Odame