



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO.475 OF 2018

DR. JOHN NDUBA.....PLAINTIFF

=VERSUS=

DIRECTOR OF SURVEY.....1ST DEFENDANT

EDWARD ELIJAH MWENDA.....2ND DEFENDANT

RULING

1. This is the notice of motion dated 6th November 2018 brought under order 40 rules 1, 2, 3, order 51 rule of the Civil Procedure Rules 2010, section 16(1) and 18, 19 and 21 of the Land Registration Act 2012, Section 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law.

2. It seeks orders :-

(1) Spent.

(2) Spent.

(3) That honourble court be pleased to grant a temporary injunction restraining, the 2nd defendant from interfering with the plaintiff's boundary and stop destroying the boundary fence pending the hearing and determination of this application and the main suit.

(4) That the 1st and 2nd respondents be restrained by way of injunction from harassing the applicant pending the full hearing and determination of this case.

(5) That the honorable court be pleased to make such further orders as may be necessary for the ends of justice.

(6) That the costs of this application be in the cause.

3. The grounds are on the face of the application and are set out in paragraphs (1) to (5).

4. The application is supported by the affidavit of John Nduba, the plaintiff/applicant herein sworn on the 6th November 2018.

5. The application is opposed there is a replying affidavit sworn by Edward Elijah Mwenda the 2nd defendant/respondent sworn on the 27th November 2018.

6. On the 27th March 2019 the court directed that the application be canvassed by way of written submissions.

7. I have considered the notice of motion and the affidavit in support. I have also considered the replying, the written submissions made on behalf of the parties and the authorities cited. The issue for determination are:-

(i) Whether the plaintiffs/applicants' application meets the threshold for grant of temporary injunctions.

(ii) Who should bear costs?

8. The principles were set down in the precedent setting case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358**. In the case of **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**, the Court of Appeal stated what amounts to a prima facie case.

9. The plaintiff/applicant and the 2nd defendant/respondent share a common boundary. Section 18 (1) of the Land Registration Act provides:-

“Except, where in accordance with section 20, its is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel”.

Sub section 2 provides that:-

“The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this Section”.

10. The Chief Land Registrar directed the parties to the Director of Surveys, since the boundary in question was a fixed boundary. In my view the 1st defendant/respondent was the officer mandated to solve the dispute. In any case it is the 2nd defendant/respondent’s case that the re-establishment of the beacons has already been conducted and a report prepared.

11. I find that the plaintiff/applicant has failed to establish a prima facie case with a probability of success at the trial. The plaintiff/applicant was invited to participate in the exercise but he declined.

12. All in all I find no merit in this application and the same is dismissed. The costs do abide the outcome of the main suit.

It is so ordered.

Dated, signed and delivered in Nairobi on this 17th day of October 2019.

.....

L. KOMINGOI

JUDGE

In the presence of:-

Ms kaeyua for Ms Muendo for the Plaintiff

Mr. Gitonga for the Defendant

Kajuju - Court Assistant