



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC 294 OF 2017

DAVE MUNYALO MUSYOKAPLAINTIFF/RESPONDENT

VERSUS

JOHN PETER MACHARIADEFENDANT /RESPONDENT

RULING

1. There is before me a notice of motion application expressed to be brought under order 40 Rule (a) and 2 order 51 rule (i) of the Civil Procedure Rules, Section 1A, 1B 3(A) of the Civil Procedure Act and all enabling provisions of the law for orders that:-

4) That the defendant himself, his agents, servants or however be restrained from entering, trespassing damaging, interfering, preventing and/or denying the plaintiff/applicant access and construction of a perimeter wall and or carrying out any work however in the suit property pending hearing and determination of the suit.

5) That cost of this application be provided for. Prayer 1, 2 and 3 are spent. The application is predicated on grounds;

6)

i. The plaintiff applicant is the registered owner of land parcel plot no. 1257 Kikumbulyu/Mikuyuni adjudication section the suit premises herein.

ii. The defendant/respondent is the owner of the land parcel No. 363 Kikumbulyu/Mikuyuni adjudication section which land parcel border the suit premises.

iii. The defendant/Respondent has unlawfully, forcibly and illegally demolished and damaged the plaintiff's perimeter wall constructed on the border of the two plots and the defendant/Respondent has forcibly prevented and denied the plaintiff construction of the said perimeter wall.

iv. The plaintiff /Respondent has put up a permanent residential home and the defendant/Respondent acts of preventing from fencing from fencing the suit premises by a perimeter wall is exposing the family to danger.

2. It is also supported by the supporting and further affidavits of **Dave Munyao Musyoka**, the applicant herein sworn on the **21st June, 2017** and **19th October, 2017**. It is opposed by the Respondent vide his replying affidavit sworn on the **14th July, 2017** and filed in court on the **19th July, 2017**.

3. On the **12th July, 2017** the court directed that the application be disposed off by way of written submissions. Both parties have filed their submissions.

4. The applicant has deposed in **paragraphs 2 and 3** that he is the registered owner of land **parcel number 1257 Kikumbulyu/Mukuyuni** adjudication section situated in **Kibwezi**. He goes on to state that his land parcels borders land parcel **number 363** owned by the defendant. In **paragraph 7**, the applicant has deposed that the Respondent and his agents destroyed the fence the applicant started to construct on the boundary between parcel, **number 1257 and 363**.

5. On the other hand the Respondent has deposed in **paragraph 5** of his replying affidavit that he is not aware of the existence of the applicant's alleged plot **number 1257**. He goes on to depose in **paragraph 6** of his affidavits that it is the applicant who has encroached into his plot. And in **paragraph 8**, the Respondent has deposed that the dispute herein involves a boundary an issue the applicant concurs with in **paragraph 6** of his further affidavit but is quick to point out that the dispute is between **plots 1255 and 363** and not plots **363 and 366** as the Respondent's contends.

6. The Applicant's counsel in his submissions has urged the court to grant the injunction sought since the applicant has established prima facie case with a probability of success. The counsel went on to submit that this is because the beacon marking the boundaries are clear from the surveyor's report marked as *DMK1* in **paragraph 9** of the applicant's affidavit.

7. He went on to submit that the applicant having established ownership of the suit premises, the balance of convenience tilts in his favour. The counsel is silent on the issue of whether or not the applicant will suffer irreparable injury save to say that according to him, the applicant was satisfied all the principles in *Giella Vs Cassman Browns & Co. Ltd [1973] EA 358.* The counsel also referred the court to the case of *Ahmed Ibrahim Suleiman and another Vs Noor Khamisi Surus [213 eKLR]* that quoted the court of Appeal decision in *JAJ Super Power Cash Carry Ltd Vs Nairobi City Council and 20 others in Civil appeal no. 111 of 2002* where the court of Appeal stated,

“This court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken because he can pay for court”.

8. On his part, the Respondent's counsel's submissions were that the applicant has not satisfied the conditions for the grant of the orders sought and, therefore, the application should be dismissed with costs.

9. Having read the application together with supporting and further affidavits as well as the replying affidavit and the submissions filed, I am in agreement with the counsel on record that in order for the orders sought by the Applicant to be granted, he must satisfy the three principles set out in *Giella vs Cassman Brown's Case.* I need not repeat those principles herein. As regards the principle of whether or not the Applicant has shown a prima facie case with a probability of success, I have no doubt that the Applicant is likely the owner of **plot number 1257** as he claims. It is clear from the sale agreement that the applicant has annexed as *DMK2* to his supporting affidavit, the exact size of the plot that he purchased from one Raphael **Yumbya Muia** is not known. This is borne out by clause 1 of the agreement which shows that **Raphael Yumbya Muia** sold to the applicant a portion of land reference number VI/366 as marked on the ground. No evidence was placed before me of that which was marked on the ground apart from the surveyor's report which in my view would be useful during the hearing of the substantive suit. I say so because the area map was not availed to show the plots **numbers 1257** and 363 on the ground. In the circumstances therefore, my finding is that the applicant has not satisfied the above principle.

10. On the issue of whether or not the applicant will suffer irreparable injury, my finding is that no evidence whatsoever was laid before me.

11. Regarding the balance of convenience the same tilts in favour of the Respondent based on the reasons that I have enumerated in grounds one and two respectively. It was upon the applicant to satisfy the three principles sequentially. He has failed to do so.

In the circumstances, I dismiss the application with costs to the respondent.

Signed, Dated and Delivered this 23rd day of **February, 2018**

MBOGO C.G

JUDGE

In the presence of:-

Mr. Kyalo holding brief for Mr. Onyancha for the Defendant/Respondent

Mr. Muia for the Plaintiff/Applicant Absent

Mr. Kwemboi – Court Assistant.

MBOGO C.G

JUDGE