



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**CASE No. 307 OF 2017**

**JOSEPH KIAMBA MAILU.....PLAINTIFF**

**VERSUS**

**TERESIA WANJIKU KABOGO.....DEFENDANT**

**RULING**

1. The plaintiff filed this suit on 20<sup>th</sup> July 2017 seeking judgment for the following:

***a. A permanent injunction be issued restraining the Defendants either by themselves, their servant and/or agents from evicting, trespassing alienating, disposing off carrying out construction and/or in any way dealing with parcel of land known as LR Nakuru Municipality Block 25/1117.***

***b. Cost of this suit.***

2. Together with the plaint, the plaintiff filed Notice of Motion dated 20<sup>th</sup> July 2017 seeking the following prayers:

**a. Spent.**

**b. Spent.**

**c. That pending the hearing and determination of this suit, the honourable court be pleased to issue a temporary injunction restraining the respondent herein either by herself, her agents, servants and/or employees from entering into, disposing off, carrying out construction and/or in any other way dealing with parcel of land known as LR Nakuru Municipality Block 25/1117.**

**d. That the honourable court be pleased to compel and/or order the Nakuru County Surveyor to pick, establish and define boundaries on all that parcel of land known as LR Nakuru Municipality/Block 25/1117.**

**e. That the terms of the above orders be enforced by the OCS Nakuru Police Station.**

**f. That costs of this application be provided for.**

3. The application is supported by an affidavit sworn by the plaintiff. He deposed that he is an administrator of the estate of his brother Cleophas Maundu Mailu (deceased) who was the owner of **Nakuru Municipality/Block 25/1117** (the suit property) and that upon distribution of the estate of the deceased he acquired the suit property. He annexed a copy of certificate of confirmation of grant. The deceased was a member of Nakuru Teachers Housing Cooperative Society and he acquired the suit property through balloting. He further deposed that some time back a boundary dispute arose among the land owners and the municipal surveyor established the boundaries and beacons but the defendant was not satisfied and he (the defendant) encroached on the suit property by moving the beacons. That the defendant has erected a permanent perimeter wall and has commenced construction of a permanent structure on the land. He annexed a photograph.

4. The application is opposed by the defendant through a replying affidavit sworn on 29<sup>th</sup> August 2017. She deposed that he is the registered owner of the parcel of land known as **Nakuru Municipality Block 25/368** which she acquired by virtue of being a member of Nakuru Teachers Housing Cooperative Society Ltd. She annexed a copy of certificate of lease. She added that she acquired the plot by virtue of being a member of Nakuru Teachers Housing Co-operative Society Ltd wherein her membership Number was No. 1453. That the initial

allocation of plots to the genuine members of Nakuru Teachers Co-operative Society Ltd was based on an original map and allottees were settled on their individual plots after proper beaconing had been done. She annexed a copy of what she termed “the original map”. That according to the original map, what is now claimed by the plaintiff as **Nakuru Municipality Block 25/1117** was actually an undersized plot or planting space for utilities and was never meant to be a full residential plot.

5. The defendant deposed further that it was not until 1995 that it was discovered that Plot No. 1117 which was originally an undersized plot and therefore not available for allocation, had illegally and fraudulently been allocated to Dr. Cleopas Maundu now deceased who was not a member of Nakuru Teachers Housing Co-operative Society Ltd.

6. The defendant and other members complained about mismanagement of the affairs of the Cooperative including selling of undersize plots to non-members. Despite the protests, in May 1995 the defendant’s plot **Number Nakuru Municipality Block 25/368** and another plot being **Nakuru Municipality Block 25 /367** were demarcated afresh and the boundary of the defendant’s plot moved inwards towards **Nakuru Municipality Block 25 /367** and fresh boundaries for **Nakuru Municipality Block 25/367** reflecting now the reduced sizes for plots **Nakuru Municipality Block 25/368** and **367** were set. She annexed a copy of a letter for resurvey dated 9<sup>th</sup> May 1995.

7. According to the defendant, the real problem on the ground is that the total acreage for plots **Nakuru Municipality Block 25/368, 367** and **1117** as per the documents of ownership do not correspond with the actual size or area on the ground. She states that it is imperative that a joint survey be conducted on plot numbers **367, 368** and **1117** to reconfirm the sizes of the said plots and their boundaries.

8. The application was argued by way of written submissions. The plaintiff filed his submissions on 24<sup>th</sup> October 2017 while the defendant filed hers on 10<sup>th</sup> November 2017. I have considered the application, affidavits filed, the submissions and the authorities cited.

9. In an application for an interlocutory injunction, the applicant must establish a prima facie case with a probability of success. Even where a prima facie case is established, an injunction ought not to issue if damages can adequately compensate the applicant. Finally, if the court is in doubt as to the answers to the above two tests then the court should determine the matter on a balance of convenience. These principles were enunciated in the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**. Recently in **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**, the Court of Appeal further elaborated the test by stating that all the three **Giella** conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially and that if *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration.

10. Each of the parties herein is a registered owner of their own plot. The plots are adjoining each other. The dispute really is one concerning the correct location of the beacons. I do not think that granting an injunction as sought will assist the situation. Instead, a survey as sought at prayer (d) of the application, is a more pragmatic approach. Indeed, the defendant is also in favour of this approach.

11. In the circumstances, I order that the District Surveyor Nakuru County and Land Registrar Nakuru County to go to the ground and carry out a survey to establish the correct location of the beacons in respect of the parcel of land known as LR Nakuru Municipality/Block 25/1117 and to prepare a report. The report to be filed in this court within 60 (sixty) days from the date of delivery of this ruling. Parties to equally share costs of the survey.

12. Costs in the cause.

**Dated, signed and delivered in open court at Nakuru this 23<sup>rd</sup> day of February 2018.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Ms. Wachira holding brief for Mrs. Ndeda for the plaintiff

Ms. Wairimu holding brief for Mr. Ndubi for the defendant

Court Assistants: Gichaba and Lotkomoi