



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

LAND & ENVIRONMENTAL DIVISION

ELC NO. 107 OF 2017

VICTOR WAKUMILE NDURURUPLAINTIFF

VERSUS

SIMON OKWARA MAUDA.....DEFENDANT

RULING

1. The application before me is a Notice of Motion dated 17/5/2017 filed on 23/5/2017 contemporaneously with a suit of even date. It is brought under Sections 3 & 3A of Civil Procedure Act (cap 21), Order 40 Rules 1, 2, 3 and Order 51 rule of Civil Procedure Rules. The Applicant, who is Plaintiff in the suit, prays for various orders against the Respondent, who is Defendant, whom he accuses of trespassing on land parcel No. BUKHAYO/LUPIDA/1842 and interfering with the boundary.

2. The application was first entertained by the court *ex parte* on 23/5/2017. What was for consideration at that stage were prayers 1 and 2. The application has five(5) prayers and what is for consideration at this stage are prayers 3, 4, and 5, which are as follows:

Prayer 3: That the Defendant by himself, agents, or assignees be

restrained from interfering, cultivating, fencing, and entering land parcel No. BUKHAYO/LUPIDA/1842 pending hearing and determination of the main suit.

Prayer 4: That this honourable court do order the Busia County

Surveyor to resurvey and determine the boundaries of land parcel No. BUKHAYO/LUPIDA/1842.

Prayer 5: Costs be in the cause.

3. The application is anchored on the grounds on the face of it which state, *inter alia*, that the Applicant is the registered owner of land parcel No. BUKHAYO/LUPIDA/1842 (“disputed land” hereafter); that the Respondent has encroached and illegally moved boundaries; and that the Applicant has irreparably suffered in a manner not compensable by an award of damages.

4. The supporting affidavit that accompanies the application deposes to the Applicant having bought the disputed land from the Respondent sometime in 2010. The land is said to have been hived off from another parcel of similar identity or description – stated to be BUKHAYO/LUPIDA/1842 (**But most likely an error as the mutation form availed and marked VWN-1 shows the land was derived from subdivision of the then land parcel BUKHAYO/LUPIDA/17**). **The Applicant said he has a title (And proceeded to avail a copy of an illegible title)** and is therefore the absolute owner of the land. The respondent is said to be making development on the disputed land. The Applicant wants the disputed land resurveyed. He also wants the Respondent evicted.

5. The Respondent made a response vide a replying affidavit dated 13/7/2017 filed here on the same date. He stated that he is the owner of land parcel No. BUKHAYO/LUPIDA/1840 for which he has a title. He said further that he sold the disputed land to one PATRICK NAMUSONGWE SAKWA in or around 2010. He did not sell to the Applicant. He said further the land is fenced off and there is no way he can encroach on it.

6. It is clear that the Respondent views the dispute as a boundary issue and this being the position he averred that his court has no jurisdiction.

7. The response of the Respondent prompted the filing of a supplementary affidavit by the Applicant on 19/9/2017. He denied knowledge of the purchaser mentioned by the Respondent. He reiterated too that the Respondent has encroached on the disputed land.

8. The application was canvassed by way of written submissions. The Applicant's submissions were filed on 3/2/2018. He submitted, *inter alia*, that his application has merits. To him, this court has jurisdiction to handle the matter. To him too, the surveyor cannot go to the disputed land unless the court issues an order directing him to do so.

9. The Respondent's submissions were filed on 8/12/2017. To the Respondent the Applicant deliberately availed an illegible title in order to mislead the court. The suit and the application were said to be incompetent. The principles for granting temporary injunctive relief spelt out in the case of **GIELA Vs CASSMAN BROWN & CO. LTD [1973] EA 358**, were said not to have been demonstrated. The court was asked to dismiss the application.

10. I have considered the application, response made, rival submissions, and the pleadings herein generally. If this matter was purely a boundary dispute, I would agree with the Respondent that this court would not have jurisdiction. Section 18(2) of the Land Registration Act, 2012, seems to bar the court from entertaining suits solely dealing with boundary disputes. That is the exclusive preserve of the Lands Office. But the Applicant herein seems to talk of occupation and/or development and is infact asking for an eviction order. This makes the matter more than a boundary dispute. It is not persuasive then to aver that the court does not have jurisdiction. Even then however, boundary dispute is very much part of the dispute and in this application itself, the Applicant is asking for a re-survey.

11. The Respondent said he sold the disputed land to one PATRICK NAMUSONGWE SAKWA. The Applicant said that this person is a stranger to him. But is he? This suit was filed on 23/5/2017. Together with the suit was also filed the Plaintiff's statement. The parties indicated in the Plaintiff's statement shows PATRICK NAMUSONGWE SAKWA as the Defendant. This name was therefore mentioned by the Applicant himself long before it was mentioned by the Respondent, the Respondent's response having come much later in July 2017. Is the Applicant being truthful then when he tells the court that this party is a stranger? The obvious answer is No. The Applicant here is being less than honest.

12. It is also clear to me that the Applicant would like a surveyor to visit the land and fix the boundary. Infact he wants beacons to be marked or placed. What this in essence means is that there is some uncertainty surrounding the position of the boundary. Injunctive relief is an equitable remedy. One requirement for orders issued in equity is certainty and effectiveness. And this is for the simple reason that equity does not act in vain. In a matter of injunctive relief, the certainty of the physical location of the entity where the order is to apply is a relevant consideration. Also relevant in this regard are the dimensions and extent of such entity. This is where the problem is in this matter. The boundaries are not yet fixed. In the circumstances, I would feel reluctant to issue an injunction.

13. But that is not all. The Respondent pointed out that the Applicant had not demonstrated that he had met the threshold spelt out in *Gielu's Case (supra)*. This is true. There is no reference at all of the principles applicable. The Applicant missed it all in the submissions. He gave the application a rather lackluster approach and missed out crucial requirements to prove it.

14. In the application there is a prayer for resurvey. It is prayer 4. This prayer was not canvassed at all in the submissions but I would grant it. And I would do so because both sides seem agreed that the boundary is a problem. I therefore grant this prayer.

15. But the prayer for restraining orders is unmerited. There was not adequate prove availed or demonstrated to warrant granting it. In sum therefore, the application herein is dismissed save for prayer 4. The Applicant is to pay costs of the application.

Dated, signed and delivered at Busia this 18th day of April, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff:

Defendant:

Counsel of Plaintiff:

Counsel of Defendant: