



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI NAIROBI

ELC CASE NO. 909 OF 2012

ALICE MUTHONI KIBUII.....1ST PLAINTIFF

MARTHA WAMBUI MBUGUA.....2ND PLAINTIFF

ELIZABETH NJERI MUGO.....3RD PLAINTIFF

JOHN IRUNGU HUMA.....4TH PLAINTIFF

=VERSUS=

ALLAN MWANGI MUIGAI.....1ST DEFENDANT

PHILLIS NJERI MUIGAI.....2ND DEFENDANT

GEORGE KIHIA MUGAI.....3RD DEFENDANT

DIRECTOR OF SURVEYS.....4TH DEFENDANT

COMMISSIONER OF LANDS.....5TH DEFENDANT

MUNICIPAL COUNCIL OF THIKA.....6TH DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 29th November 2012 in which the Plaintiffs/Applicants seek for the following orders:

- a) Spent.
- b) A temporary injunction restraining the 1st to 3rd Defendants from entering, trespassing and remaining in possession, from encroaching, undertaking developments and or any other activities on the land parcels known as Thika Municipality/Block 8/120, 121, 166, 167, 168, 169, 170 and 171 (hereinafter referred to as the “suit properties”) pending the hearing and determination of this Application and or this suit.
- c) A mandatory order that all encroachments by the 1st to 3rd Defendants on the suit properties be removed forthwith and the said order be enforced by the 6th Defendant and the Officer Commanding Thika Police Station.
- d) That the costs of this Application be provided for.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the 1st Plaintiff/Applicant, Alice Muthoni Kibuii, sworn on 29th November 2012 in which she averred that the suit properties formally comprised part of the land parcel known as Land Reference No. 4953/1709 (hereinafter referred to as the “Former Parcel”) which was surrendered to the Government of the Republic of Kenya for conversion and issuance of leases under the Registered Land Act Cap. 300 (now repealed). She further averred that she and the other Plaintiffs are the registered proprietors of the suit properties which have a common boundary with the parcel of land known as Land Reference Number 4953/2411 (hereinafter referred to as the “Adjacent Parcel”) which is owned by the 1st to 3rd Defendants. It was

her further averment that sometimes in the month of December 2002, the former proprietors of the Former Parcel engaged the services of surveyors namely Development Survey Consultants who undertook survey works on the Former Parcel and established that there was encroachment into the Former Parcel by the Adjacent Parcel by over 20 meters. She averred further that the issue was raised with the Land Registrar Thika in February 2003 but no action was taken to rectify the problem. She then stated that despite the Plaintiff's fervent effort to have the boundary dispute resolved, they have been frustrated as the 1st to 3rd Defendants are continuing with wrongful developments along the disputed boundary. She added that unless the 1st to 3rd Defendants are stopped, restrained and enjoined by orders of this court, the Plaintiffs shall continue to suffer loss of use, loss of profits and damage. On those grounds, she sought for this Application to be allowed.

The Application is contested. The 1st to 3rd Defendants filed the Replying Affidavit of Allan Mwangi Muigai sworn on 7th December 2012 in which he averred that this Application is frivolous, lacks merit and is calculated to interfere with the operations and smooth running of their established hotel called the Cravers Grill Limited which has been in operation on the Adjacent Parcel. He further averred that the Plaintiffs/Applicants have not demonstrated that the suit properties have a common boundary with the Adjacent Parcel as alleged in their pleadings or at all. He further stated that the Plaintiffs/Applicants have also not annexed any survey certificate to prove that the 1st to 3rd Defendants have encroached into the suit properties by 20 meters or at all. He denied that the Former Parcel shared a common boundary with the Adjacent Parcel. He further pointed out that the Adjacent Parcel was registered on 8th November 2000 which is many years before the suit properties which were only recently registered. He added that by the time the suit properties were registered, they had already put up a perimeter wall around the Adjacent Parcel and the established hotel therein. He further averred that the boundary of the Adjacent Parcel to the west does not border the suit properties but instead boards a sewerage line and there is no way the suit properties could be on the sewerage line. He further indicated that the Adjacent Parcel was purchased from one Patrick Karanja Ngugi who held the prior title and that annexed to the prior title was a deed plan which was showing clearly the dimensions, abutments and boundaries thereof and delineated on the said plan and more particularly Land Survey plan number 180998 deposited in the survey records office at Nairobi. He emphasized that at the point of conveyancing, all enquiries as to boundaries, survey plan and official search in the land registry, consents to transfer, land rents, rates from the local authority and stamp duty were duly and professionally complied with and finally a new title deed was issued to them. He annexed, inter alia, a copy of the Certificate of Title of the Adjacent Parcel.

Further to this, the 1st to 3rd Defendants filed their Supplementary Affidavit sworn by Allan Mwangi Muigai on 27th March 2013 under cover of which he annexed a copy of the current beacon certificate and approved survey map of the Adjacent Parcel including various photographs of the hotel in the Adjacent Parcel.

In further opposition to this Application, the 6th Defendant/Respondent filed the Replying Affidavit of its Town Clerk, John M. Muite, sworn on 10th January 2013 in which he averred that the 6th Defendant has not played any role to rob the Plaintiffs of their due share of land and has not encroached into the suit properties. He added that the 6th Defendant has not frustrated any effort to correct any anomaly if any and sought for this Application to be dismissed with costs.

Both the Plaintiffs and the Defendants filed their respective written submissions.

The issues that this court is called upon to determine in this Application are whether or not to grant the order of temporary injunction and mandatory injunction as requested by the Plaintiffs. We shall start with the temporary injunction. In deciding whether or not to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the celebrated case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“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 be normally 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.”

Have the Plaintiffs/Applicants made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

Do the Plaintiffs/Applicants have a ‘genuine and arguable case’ and therefore a prima facie case? Before I can go any further to set out my deductions herein, I must mention to the parties that my findings herein are not conclusive and must await the full trial of this suit. This position is supported by the decision in **Airland Tours & Travels Ltd versus National Industrial Credit Bank Milimani High Court Civil Case No. 1234 of 2002** where the court held as follows:

“In an interlocutory application, the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed provisions of the law.”

In this case, the Plaintiffs/Applicants allege that the 1st to 3rd Defendants who own the Adjacent Parcel have encroached into the suit properties to the extent of 20 metres on the purported common boundary shared by the parcels. However, the court has looked at the documents that the Plaintiffs have filed in court to ascertain which is this common boundary that is shared between the suit properties and the Adjacent Parcel. A copy of the title deed for the Adjacent Parcel which the Plaintiffs themselves annexed and which is the same title deed the 1st to 3rd Defendants annexed contains Deed Plan No. 180988 which shows that the Adjacent Parcel only shares common boundaries with Land Reference Numbers 4953/2412, 2413 and 2016. The suit properties are nowhere to be seen on this Deed Plan. It is therefore not clear which common boundary the Plaintiffs are alluding to. That being the position, this court makes a preliminary finding that there is no common boundary shared between the suit properties and the Adjacent Parcel. This being the case, this court finds that the

Plaintiffs/Applicants have not satisfied the court that they have a prima facie case with a probability of success at the main trial.

Since the Plaintiffs/Applicants have failed to prove the first ground in the grounds set down in the celebrated case of *Giella versus Cassman Brown*, this Honourable Court need not venture into the other grounds. This position was upheld in the Court of Appeal case of **Kenya Commercial Finance Co. Ltd versus Afraha Education Society (2001) 1 EA 86** as follows:

*“The sequence of granting an interlocutory injunction is firstly that an applicant must show a prima facie case with a probability of success if this discretionary remedy will inure in his favour. Secondly, that such an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury; and thirdly where the court is in doubt it will decide the application on a balance of convenience. See *Giella vs. Cassman Brown and Co. Ltd 1973 EA at page 360 Letter E*. These conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed.”*

Also, in the case of *Nguruman Ltd versus Jan Bonde Nielsen (2014) eKLR*, the Court of Appeal had this to say:

“If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.”

The prayer for a mandatory injunction is also declined on the basis of the reasoning given above. In light of the foregoing, I hereby dismiss this Application with costs to the 1st to 3rd Defendants.

DATED AND SIGNED AT NAIROBI BY LADY JUSTICE MARY M. GITUMBI THIS 19TH DAY OF JUNE 2018

MARY M. GITUMBI

JUDGE

DELIVERED BY HON. JUSTICE BERNARD EBOSO ON THIS 21ST DAY OF JUNE 2018.

BERNARD EBOSO

JUDGE