



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC CASE NO. 79 OF 2007

MUTUNGA MUTHIKE MUSYIMI.....PLAINTIFF

VERSUS

JONES MUTUA MUTHIKE.....DEFENDANT

RULING

1. In the Complaint dated 28th September, 2007, the Applicant is seeking for declaratory and eviction reliefs against the Defendant in respect of parcel No.3713 Nzeveni Adjudication Section (*hereinafter referred to as suit land*).
2. The suit was filed together with the Chamber Summons dated 28th September, 2007 seeking interim injunction which was granted pending interpartes hearing of the Application.
3. Those orders lapsed and the Applicant filed another Application by way of a Motion on 23rd January, 2013. In the said Motion, the Applicant is seeking for interim orders to stop trespass into the suit land against the Defendant pending the hearing of the suit.
4. The Application is supported by the grounds on the face of the Motion and the Affidavit sworn by the Applicant on 22nd January, 2013 and a Further Affidavit sworn on 11th February, 2015.
5. The Applicant deponed that on 13th December, 2012, the Respondent with others tied him with ropes and took from him Kshs.4,120 and that they unlawfully moved the boundary of his land for about 100 metres effectively excising a portion thereof.
6. By then, the suit herein was pending in court. The Plaintiff deponed that the Respondent is cultivating the said appropriated portion of his land.
7. The Respondent opposed the Motion and swore an Affidavit on 8th February, 2013. He deponed that the Motion is bad in law as it violates Order 51 Rule 1 of the Civil Procedure Rules and that it is intended to frustrate the hearing of the instant suit; that a similar Application was lodged by the Applicant; that the alleged encroachment is not true as it was undertaken by both parties and clan members on 13th December, 2012 and that the Applicant signed the minutes to that effect.
8. The parties agreed to canvass the Motion by way of written submissions which they filed and exchanged.
9. I have gone through the pleadings, affidavits and the parties' submissions.

10. Order 51 Rule (1) of the Civil Procedure Rules 2010, prescribes that all Application should be by way of Motion. The instant Application is by of a Motion. The Application is thus competent. In any event, the want of form cannot defeat an Application in light of the provision of Article 159(2) d of the Constitution, and Section 13(a) of Environment and Land Court Act.

11. The Applicant submitted that he has met the threshold for the grant of orders sought in terms of ***Giella Vs Cassman Brown (1973) E.A 358*** case. He deponed that he is the owner of the expropriated portion of land and that he has established a *prima facie* case.

12. However, the Respondent demonstrated with minutes that the disputed portion of land is his as established by a boundary fixed by the clan and vide minutes signed by both parties. The essence of the aforesaid is that the minutes which the Applicant acknowledges, although he claims to have been coerced to sign, will be interrogated during the hearing. At this stage the court finds that it is doubtful as to whether the Plaintiff owns the disputed portion of land and therefore a *prima facie* case has not been demonstrated. The court cannot consider the second or third limb of the principles for the grant of an interim injunction in view of the failure to establish the first limb.

13. However, in view of the raging dispute on the ground, it is prudent for the court to order for *status quo* to be maintained pending the hearing and determination of the case. In the circumstances, I make the following order:

a) The prevailing status quo to be maintained until the suit is determined.

b) Costs to be in the cause.

DATED AND DELIVERED AT MACHAKOS THIS 10TH DAY OF MARCH, 2017.

OSCAR A. ANGOTE

JUDGE