



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 85 OF 2015

JOHN AGUILINDA ARADI.....PLAINTIFF

VERSUS

FESTO WAKHUNGU ZEPHANIA..... DEFENDANT

R U L I N G

1. The plaintiff filed an application dated 4th October, 2016 seeking orders of injunction, first to restrain the defendant/respondent from selling, subdividing and/or in any other way interfering with Land Parcel Numbers **Kitale Municipality Block 17 (Bidii) 334 and 335** (formerly **Kitale Municipality Block 17 (Bidii) 20** pending the hearing of the suit and secondly, that an injunction be issued restraining the defendant/respondent from trespassing on or in any other way interfering with Land Parcel No. **Kitale Municipality Block 17 (Bidii) 21 and 230** pending the hearing and determination of this suit.
2. The application has several grounds at its foot on which it is based. In his sworn affidavit the applicant states the court made an order for survey to be carried out on Land Parcel Nos. **Kitale Municipality Block 17 (Bidii) 20 and 230** to establish the extent of the defendant/respondent's alleged encroachment upon Parcel No. **Kitale Municipality Block 17 (Bidii) 230**. Despite this, stated the plaintiff/applicant, the defendant rushed to subdivide and dispose of the **Parcel No. 20** and created new Parcels Nos. **334 and 335**, the dealing in which restraint orders are sought.
3. The plaintiff/applicant further states that from the surveyor's report dated 12/8/2016, it is clear that it was not possible to establish the extent of encroachment due to alleged interference with the map by the defendant/respondent who allegedly had the map amended. It is claimed that the defendant/respondent's actions are aimed at defeating the very purposes for which this suit was filed.
4. The counsel for the applicant submitted that the defence has not even been amended to reflect the new subdivisions, and any disruption of the status quo will render the plaintiff's suit nugatory, in view of the prayer for rectification of boundaries in the amended plaint dated 25/2/2016. It is noted that the amended plaint states that the defendant is occupying **5 acres of LR. No. Kitale Municipality Block 17 (Bidii) 230** and prayer (bb) seeks that he surrenders these 5 acres. Rectification of the boundary is also sought.
5. The defendant/respondent on the other hand avers that there exists a road between **Parcel Nos. 20 and 230**, that **Plot No. 20** has now been subdivided into **Plot Nos. 334 and 335**, that he is not occupying any part of **Plot No. 230**, and that the land he is occupying is strictly that comprised in **Parcel No. 20**. The defendant/respondent stated that in the **year 2010**(5 years prior to the filing of the suit) he subdivided **Plot No. 20** into parcels **Nos. 334 and 335**, but that he has not registered the mutation and his land remains as **Parcel No. 20** and it is still registered in his name. For that reason, he avers, the plaintiff/applicant, while seeking a temporary/injunction in respect of non existent **Plots Nos.334 and 335**, has not made out a prima facie case with probability of success.

6. It is also submitted on behalf of the defendant/respondent that **Plot No. 21** does not exist as the same was amalgamated with **Plot No. 224** and then subdivided into **7 plots** including **Plot No. 230** and no order can therefore be made in respect of **Plot No.21**. The defendant/respondent, it has been submitted, has treated the road between **Plot No. 20** and **Plot No. 230** as the boundary between the two plots and he has confined himself to **Plot No. 20**.

7. The question that necessarily arises is whether the applicant has attained the prerequisite threshold for obtaining an injunction against the respondent. In the case of **Giella -vs- Cassman Brown 1973 EA 358**, the court laid out the principles to be considered in application for injunctions. First, the applicant must establish a prima facie case with a probability of success, and secondly the applicant must demonstrate that damages would not be an adequate remedy. If in doubt, the court may decide the case on a balance of convenience.

8. So has the applicant established a prima facie case with a probability of success? In the case of **Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 Others [2003] KLR** the court stated as follows:-

“So what is a prima facie case? I would say that in civil cases it is a case in 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”.

9. As stated hereinbefore the amended plaint states that the defendant is occupying 5 acres being part of **LR. No. Kitale Municipality Block 17/Bidii/230**, and that he should surrender this acreage to the plaintiff. Further, rectification of boundary is sought.

10. While ruling on an application or withdrawal of an application for injunction which had been filed by the plaintiff/applicant earlier in this matter, this court addressed the nature of the plaintiff's case. It stated as follows in the Ruling dated 22/10/2015:-

4. “I have considered the application as well as the opposition thereto by the defendant/respondent's advocate. The consent which was recorded on 2/7/2015 was asking surveyors to visit Parcel Nos. Kitale Municipality Block 17 (Bidii) 230 and 20 and ascertain whether there existed an access road between the two properties. The plaintiff/applicant was clear that the report was required before the application dated 15/6/2016 could be heard.

“5. There are now new developments in that the plaintiff/applicant is doing away with the issue of pursuing the access road but now wants a surveyor sent to the ground to determine the acreages of the two parcels. I have looked at the notice of motion dated 7/10/2015 together with the proposed amendment to the plaint. The proposed amended plaint has rendered the motion of 15/6/2015 superfluous. This is because the plaintiff's claim has completely changed from that of determination of whether there is an access road in between the two plots to that of whether there is encroachment”.

11. The proposed amendment was allowed. It appears that the plaintiff not only is fighting against a road of access being established on his land; He is now also fighting against the apparent encroachment on part of that land by the defendant.

12. I therefore find that the plaintiff has established a prima facie case. The proximate cause that catalyzed the plaintiff/applicant to lodge the application for injunctive orders dated 4/10/2016 is the discovery that the **Land Parcel No. 20** had been subdivided into **Parcels Nos. 334 and 335**. It therefore follows that if the 5 acres that the plaintiff/applicant claims have been trespassed on by the defendant/respondent are said by the respondent to be part **Land Parcel No. 20**, the plaintiff/applicant may lose the 5 acres at the end of this suit, if it turns out at the determination, that he was infact entitled to the 5 acres, if the subdivisions or any of them have by then been disposed of by the defendant/respondent.

13. In this regard, I do find that there would be loss on the part of the plaintiff/applicant, of land which

may be finally be found to have rightfully belonged to the plaintiff's late father, which loss may be irreparable.

14. Lastly the balance of convenience in this matter clearly favours the issuance of an injunction in order to preserve the land subject matter of the suit. Any disposal of the same may lead to protracted proceedings which may be further hampered by the need to join other parties to the suit much to the detriment of the quintessential requirement that justice shall be done without undue delay as contained in **Article 159 (2) (b) of the Constitution**. It behoves the court, in a matter where the activities of a party threaten to protract the pending litigation and complicate it more than it already is, to restrain such a party from those activities. Any failure on the part of the court to do that may work contrary to the interests of the parties and the justice system at large.

15. In the current case, it matters not that the application for injunction was made in the year 2016, while the mutation meant to effect the subdivision of Parcel No. 20 was made in the year 2010 as submitted by the defendant/respondent. What matters is that this mutation has now come to the attention of the applicant and that he senses the threat that it poses to his claim, and that he has brought this application.

16. The respondent's submissions that the **Parcel Numbers 334 and 335** are non existent and that the orders sought are therefore not deserved is not correct. A look at the copy of the mutation shows that the Registry Index Map Amendment Fee of Kshs.510/= and the registration fee of Kshs.1100/= have been assessed and a receipt No. A 6849563 endorsed on the face of the mutation, and the mutations apparent endorsement by the Trans-Nzoia District Surveyor on 9/8/2010, are all evidence that the subdivision may not be a joke but maybe indeed registrable . This would be so if the same is submitted to the Land Registrar and registered. Besides, it is doubtful whether in survey and land registration custom, the numbers **334 and 335** will ever apply to any other parcels other than those addressed by the said mutation.

17. For the above reasons, I find that the application dated 4/10/2016 is merited. I therefore issue orders of injunction as prayed in prayers (1) and (2) of that application. The costs of this application shall be in the cause.

Dated, signed and delivered at Kitale on this 6th day of March, 2017.

MWANGI NJOROGE

JUDGE

In the presence of:

Ms. Arunga for Plaintiff/Applicant

Ms. Wanyama for Defendant/Respondent

Court Assistant - Isabellah.

MWANGI NJOROGE

JUDGE

6/03/2017