

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO. 927 OF 2016

MUKURU MUNGE..... PLAINTIFF

VERSUS

PAUL MUTISYA MUTUKU KALULU....DEFENDANT

RULING

The Plaintiff and the Defendant own business premises at Lungalunga Viwandani Nairobi. Their premises are adjacent to each other. From the material on record, it appears as if the title held by the parties in respect of their respective parcels of land are not registered as none has been mentioned or exhibited by either party. The Plaintiff brought this suit against the Defendant on 2nd August 2016 seeking an order to compel and Defendant to remove the portion of his building that had encroached onto the Plaintiff's premises and an injunction to restrain the Defendant from occupying or doing business in the premises which have encroached on the Plaintiff's land.

The Plaintiff averred that the Defendant and the Plaintiff are neighbours and that they had co-existed peacefully for several years until the year 2016 when the Defendant altered the boundaries of the parcels of land they had occupied over the years and extended his building towards the Plaintiff's premises thereby blocking the pathway leading to the Plaintiff's house.

Together with the Plaintiff, the Plaintiff filed an application by way of Notice of Motion dated 2nd August 2016 seeking a temporary injunction to restrain the Defendant from carrying out further construction or doing business in the house which he has constructed on the Plaintiff's land. The Plaintiff also sought an order that the Defendant do open up the pathway leading to the Plaintiff's premises. The application was opposed by the Defendant through affidavit and further affidavit sworn by the Defendant on 15th August, 2016 and 2nd September 2016 respectively. The Defendant denied that the structure which he had put up on the disputed premises has blocked access to the Plaintiff's house. The Defendant contended that the structure that he had put up was constructed on the basis of plans which were approved by the area chief and that it is in fact the Plaintiff who had blocked the pathway in contention by erecting an illegal structure thereon.

I have considered the Plaintiff's application and the affidavits filed in opposition thereto by the Defendant. On the material before me, I am unable to determine the issues raised by the parties. As I have mentioned at the beginning of this ruling, the parcels of land occupied by the parties are not registered. The measurements of the portions of land occupied by each of the parties are not stated and cannot be ascertained from the material on record. It is difficult in the circumstances for the court to determine the allegations of trespass made by the Plaintiff against the Defendant. I am of the view that the dispute herein should have been referred to the area chief for arbitration instead of being brought to this court. I have photograph evidence before me produced by the Plaintiff and the Defendant both said to have been taken on the disputed land. Whereas the Plaintiff has contended that the photographs show how access to his premises have been blocked, the Defendant on the other hand has contended that the photographs which he has exhibited show that the Plaintiff has access to his premises. The said photographs are not helpful in the circumstances. There is no clear picture of the location of the parties' respective houses and how they are accessed to enable the court determine whether there is blockage or not.

For the foregoing reasons, I am not satisfied that the Plaintiff has established a prima facie case with a

probability of success against the Defendant. That being my view on the matter, it is not necessary for me to consider whether the Plaintiff would suffer irreparable harm unless the orders sought are granted.

The upshot of the foregoing is that the Notice of Motion dated 2nd August 2016 is not for granting. The same is accordingly dismissed. The costs thereof shall be in the cause.

Delivered and signed at Nairobi this 28th day of April, 2017

S. OKONG'O

JUDGE

In the presence of

Present in person Plaintiff

Mr. Wambua h/b for Musyoki for the Defendant

Kajuju Court Assistant