

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC NO. 10 /2017

MULI KYOVE.....PLAINTIFF

VERSUS

RUTH NZIOKA..... DEFENDANT

RULING

1. There is before me a notice of motion application expressed to be brought under order **40 Rules 1,2,3,4** and **10**, orders **50 Rule 1** of the Civil Procedure Rules, Section **1A, 1B** and **3A** of the Civil Procedure Act Cap **2** (section) of the laws of Kenya , section **155** of the **Land Act, 2012** section **25** of the Land Registration Act **2012** and all other enabling provisions of the law for orders:-

i. That this court be pleased to grant a temporary injunction against the defendant, her servant, agent and/or whom whatsoever from entering, trespassing and encroaching on the plaintiff parcel of land which has hived from his parcel of land Kathonzweni/Thavu/997 and surveyed as part of land number Kathonzweni/Thavu/596 pending the hearing and determination of this suit.

ii. That costs of this application be provided for.

2. The application is dated **22/2/2017** and was filed in court on the **28/5/2017**. It is predicated on the grounds on its face and is supported by the affidavit of **Muli Kyove**, the Applicant herein, sworn on the **22/2/2017**. It is opposed by the Respondent vide her replying affidavit dated **10/3/2017** and filed in court on **30/3/2017**.

3. On **5/4/2017** both parties agreed to dispose off this application by way of written submissions. Both parties have filed their submissions and hence thus ruling.

4. The Applicant in paragraph **2** of his supporting affidavit has deponed that he purchased a parcel of land from **Nzioka Lonzi** who is deceased on **21/12/1967**. He further deponed that he paid the full purchase price and was shown the boundary where he proceeded to plant sisal feature. That during demarcation, he was away seeking treatment when the late **Nzioka Lonzi** took to advantage of his absence to reduce the size of the parcel of land that the Applicant had purchased from him. That he could not be able to complain or object to the exercise due to his illness. The Respondent in paragraph **2** of her replying affidavit states that the Applicant is her immediate neighbour and has his own parcel of land registered in his name. That, all along since **1965**, he has been living on the said parcel of land with no complaint of impropriety and or encroachment arising thereof from either of them or the other neighbours. She has further deponed in **paragraph 5** of her replying affidavit that the applicant never raised the issue of encroachment during her husband's life time.

5. In his submissions the Applicant urged the court to grant the prayers sought while the Respondent's counsel correctly submitted that the Applicant must satisfy the three principles enunciated in the case of **Giella Vs Cassman Brown &Co. [1973] EA358** before the order of injunction can be granted. On whether the Applicant has established a prima facie case with probability of success, the counsel submitted that the Applicant has come to court **50 years** instead of six hence making the suit incompetent. On whether or not the applicant will suffer irreparable harm that cannot be compensated by way of damages of the order is not granted, the counsel submitted that the Respondent has lived on the suit land for over **50 years**. And finally, on the balance of convenience if the court is in doubt, the counsel asked the court to look at what is convenient namely the fact that the Respondent has lived in the suit premises for over **50 years**.

6. Having read to the application and the supporting affidavit as well as the replying affidavit and the submissions filed, my holding is as follows;

i. Firstly, the Applicant has not satisfied this court that he has a prima facie case with probability of success. He has not given the reasons why he is coming to court after 50 years after the alleged cause of action arose.

ii. Secondly, on the issue of whether or not he will suffer irreparable harm that cannot be compensated by way if damages of the order of injunction is not granted, the facts and the affidavit evidence clearly shows that the Respondent is in occupation of the suit premises since 1965 as she put or 1967 as the Applicant deponed in his affidavit. That being the case, he has not shown how he will suffer irreparable harm that cannot be compensated by way of damages.

iii. Regarding the third principle, I wish to state that the court is not doubt and even if it were, the balance convenience tilts in favor of the respondent because of the reasons I have given in principles 1 and 2. In a nutshell, I hold that the Applicant has not satisfied the conditions for the grant of the temporary injunction that he seeks. His applicant must fail. In the circumstance, I proceed to dismiss the application dated 22/2/2017 with costs to the respondents.

Signed, Dated and Delivered this 31st day of May, 2017

MBOGO C.G

JUDGE