



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC NO. 54 OF 2017

BONIFACE MUTETI NDUNDA.....APPLICANT

VERSUS

PAUL KINYUMU.....1ST RESPONDENT

CLYDE MULEI KINYUMU.....2ND RESPONDENT

MUNYAO KYALO..... 3RD RESPONDENT

MULI KIOKO.....4TH RESPONDENT

MUSAU NGUNDO.....5TH RESPONDENT

MUTINDA KINYUMU..... 6TH RESPONDENT

COUNTY SURVEYOR MAKUENI.....7TH RESPONDENT

THE DIRECTOR OF SURVEY.....8TH RESPONDENT

RULING

1. By his notice of motion applications expressed to be brought under **Sections 1A, 1B, 3A and 63(e)** of the Civil Procedure Act and **Order 40 Rules 1,2 and 3** of the Civil Procedure Rules the applicant prays for an order of temporary injunction to issue restraining the respondents, their authorized agents, servants or anyone claiming under them or through them from interfering in any manner with lawfully demarcated boundary between land parcel number **Makueni/Kimundi/1014** and land parcel number **Makueni/Kimondi/1018** as well as from trespassing, encroaching, excising, entering upon or in any manner interfering with the Applicant's quiet enjoyment and possession of the land parcel **Makueni/Kimundi/1014** pending the hearing and determination of this suit with costs of the application being provided for.

2. The application is dated **14th September, 2016** and was filed in court on even date. It is predicated on the grounds on its face and is supported by the affidavit of the applicant sworn on the **14th September, 2014** as well as the Applicants supplementary affidavit sworn on the **24th November, 2016** and filed in court on even date. It is opposed by the Respondents vide the replying affidavit sworn by **Clyde Mulei Kinyumu**, the second respondent herein on the **12th October, 2016** and filed in court on the **14th October, 2016**.

3. Both parties appear to have elected to dispose off the application by way of written submission even though there is no express direction by the court or a consent to that effect. Be that as it may, I will proceed to make my determination on the basis of the submissions already filed.

4. The Applicant claims to be the registered owner of land parcel number **Makuneni /Kimundi/1014**. He alleges that on **24/08/2016** officials of the **Makueni District** survey office under the supervision of the **7th Defendant/Respondent** visited land parcel number **Makueni/Kimundi/1014** and purported to point out beacons for an access road between the said land parcel number **Makueni/Kimundi/1014** and parcel number **Makueni/Kimundi/1018**. According to the Applicant there is no access road between the two land parcels. He now wants an order of temporary injunction to issue against the Respondents pending the hearing and determination of the suit herein.

5. The Applicants counsel correctly submitted that this court is not required to make any conclusive or definitive findings of facts or law and

most certainly not on the basis of contradictory affidavit evidence or disputed proposition of the law. He however went on to submit that the Applicant has satisfied the three principles laid down in **Giella Vs Cassman Brown Co. [1973] EA 358**.

6. On the principle of prima facie case with probability of success, the counsel submitted that the Respondents have purported to demarcate a road of access through his land without his consent. The counsel added that the Applicant has demonstrated that a second road of access is not necessary since he has demonstrated that there exists another road of access and that the survey that was done by the Respondents was unilateral and purely an abuse of their statutory duties. The Respondent contend that the Applicant has failed to establish a prima facie case capable of success. The Respondents' counsel submitted that the Applicant has failed to demonstrate to this court how the road of access forms part of his acreage of land. The counsel added that both parties rely on the registry map (**CMK2**) which was drawn in **September, 2002**.

7. On the issue of irreparable injury that the Applicant stands to suffer if the ordered herein are not granted, the Applicants counsel submitted that the Applicant has demonstrated from his pleadings that he will suffer irreparable injury. The counsel submitted that to allow the Respondents to demarcate the road of access will cause irreparable harm to the Applicant's development on the suit property. The counsel added that the demarcation will prejudice the Applicant since it will reduce his acreage. In reply, the Respondents' counsel submitted that the Applicant has not shown the irreparable damage that he will suffer and pointed out that the Applicant has not brought pictures or other information to show the injury that he is likely to suffer. The counsel went on to submit that instead it is the first to the **6th Respondents** who will suffer irreparably if there is no access road and pointed out that second respondents affidavit outlines the water problem facing the area.

8. On the issue of balance of convenience, the Applicants counsel that it tilts in the Applicant's favor since he has been in uninterrupted occupation of the suit land for many years where he has made considerable development. The respondent did not respond to this issue.

9. Having read the Application, the supporting and the supplementary affidavit as well as the annexure thereto and having read the replying affidavit together with the submissions filed, my finding is as follows:-

I. Let me start by saying that I am in agreement with the counsel for the Applicant and the counsel for the Respondents that the basis upon which this application is to be determined are the principles enunciated in the **Giella Vs Cassman Brown and Company limited [1973] EA 358**. On the issue of whether or not the Applicant has a prima facie case with probability of success, the applicant says that when he purchased a copy of registry map after the Respondent purported to established a road of access between his land parcel number **Makueni/Kimundi/1014** and **Makueni/Kimundi/1018**, he realized that a road had been inserted between the two parcels of land. The Applicant has not in any way alluded to there having another registry map which showed otherwise. In any case, this is an issue which will conclusively be determined during the hearing of the main suit. In my view, the applicant has not shown that he has a prima facie case with a probability of success.

II. On the issue of whether or not the Applicant will suffer irreparable injury if the order sought is not granted the Applicant says that he has made permanent developments on his parcel of land. He also says that the Agricultural activity that he carries on the said parcel of land will be interfered with. In my view, the injury, if any, that the Applicant is likely to suffer should the order sought is not granted is quantifiable. It cannot be said that the Applicant will suffer irreparable injury. The Applicant fails on this ground as well.

III. On the issue of balance of convenience and I wish to point out that this court is not in doubt, the same favours the Respondents given the reasons that I have enumerated herein above. Suffice it to say, the Applicant has failed to satisfy this court his application has merits. In the circumstance, I hereby proceed to dismiss it with costs to the Respondents. It is so ordered.

Signed, Dated and Delivered this 9th day of May, 2017

MBOGO C.G

JUDGE

Court: Ruling read aloud and dated in open court in the presence of **Mr. Mbullo** holding brief for **Mr. Mullei** for the Applicant. Mr Kwemboi Court Assistant.

MBOGO C.G

JUDGE