



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 2 OF 2011

HON. JOHNSON MUTHAMA.....PLAINTIFF

VERSUS

NICHOLAS NGOMA WAMBUA1ST DEFENDANT

MUNYOKI WAMBUA2ND DEFENDANT

MAITHYA WAMBUA3RD DEFENDANT

NDUNDA WAMBUA4TH DEFENDANT

KYENGO MAITHA5TH DEFENDANT

CHARLES MUTINDA6TH DEFENDANT

ANCIENT KIOKO7TH DEFENDANT

RULING

1. In the Notice of Motion dated 22nd July, 2014, the Plaintiff is seeking for the following orders:

a. The pending the hearing and determination of this Application there be an express order of injunction restraining the Defendants, their agents or servants from encroaching, trespassing, sub-dividing, fencing, developing, marketing, selling, alienating or in any other way dealing in the suit property L.R. No. Matungulu/Katine/271.

b. That pending the hearing and determination of this suit, there be an express order of injunction restraining the Defendants, their agents or servants from encroaching, trespassing, sub-dividing, fencing, developing, marketing, selling, alienating or in any other way dealing in the suit property.

c. That the Defendants herein be cited for contempt of court and punished by way of imprisonment for upto 6 months and fined by attachment of their personal property, and until they purge their contempt they be denied audience.

d. That all those fences erected on L.R. No. Matungulu/Katine/271 (the suit property) the Defendants be demolished and removed within seven (7) days of the order and the OCS Tala Police Station to ensure compliance with this order.

e. Costs be provided for.

2. The Application is premised on the grounds that there are consent orders of 13th January, 2011, 17th May, 2011 and 21st February, 2012 that the parties do maintain *status quo* over the suit property pending the hearing and final determination of the suit; that in disregard of those orders, the Defendants have entered and fenced off the suit property and are offering it for sale and that the orders in the Application should be issued.

3. In his Affidavit, the Plaintiff deponed that he is the registered owner of parcel of land number Matungulu/Katine/271 (*the suit land*); that in September, 2010, he found the Defendants had encroached on the land and that upon filing this suit, a consent was recorded in court directing the District Land Registrar, Machakos, to determine the actual position and boundaries of the suit property and two (2) other parcels.

4. The Plaintiff deponed that on 21st February, 2012, the court ordered that the *status quo* be maintained until final determination of the suit; that on 14th June, 2014, he noticed the Defendants placing new poles and fences on the suit land; that the Defendants were also sub-dividing the land for purposes of selling it and that the orders prayed for should be granted to protect the dignity of the court.

5. In response, the 1st Defendant swore a Replying Affidavit on his behalf and on behalf of the 2nd and 3rd Defendants, who are his brothers.

6. According to the 1st, 2nd and 3rd Defendants, the orders that were made by the court for the maintenance of *status quo* were never served on them; that they have always maintained the *status quo*; that the fencing posts freshly done and seen in the photos were a replacement of the dark posts appearing in the photographs and that those posts were knocked down by people installing internet cables along the Tala-Kangundo road.

7. According to the Defendants, those poles were erected along the original perimeter fence and that no sub-division of the suit land has been done as alleged by the Plaintiff.

8. The 1st Defendant deponed that the re-installation of the said perimeter fence was meant to safeguard the land from trespassers; that the exercise was done by him in good faith and in the best interest of all the parties and that they have been in occupation of the land since they were born.

9. The 5th Defendant swore an Affidavit on behalf of the 6th and 7th Defendants.

10. According to the 5th Defendant, the 1st Defendant restored the perimeter fence around the two parcels of land in issue, that is Matungulu/Katine/465 and Matungulu/Katine/271; that he did this in the best interest of everyone, including the Plaintiff and that the restored perimeter fence has since been removed after the Plaintiff complained.

11. The 5th Defendant deponed that although they have never been served with the order of the court, they have never disrupted the *status quo* obtaining on the ground and that they have put up permanent buildings on the land.

12. The Plaintiff filed a Further Affidavit in which he deponed that the orders of the court were granted with the full knowledge and consent of all the parties and in the presence of their advocates; that the suit land did not have a fence prior to the fencing that was undertaken in June, 2014 and that the allegation that the 1st Defendant was replacing an old or weak fence in the interest of all the parties is false and misleading.

13. The Plaintiff finally deponed that there is no residence or business establishment on a parcel of land known as Matungulu/Katine/271 except for an incomplete shop at one corner whose construction was

stopped by this court.

14. When the Application came up for hearing on 18th December, 2015, the parties agreed to dispose the Application by way of written submissions which were filed on 5th March, 2015 and 30th March, 2015, by the Plaintiff's and the Defendants' advocates respectively. However, the Defendants' advocate applied to have the Defendants testify orally, which Application was allowed by the court.

15. In his testimony, the 1st Defendant informed the court that the 2nd and 3rd Defendants are his brothers; that there are three parcels of land abutting each other; that Plot No. 465 is registered in his father's name while plot number 271 is registered in favour of the Plaintiff and that plot number 466 was sold to a third party by his father.

16. The 1st Defendant informed the court that when the old fence fell down due to rains, he restored the fence to ward off animals.

17. The 1st Defendant denied that he sub-divided the suit land. The 1st Defendant also denied that he was served with the orders of the court.

18. In cross-examination, DW1 denied that he is the one who removed the euphorbia tree indicated at page 5 of the Valuation report of 29th August, 2011.

19. On his part, the 5th Respondent, DW1, informed the court that the 1st Defendant just returned the barbed wire that had fallen; that the fallen fence went around the whole land and that he replaced the old poles which had been stolen.

20. According to DW2, the fence that was put up by the 1st Defendant was to prevent cattle from grazing on the land and that he uprooted the fence that the 1st Defendant had put up when the current Application was filed.

21. According to DW2, plot 271 is enclosed in plot 465 which was fenced and that the fence was meant to secure both plots; that he purchased a portion of plot number 465 and that he has lived on the land he purchased since 1995.

22. The Plaintiff's advocate submitted at length as to why the orders for injunction should issue.

23. Counsel submitted that the Plaintiff purchased the suit land in 1994 and obtained a Title Deed; that a Title Deed is to be taken by all courts as *prima facie* evidence that the person named therein is the indefeasible owner and that the Defendants took advantage of the fact that the Plaintiff does not live on the land to encroach on the suit land.

24. On the issue of contempt, the Plaintiff's advocate submitted that the orders to maintain the *status quo* was given by the consent of the parties; that knowledge of the order is higher than service of the order and that the Defendants have undertaken fencing, sub-dividing and marketing of the suit land in blatant disobedience of an order of the court.

25. The Defendants' advocate submitted that the Defendants were never served with an order for maintenance of the *status quo* pending the hearing and determination of the suit; that the 1st Defendant only restored the perimeter wooden and barbed wire fence that existed because it had been destroyed by people and cattle and that the said fence was old and rotten.

26. According to counsel, the 1st Defendant only sought to maintain the current state of affairs; that he did not construct a new fence; that the fresh poles were all erected against the falling small poles and that the Plaintiff has not suffered any prejudice for the restoration of a perimeter fence.

27. Counsel submitted that if there was any contempt of court, the same has been purged by the removal of the posts; that the current Application is only meant to harass, vex and punish the Defendants and that plot number Matungulu/Katine/271 is right inside plot numbers 465 and 466.

28. The Application by the Plaintiff is seeking for both an injunctive order and for an order committing the Defendants to jail for being in contempt of court.

29. Vide a Plaint dated 6th January, 2011, the Plaintiff sought for a permanent injunction to restrain the Defendants from trespassing, encroaching, alienating or in any other way from interfering with a parcel of land known as Matungulu/Katine/271.

30. The Plaintiff has further sought for an order directed at the Defendants to attend to the District Land Surveyor, Machakos, for purposes of pointing out the beacons of the suit land.

31. Simultaneously with the Plaint, the Plaintiff filed an Application in which he sought for an interim order of injunction in respect to the suit property.

32. The record shows that on 13th January, 2011, the parties herein, through their respective advocates, entered into a consent which read as follows:

“By consent:-

1) District Land Registrar Machakos and the District Land Surveyor Machakos to undertake the exercise of determining the actual position and boundaries of the following parcels of land:-

a) Title No. Matungulu/Katine/271

b) Title No. Matungulu/Katine/465

c) Title No. Matungulu/Katine/466

2) ...

3) ...

4) Status quo to be maintained

5) ...”

33. It would appear that the above consent was never implemented. On 17th May, 2011, a second consent was entered into whereby the parties agreed to have the Institute of Surveyors of Kenya to appoint a licenced Surveyor to come up with a report in compliance with the order of 13th January, 2011.

34. When the matter came up for mention on 27th October, 2011, the court was informed that indeed, the Surveyor had filed his report.

35. On the same day, the advocates allowed by consent the Applicant’s Application dated 21st July, 2011. One of the orders that was allowed by the consent of the parties reads as follows:

“That pending hearing and determination of this suit the status quo obtaining on the ground regarding Matungulu/Katine/465 and 271 be maintained.”

36. On 21st February, 2012, a further consent order was recorded by the parties. The said order read as follows:

“That being the case, the status quo currently obtaining in respect of land parcel Nos. Matungulu/Katine/271, Matungulu/Katine/465 and Matungulu/Katine/466 to be maintained until the hearing and final determination of this suit.”

37. Although the Plaintiff is praying for injunctive orders restraining the Defendants from encroaching, trespassing, sub-dividing, fencing or dealing with plot number 271 pending the hearing of the suit, he has not set aside the earlier orders of the court for the maintenance of the *status quo* pending the hearing and determination of the suit. The orders of injunction cannot therefore issue.

38. In any event, the issue of determining the position and the boundaries of plot number 271 is still pending.

39. According to the Defendants, they are in occupation of the land that the Plaintiff is claiming, and that they have established business establishments on the land.

40. The Defendants’ deposition that they are in possession of plot No. 271 was confirmed by the report of Geoacre Surveys Limited dated 29th August, 2011 in which they observed as follows:-

“(d) There are several buildings on site where majority of them are on Matungulu/Katine/271 and partially on Matungulu/Katine/466.”

41. Considering that the Plaintiff’s main prayer in the Plaint is to determine the position of plot number 271 viz-a-viz plot numbers 465 and 466, and in view of the findings of the Surveyor, an order of injunction is likely to have the effect of evicting the Defendants at an interlocutory stage from the suit land. The same cannot therefore be granted at this stage until the issue of ownership of plot 271 and the propriety of the Title Deed for the said plot is established.

42. I will now deal with the issue of whether the Defendants are in contempt of the orders of 13th January, 2011, 7th May, 2011 and 21st February, 2012, which orders I have reproduced above.

43. As I have stated above, the court ordered that the *status quo* in respect to plot numbers 271, 465 and 466 should be maintained pending the hearing and determination of the suit.

44. The order for the maintenance of *status quo* was by the consent of the parties, through their recognized agents.

45. Having instructed their advocate to record the consent, the Defendants cannot turn around and claim that the said order was not served on them.

46. Considering that the Defendants were aware of the consent order by virtue of having been represented by their advocate when the order was recorded and adopted by the court, the requirement for personal services does not arise.

47. The parties herein were ordered to maintain the *status quo* pending the hearing and determination of the suit.

48. In the case of *Shimmers Plaza Ltd vs. National Bank of Kenya Ltd (2015) eKLR*, the Court of Appeal defined “*Status quo*” as follows:

“All it meant was that everything was to remain as it was as at the time that order was given.”

49. The Plaintiff has maintained that as at the time the order for the maintenance of *status quo* was given, plot number 271 was not fenced.

50. The 1st Defendant on the other hand has maintained that he simply replaced the old posts which had been knocked down by people who were installing internet cables along the Kangundo road; that the re-installation of the said perimeter fence was only meant to safeguard the land from trespassers and that he is not in contempt of the court.

51. The 5th Defendant on the other hand deponed in his Affidavit that indeed the 1st Defendant restored the perimeter fence around plot numbers 465 and 271; that he did this in the best interest of everyone, including the Plaintiff and that the 1st Defendant instructed him to remove the restored fence after the Application was filed.

52. In my view, both the 1st and 5th Defendants have admitted in their respective Affidavits that they interfered with the *status quo* of plot number 271 and 465 by “restoring” the fence, which, according to them, had fallen down.

53. Whether there was indeed a fence around the two plots which had fallen down or not, the 1st Defendant was not supposed to “restore” the fallen fence using fresh posts and a barbed wire fence as deponed in his Affidavit.

54. Evidence has been presented to this court showing the “freshly” done barbed wire fence. Evidence was also produced to show the fence that was brought down by the 5th Defendant, on the instructions of the 1st Defendant, with a view of purging the contempt.

55. Having gone through the photographs annexed on the Plaintiff’s Supporting Affidavit, I am convinced that the 1st Defendant put up a barbed wire fence around the suit land in contravention of the orders of the court.

56. Indeed, I am convinced that before the orders for the maintenance of the *status quo* were made, the suit property was not enclosed by a barbed wire fence as alleged by the 1st and 5th Defendants.

57. Although the 1st Defendant and the 5th Defendant have claimed that the photographs annexed on the Plaintiff’s photographs shows the old poles on the ground, the so called “old poles” are actually the shadows of the erected new poles. The issue of the suit land having had old poles which had fallen down by the activities of people does not therefore arise.

58. Indeed, I have gone through the report of Geoacre Surveys Limited dated 29th August, 2011. The said report does not mention the existence of a barbed wire fence around any of the three properties.

59. According to the said report, the only thing separating the two plots are euphorbia trees, one of which had been uprooted.

60. In the circumstances, and based on the evidence before me, I find that the 1st Defendant interfered with the boundaries of the suit land by erecting a barbed wire fence in disobedience of the orders of the court.

61. Consequently, I find the 1st Defendant to have been in contempt of the orders of court made on 13th January, 2011, 17th May, 2011 and 21st February, 2012.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 30TH DAY OF JUNE, 2017.

O.A. ANGOTE

JUDGE