



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT GARISSA

ELC NO. 50 OF 2017

MUSEMBI MAKAU.....PLAINTIFF

VERSUS

WILLY MUTUNGA LONG'O.....1ST DEFENDANT

LONG'O MUTUNGA.....2ND DEFENDANT

RULING

The application before me is Notice of Motion brought under Order 40 CPR. The application was filed simultaneously with the suit under certificate of urgency. When the application was placed on my chamber as the duty court for directions and after perusing through the supporting documents I declined to certify the application as urgent and directed the parties to take dates in the court registry in the usual manner. When the matter came up next for hearing the parties agreed by consent to dispose of the application by way of written submissions.

APPLICANT'S CASE

The applicant is seeking the following orders.

1. (spent)
2. THAT pending the inter parties hearing of this application this honourable court be pleased to issue an order restraining defendants either by themselves or through their agents from interfering with all that parcel of land number Migwani /Kyome/111
3. THAT pending the hearing and determination of the suit , this honourable court be pleased to issue an order restraining defendants either by themselves or through their agents from interfering with all that parcel of land number Migwani /Kyome/111
4. THAT costs of this application be provided for.

The application is supported by grounds shown on the face of the said application and an affidavit sworn by the applicant on 14/7/2017.

Attached to that affidavit is a title deed No. Migwani /Kyome/111 measuring 5.4 HA. In the name of Musembi Makau (applicant). Also attached is a copy of certificate of official search and an application for

consent of Land Control Bond dated 10th July 2017 and 26/6/2012 respectively. Also attached to the supporting affidavit is a letter by the assistant chief, Idalune Sub-location addressed to the Land Registrar, Mwingi District dated 16th February, 2016 and three letters by the District Land Registrar, Mwingi addressed to the defendant herein.

THE RESPONDENT'S CASE

In a replying affidavit sworn on 15th August 2017, the respondent stated that sometime in March 2017, the applicant jointly with Mwingi District Survey or and Land Registrar in the company of the police officers held a meeting whereby the applicant claimed ownership of parcel and boundary between his land No. Migwani /Kyome/111 and this parcel No. Migwani /Kyome/ No. 113.

The respondent further stated that sometime in 1984, sisal plants were planted by surveyor to mark the boundary between the two parcels but the applicant has interfered with the same.

I have considered the affidavit evidence by the applicant and the respondent. The applicant and the respondent are registered owners of parcel No. Migwani /Kyome/111 and Migwani /Kyome/113. Both parcels by land boarder each other. The plaintiff's/applicant's complaint is that the defendant encroached into his parcel of land No. Migwani /Kyome/111 and wants him restrained by way of an injunction.

The main issue for determination in this application is whether the plaintiff/applicant has satisfied this court the principles for the grant of injunction orders as set out in the locus classicus case of Grella –vs- Cassman Brown Co. Ltd (1973) EA. The three principles are set out as follows:

1. The applicant must establish a prima facie case with high chances of success at the main hearing.
2. The applicant must demonstrate that he will suffer injury and damages will not be sufficient compensation and
3. Where the court is in doubt, it shall decide the matter on a balance of convenience.

From the letters attached by the District Surveyor dated 11th August 2016, 14th September 2016 and 14th February 2017, it is apparent that the respondent was being asked to appear at the place of disputed land to place the beacons to the boundary. It appears that the respondent did not honour those summons. The applicant has not shown a survey map of his portion of land and the beacons separating his land from that of the respondent. There is no beacons certificate demarcating the two parcels of land.

For now, I find that the interest of justice demand that this matter proceeds to full hearing where parties in pre-trial may agree on a joint surveyor or separate parcels of land and prepare reports to assist in the determination of the dispute.

In the upshot, the application dated 14th July 2017 is disallowed with costs to abide the event.

Read and Signed in the open court this 24th day of October 2017.

E.C Cherono (Mr.)

ELC Judge

In the presence of

1. Mr. Ngala for the plaintiff/applicant and in the absence of the defendant/respondent.