



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC CASE NO. 65 OF 2017**

**JANE NYAWIRA KIAMA ..... 1<sup>ST</sup> PLAINTIFF/APPLICANT**

**STEPHEN RUHENI KIAMA ..... 2<sup>ND</sup> PLAINTIFF/APPLICANT**

***(SUING ON BEHALF OF THE ESTATE OF JOSEPH KIAMA RUHENI)***

**-VERSUS-**

**MURAKARU WAIREGI ..... 1<sup>ST</sup> DEFENDANT/RESPONDENT**

**COUNTY GOVERNMENT OF LAIKIPIA ..... 2<sup>ND</sup> DEFENDANT/RESPONDENT**

**LAND REGISTRAR LAIKIPIA ..... 3<sup>RD</sup> DEFENDANT/RESPONDENT**

**CHIEF LAND REGISTRAR ..... 4<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

1. By a plaint dated **11<sup>th</sup> April, 2017** and amended on **10<sup>th</sup> May, 2017** the plaintiffs herein instituted the suit herein seeking the following reliefs:

**i. A permanent injunction to restrain the 1<sup>st</sup> defendant, his agents and/or servants from encroaching on unsurveyed plot No. 28-Nanyuki Municipality, undertaking any developments thereon, dealing with title thereof whether by alienating, transferring, charging, leasing or in any other way;**

**ii. A declaration that the survey works done by the defendants vide survey plan number F/R 404/144, in respect of the suit property in favour of the 1<sup>st</sup> defendant is illegal and an order deregistering the same;**

**iii. Without prejudice to (ii) above an order cancelling L.R Nanyuki Municipality Block 8/848 issued in the name of the 1<sup>st</sup> defendant;**

**iv. A permanent injunction barring the 2<sup>nd</sup> defendant from issuing to the 1<sup>st</sup> defendant any approvals for the development of the suit land;**

**v. Mesne profit for loss of use of the suit land to the 1<sup>st</sup> defendant;**

**vi. Any other and better relief this court may deem fit to grant.**

**vii. Cost of the suit.**

2. Simultaneously with the plaint, the plaintiffs filed the notice of motion dated **11<sup>th</sup> April, 2017** to restrain the 1<sup>st</sup> defendant (hereinafter referred to as the 1<sup>st</sup> respondent) his agents and/or servants from encroaching on the, unsurveyed **plot No. 28-Nanyuki Municipality** (hereinafter referred to as the suit property), undertaking any development thereon, dealing with the title thereof whether by alienating, transferring, charging, leasing or in any other way pending the hearing of the application *inter partes* and further pending the hearing and determination of the suit.

3. The application is premised on the grounds on its face and supported by the affidavits (supporting and supplementary) of the 1<sup>st</sup> plaintiff/applicant, Jane Nyawira Kiama sworn on **11<sup>th</sup> April, 2017** and **22<sup>nd</sup> May, 2017** respectively.

4. As can be gathered from the grounds on the face of the application and the aforementioned affidavits, the 2<sup>nd</sup> respondent approved commencement of works on the suit property when there existed an unresolved dispute between the plaintiffs/applicants and the 1<sup>st</sup> respondent over developments being effected by the 1<sup>st</sup> respondent on what the plaintiffs/applicants call their land; the suit property.

5. It is the case of the plaintiffs/applicants that that approval of works being undertaken by the 1<sup>st</sup> respondent was done by the 2<sup>nd</sup> respondent in violation of the advice offered by the District physical planning officer.

6. When the application came up for hearing on 19<sup>th</sup> April 2017, the trial judge, **Kemei J**, certified the application as urgent and proceeded to issue a temporarily injunction restraining the 1<sup>st</sup> respondent his agents and servants from encroaching on the suit property, undertaking any developments thereon, dealing with the title thereof whether by alienating, transferring, charging, leasing or in any other way pending the *inter partes* hearing of the application on 30<sup>th</sup> May, 2017 before this court.

7. Upon being served with the application, the 1<sup>st</sup> respondent filed a response vide the replying affidavit he swore on **8<sup>th</sup> May, 2017** and the further affidavit he swore on **30<sup>th</sup> May, 2017**.

8. As can be discerned from that response, the 1<sup>st</sup> respondent opposes the application on the grounds that the parcel of land it owns is not the same as that claimed by the applicants; that the impugned developments were approved by the relevant Government institutions and that the documents relied on by the applicants' in support of their claim are dubious, manipulated and falsified and that granting the orders sought will occasion him irreparable injury.

9. Simultaneously with the replying affidavit, the 1<sup>st</sup> respondent filed the application dated **8<sup>th</sup> May, 2017** seeking to discharge, lift and/or vary the order issued on 19<sup>th</sup> April, 2017 pending the hearing and determination of the application and the motion dated 11<sup>th</sup> April, 2017.

10. The application is premised on the grounds that plot No. 28 on which the plaintiffs' claim is premised, is different from title No. Nanyuki Municipality 8/848 on which the impugned developments are being undertaken; that the title No. Nanyuki Municipality 8/848 is as a result of plot No. 27 as opposed to plot No. 28; that the order of 19<sup>th</sup> April, 2017 was made through misrepresentation and none disclosure of material facts and that any issues touching on the boundary to L.R No. Nanyuki Municipality 8/848 can only be resolved by the District Land Registrar.

11. The 1<sup>st</sup> respondent has denied having encroached on plot No. 28 and faulted the trial judge for having granted a temporary injunction for more than the 14 days provided for under the Civil Procedure Rules.

12. The 1<sup>st</sup> respondent contends that if the order sought to be lifted, vacated or varied remains in force, it will greatly prejudice him as he will not be able to proceed with the construction of the reinforced perimeter wall and the 2 basement floors he had began constructing on title No. Nanyuki Municipality Block 8/848 thus risking collapse of the neighboring plots and buildings as a result of erosion of soil by the ongoing heavy rains.

13. The application is supported by the affidavit of the 1<sup>st</sup> respondent/applicant on which the grounds on the face of the application are reiterated.

14. The application is opposed on the grounds that the orders were granted after the court considered the material presented before the court; that the orders were meant to cushion the plaintiffs/respondents from the adverse and permanent consequences of the 1<sup>st</sup> respondent/applicant's actions; that the court was justified in granting the injunction for a period way beyond that provided in the Civil Procedure Rules as the trial court was away on leave and that the plaintiffs/respondents will be greatly prejudiced if the orders are vacated.

15. Arguing that the 1<sup>st</sup> respondent's application is meant to derail the hearing and determination of their application, the plaintiffs/respondents contend that there are no grounds warranting the disturbance of the orders granted on 19<sup>th</sup> April, 2017. In this regard see the grounds of opposition dated **10<sup>th</sup> May, 2017** and the replying affidavit of the 1<sup>st</sup> plaintiff/respondent sworn on **22<sup>nd</sup> May, 2017**.

16. In accordance with his contention that it's the District Land Registrar who has the legal mandate to determine the boundary to his parcel of land which is registered, on 25<sup>th</sup> May 2017, the 1<sup>st</sup> respondent filed a notice of preliminary objection challenging jurisdiction of this court to hear and determine the dispute herein.

### **Analysis and determination**

17. As the notice of preliminary objection by the 1<sup>st</sup> respondent is capable of preliminary determining the applications and the suit herein, I will determine it first.

18. As pointed out hereinabove, the 1<sup>st</sup> respondent contends that this court lacks jurisdiction to hear and determine the dispute preferred to it as it relates to "determination of the boundaries relating to the title No. Nanyuki Municipality Block 8/848."

19. Whilst counsel for the 1<sup>st</sup> respondent maintains that the suit herein relates to a boundary dispute between the plaintiffs/applicants and the 1<sup>st</sup> defendant/respondent, counsel for the plaintiffs/ applicants does not think so.

20. According to the counsel for the plaintiffs/ applicants, the claim by the applicants is based on alleged fraud in the acquisition of the suit property by the 1<sup>st</sup> defendant/respondent.

21. I have read the pleadings filed in this suit and considered them alongside the submissions by counsel for the respective parties. It is my considered view that the dispute herein is not a boundary dispute.

22. I say so because from the pleadings filed in this suit, the plaintiffs are claiming that the title held by the 1<sup>st</sup> respondent relates to the parcel of land comprised in plot No. 28 allocated to Joseph Kiama Ruheni (deceased) while the 1<sup>st</sup> respondent claims that the title he holds relates to plot No. 27 which was issued to Charles Kipsang Chumba.

23. Clearly, the said claim cannot reasonably be said to be a boundary dispute as it relates to entitlement to the parcels of land in question and the question as to whether there was manipulation of the Part Development Plan (PDP) in respect of the said parcels of land resulting in issuance of a title in respect of the parcel claimed by the plaintiffs in favour of the 1<sup>st</sup> respondent. In this regard see the case of **Njowabu**

**Kenya Ltd v. Jinit Mohamed Shah (2017) e KLR** where it was observed:

**“It is not in dispute that the Defendant was allocated and registered as the proprietor of LR No 4953/2020 in the year 2009. The Plaintiff on his part was allegedly allocated and registered as proprietor of LR No 4953/4350 in the year 2010. The Defendant has alleged that the Plaintiff’s Land was wrongly curved out of his parcel of Land and the Title Deed that is held by the Plaintiff is fraudulent, null and void. The dispute herein is therefore over ownership of the suit property but not a boundary dispute. The Defendant has not admitted that his parcel of land borders that of the Plaintiff and that the only issue is the boundary dispute. The Plaintiff’s certificate of title is questioned by the Defendant. The Court would therefore finds it not ripe at this stage to direct that the District surveyor do visit the site and make a report on the boundaries of the two parcels of land. The court finds that this is a matter that first needs to go for full trial and determine the ownership dispute of the two parcels of land before determining the boundaries”.**

24. Even assuming that the dispute between the plaintiffs and the 1<sup>st</sup> respondent touched on the boundary between the plot claimed by the plaintiffs and the parcel of land claimed by the 1<sup>st</sup> respondent, I doubt whether the Registrar would have exclusive mandate to resolve the dispute as it relate to registered and unregistered parcel of land.

25. For the foregoing reasons, I find the notice of preliminary objection to be lacking in merits and dismiss it.

26. Turning to the application dated 11<sup>th</sup> April, 2017 the sole issue for the court’s determination is whether the plaintiffs/applicants have made up a case for confirmation of the order issued on 19<sup>th</sup> April, 2017 pending the hearing and determination of the suit.

27. To be entitled to an order of confirmation of the order issued on 19<sup>th</sup> April, 2017, the applicants must demonstrate that they have a prima facie case with a probability of success and demonstrate irreparable loss and damage that will be suffered. See the case of **Giella v Cassman Brown (1973) E.A 358** where it was held:

**“The conditions for a grant of an interlocutory injunction are now I think well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant must otherwise suffer irreparable injury, which would not adequately be compensated by an award for damages. Thirdly if the court is in doubt, it will decide an application on the balance of convenience.”**

28. What amounts to a prima facie case was defined by the Court of Appeal in the case of **Mrao Ltd vs. First American Bank Ltd & 2 others (2003) KLR 123** thus:

***“in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.***

29. In applying the foregoing principles to the instant case, the evidence adduced in this matter shows that the plots that are the subject of this dispute namely the unsurveyed plots No. 27 and 28 Nanyuki Municipality were allocated to Charles Kipsang Chumba and Joseph Kiama Ruheni respectively.

30. Whilst the plaintiffs’ claim that plot number 28 that belongs to the estate of Joseph Kiama Ruheni which they administer was wrongly transferred to the 1<sup>st</sup> respondent, the 1<sup>st</sup> respondent maintains that the plot that was sold to him and a title subsequently issued to him is plot No. 27 as opposed to plot No.28 on which the plaintiffs’ claim is premised.

31. *Since this court is at this juncture not supposed to give a conclusive finding on the issue of whether or not there was a mistake, fraud or error in registration of the 1<sup>st</sup> respondent as the proprietor of the parcel of land known as Title No. Nanyuki Municipality/Block 8/848, which issue shall be determined during trial, I find the order that best commends itself under the circumstances to be an order of status quo pending the hearing and determination of the suit.*

32. The status quo to be maintained will be as follows; Once the 1<sup>st</sup> defendant/respondent has completed construction of the perimeter wall and basement as agreed by the parties and confirmed by this court, he is restrained from carrying out any further construction on Nanyuki Municipality/Block 8/848 pending the hearing and determination of the suit.

33. The order of status quo *confirmed compromises the applications dated 11<sup>th</sup> April, 2017 and 8<sup>th</sup> May, 2017.*

34. *Costs will be in the cause.*

*Orders accordingly.*

***Dated, signed and delivered at Nyeri this 21st day of November, 2017.***

***L N WAITHAKA***

***JUDGE***

Coram:

Mr. Kimunya for the plaintiff

Mr. Mahinda for the 1<sup>st</sup> defendant

No appearance for the 2<sup>nd</sup> defendant/respondent

Mr. Njoroge for the Attorney General (3<sup>rd</sup> & 4<sup>th</sup> respondents)