



REPUBLIC OF KENYA



KENYA LAW
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**Nyagoto Investment Limited v D.M Concrete (K) Ltd; County
Government of Machakos (Interested Party) (Environment & Land Petition
E016 of 2022) [2024] KEELC 903 (KLR) (26 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 903 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT & LAND PETITION E016 OF 2022

CA OCHIENG, J

FEBRUARY 26, 2024

**IN THE MATTER OF: THE CONSTITUTION OF KENYA, 2010 ARTICLES
10, 19(2), 20(4), 21(1), 23(3), 40, 47(1) & (2), 62(1) (G), 67, 68, 245, 258 AND 259**

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT (ACT NO. 4 OF 2015)

AND

IN THE MATTER OF THE LAND ACT (ACT NO. 6 OF 2012)

AND

IN THE MATTER OF THE LAND REGISTRATION ACT (ACT NO. 3 OF 2012)

AND

IN THE MATTER OF PLOT NUMBERS LR. 26647 & 1R 90625, MAVOKO MUNICIPALITY

BETWEEN

NYAGOTO INVESTMENT LIMITED PETITIONER

AND

D.M CONCRETE (K) LTD RESPONDENT

AND

COUNTY GOVERNMENT OF MACHAKOS INTERESTED PARTY

RULING

1. What is before Court for determination is the Petitioner's Notice of Motion Application dated the 13th December, 2022 where it seeks the following orders:-



1. Spent
 2. Spent
 3. Pending the hearing and determination of this application inter partes, this Honourable Court be pleased to, and do issue a temporary injunction restraining the Respondent, its agents, servants and/or any other person acting on the Respondent's instructions from in any way interfering with and/or disturbing the Petitioner's peaceful occupation of land parcel number LR No. 26647 situated at Mavoko Municipality.
 4. Pending the hearing and determination of the Petition herein, this Honourable Court be pleased to and do issue an order directing the Respondent to create an access to land parcel LR No. 26647 situated at Mavoko Municipality within 7 days at its cost.
 5. The Honourable Court be pleased and do issue an order directing the OCS Mlolongo Police Station to provide security and ensure compliance with court orders herein.
 6. The Honourable Court be pleased to make such further Orders and/or Directions that are necessary for ends of justice.
 7. The cost of the Application be provided for.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Adrian Dave Monari Ongwae. The Petitioner claims it was granted a Letter of Allotment by the defunct County Council of Machakos on 5th November, 1999. It confirms having paid stamp duty on 28th November, 2002 to the Athi River Municipality and was issued with a receipt. Further, that the Survey Plan for the disputed plot was registered in the year 2002 and later in the same year, the Director of Survey wrote to the Ministry requesting to be supplied with a Deed Plan to property LR No. 26647. It explains that sometime in 2021 it undertook due diligence survey over the suit land as it was denied access to the said land by the Respondent. Further, that it conducted a search on the suit land on 23rd March, 2021 and Survey of Kenya confirmed that the Survey Plan was registered in 2002. It contends that although it is the registered proprietor of the suit land, paid the arrears of Kshs. 15,488, the Respondent claimed ownership of the suit land, erected a red perimeter wall around it and hence denied it access. Further, despite reporting matter to the Mlolongo Police Station, Directorate of Criminal Investigations and Ministry of Lands on different dates, the Respondent has refused to remove the perimeter wall. It reiterates that as a result of the Respondent's illegal and unconstitutional actions, it has suffered loss of benefits and rights that accrue to it as the legal owner of the said land.
 3. The Respondent opposed the instant Application by filing a Replying Affidavit sworn by Dipak H Patel, where he deposes that the Respondent does not own any property that is appurtenant to the Petitioner's property and does not assert any claim or interest over it. He insists that the instant Application and Petition does not disclose any justiciable complaint against the Respondent in connection with the suit land. He argues that even if a justiciable complaint had been pleaded and established, the Petitioner's claim of an alleged encroachment of its property would have related to a boundary dispute which this court is divested of jurisdiction to hear and determine by dint of Section 18(2) of the [Land Registration Act](#). He reiterates that the Petitioner's claim does not satisfy the threshold for grant of orders of injunction.
 4. The Petition was canvassed by way of written submissions.



Analysis and Determination

5. Upon consideration of the instant Notice of Motion Application including the respective affidavits, annexures and rivaling submissions, the only issue for determination is whether the Petitioner is entitled to orders of interlocutory injunction pending the outcome of this suit.
6. The Petitioner in its submissions reiterated its averments as per the Supporting Affidavit and argued that it had satisfied the grounds for the grant of temporary injunction pending the hearing and determination of the suit. It submitted that it had established a prima facie case. Further, that it is the owner of the suit land as it has produced a Certificate of Title hence entitled to vacant possession. It insisted that it stands to suffer irreparable harm if the order is not granted as it attached an emotional value to the suit land. It reiterates that the balance of convenience tilts in its favour. To support its averments, it relied on following decisions: *Giella V Cassman Brown & Co. Ltd* (1973) EA 358; [*Nguruman Limited v Jan Bonde Nielsen & 2 Others*](#) (2013) eKLR; [*John Kariuki Kinyariro v Reuben Waweru & Another*](#) (2014) eKLR; [*Pius Kipchirchir Kogo v Frank Kimeli Tenai*](#) (2018) eKLR.
7. The Respondent in its submissions relied on its Replying Affidavit and insisted that based on the reliefs sought, the order of injunction sought would not serve any meaningful purpose as it will not have efficacy once the Application is determined. It further submitted that the Petitioner's alleged claim revolves around encroachment, which is a boundary dispute. Further, that the Petitioner's claim should have been lodged with the Land Registrar first. It submitted that the application has failed for want of merit as there is no justiciable complaint against it. To support its arguments, it relied on the following decisions: [*Re Estate of Bakari Marakweli Mwakwisha \(deceased\)*](#) (2008) eKLR; [*Willis Ochola v Mary Ndege*](#) (2016) eKLR; and [*Mrao Ltd v First American Bank of Kenya Ltd & 2 others*](#) (2003) eKLR.
8. In line with the principles articulated in the case of *Giella Vs Cassman Brown & Company* (1973) EA 358 as well as the description of a prima facie case as prescribed in the case of [*Mrao Ltd Vs First American Bank of Kenya & 2 Others*](#) (2003) KLR 125, I will proceed to decipher whether the Petitioner has established a prima facie case to warrant the orders of interlocutory injunction as sought.
9. The Petitioner claims to be owner of LR No. 26647 and has annexed a Certificate of Title to that effect. It explained how it acquired the suit land through obtaining a Letter of Allotment and later a Deed Plan including a Certificate of Title. It contends that the Respondent has encroached on the suit land by constructing a red perimeter wall thereon. The Respondent has denied encroaching on the suit land and insisted that the Petitioner's claim against it was not justiciable. Further, it argued that the dispute herein was a boundary one and this court was devoid of jurisdiction to handle it, by dint of Section 18(2) of the [*Land Registration Act*](#).
10. Looking at the documents presented, I note that the Petitioner was registered as proprietor of the suit land on 4th December, 2002. Further, there are receipts confirming various payments in respect to the suit land. I note as per an email dated the 23rd November, 2022 from the Petitioner's advocates to the Respondent, it indicates there is an alleged encroachment on the suit land and the Respondent is advised to reestablish the boundary beacons. From this email alone, it is clear there had been discussion between Petitioner and Respondent over the dispute herein. It seems to me the fulcrum of the dispute herein indeed revolves around establishment of boundaries. It is my considered view that since the Respondent has denied encroaching on the Petitioner's land and insists it is a boundary dispute, it would be important if parties proceeded before the Land Registrar to determine the beacons/ boundaries in accordance with Section 18 of the [*Land Registration Act*](#). Further, I note the Petitioner has also sought for an order directing the Respondent to create an access to land parcel LR No. 26647



situated at Mavoko Municipality within seven (7) days at its cost, but I opine that this Order can only be granted once the issue of boundary is determined. Insofar as the Petitioner has established a prima facie case as it is the owner of the suit land, however at this juncture, I opine that granting an injunction would be tantamount to issuing eviction orders as there is a wall already in place.

11. Further, it is trite that where there is a boundary dispute, the matter should first be dealt with by the Land Registrar by dint of Section 18(2) of the [Land Registration Act](#) before, it can proceed in court.
12. It is against the foregoing that I find the instant Notice of Motion merited but will not grant the orders as sought but make an order for the obtaining status quo be maintained pending the determination of the boundary dispute by the Land Registrar.
13. Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 26TH DAY OF FEBRUARY, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of;

Mrs. Achieng holding brief for Wanyama for Petitioner

Masila holding brief for Mutua for Respondent

Court Assistant – Simon/Ashley

