



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

**AT NAKURU**

**ELC NO. 272 OF 2014**

**JOHANA GATHERU MURUHA.....1<sup>ST</sup> PLAINTIFF**

**STANLEY MURANGO KAGIRI MURUHA .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**GODFREY NJUGUNA GITHIRU.....DEFENDANT**

**RULING**

***(Application for injunction; principles to be applied; apparent boundary dispute between plaintiffs and defendant; survey map showing that defendant has encroached into 9 acres; prima facie plaintiffs showing that the defendant has encroached into their land; order that the defendant to cede possession of the disputed portion pending hearing and determination of the suit)***

1. The application before me is that dated 26<sup>th</sup> September 2014. It is an application for injunction which was filed by the plaintiffs contemporaneously with the filing of this suit. In the application, the plaintiffs want the defendant restrained from erecting a fence or in any other way interfere with the boundaries to the land described as Plot No. 15 Elementaita (Kiriko Farm) (the suit property).

2. It is the case of the two plaintiffs that their late father was a member of Kiriko Farm, a land buying company. Kiriko Farm purchased the land registered as Elementaita Kiambogo LR No. 10243. The land was then subdivided amongst the members without formal survey being done. The land was later surveyed and the plaintiff's father allotted the Plot No. 15. The new survey necessitated a movement from the earlier boundaries and most members complied except the defendant who was allotted the Plot No. 16. The defendant purchased the land from a person who had purchased from one of the original members of Kiriko Farm. It is alleged that since his purchase, the defendant has been a constant obstacle to the process of relocating the boundaries. It is averred that he has now started putting up a fence on the disputed boundary. The dispute had earlier been referred to the Chief and District Officer, Elementaita, who directed that the disputed boundary should not be developed until the surveyor, a Mr. Nderitu of M/s Gatome & Associates Surveyors resolved the boundary. In the suit, the plaintiffs want the defendant ordered to respect the new boundaries and a permanent injunction to restrain him from the land parcel No. 15.

3. The plaintiffs first appeared before me ex-parte. On looking at the application, I was of the opinion that the matter could probably be resolved if I directed the Surveyors who conducted the survey, to give a report on the ground occupation of the land parcels in dispute. The Surveyor did file his report in which he stated that the owner of the Plot No. 16 has encroached into the Plot No. 15 by about 9 acres.

4. The defendant filed a replying affidavit to the application. He confirmed being the owner of the Plot No. 16 and the plaintiffs being the owners of the suit land. He stated that he has fenced off his plot which is 85 acres and has not encroached into the Plot No. 15. He has averred that it is the plaintiffs who have on several occasions encroached into his land by about 25 acres. He has stated that he is a member of Kenya National Hawkers Society and entered into an agreement to purchase the land in his capacity as Secretary General. He has stated that there has never been an amendment of the original map as alleged. He has stated that the plaintiffs themselves have not moved to accommodate the owner of the plot No. 14 in the new boundaries and therefore they will occupy additional acreage if he (the defendant) is to move. He has stated that if his acreage is reduced, he will have to move into the Plot No. 17.

5. At the hearing of the application, Mr. Chege for the respondent argued that the respondents have no capacity to sue as they are not owners of the suit land. He also submitted that the defendant has been wrongly sued as the land belongs to Kenya National Caucus Association. He referred me to the agreement for the purchase of the Plot No. 16. He stated that the defendant is only an official and is occupying the land merely as agent. He also asked that the survey report be expunged as the surveyor is biased. He asked the court to review its orders on the survey as the defendant was not involved at all.

6. I have considered the application. What is before me is an application for injunction. To succeed in an application for injunction, the applicant needs to demonstrate a prima facie case with a probability of success and also show that he stands to suffer irreparable loss unless the injunction is granted. If in doubt, the court will decide the application on a balance of convenience. These principles were laid down in the case of *Giella vs Cassman Brown (1973) EA 358*.

7. On the first argument of the defendant, that the plaintiffs have no capacity as they do not own the suit property, I have seen that the plaintiffs are administrators of the estate of Livingstone Mureru Mweru. The estate of the late Mweru has been distributed and as per the Certificate of Confirmation of Grant, the suit property was distributed to the plaintiffs. I do not see how it can be said that the plaintiffs have no locus to file this case. Who, if not the plaintiffs was supposed to file the suit? I find absolutely no merit in the argument by the defendant that the plaintiffs have no capacity to file this suit. It was also argued that the defendant has been wrongly sued. In his own affidavit, the defendant has variously deposed that he is the owner of the suit property. This is stated in paragraph 7 of his affidavit. At times, the defendant has deposed that the property is owned by a Society. Clearly the defendant is blowing hot and cold. But to me, what is relevant is that he is the person who is said to be interfering with the boundary, and this, he has not denied. What he has done is to justify his actions stating that if the plaintiffs move into the disputed portion, he stands to lose some acreage. I therefore do not see how the plaintiffs can be said to have sued the wrong person. The defendant also raised issue with the survey report stating that the same is biased. I am afraid that no evidence of any bias has been demonstrated to me. If the defendant was not happy with the report, and he thought that the same does not reflect the true position of the boundaries, nothing stopped him from appointing a surveyor of his choice to make a report which he could have annexed to his replying affidavit.

8. When a court is faced with an application for injunction, what the court is essentially being asked to do is to make a statement on how the subject matter in dispute should be preserved pending hearing and determination of the case. This of course is guided on whether or not the applicant has demonstrated a prima facie case with a probability of success.

9. On the face of it, without making a final determination, for this can only be made after hearing the parties, and principally being guided by the survey report, it is highly probable that the defendant has encroached into 9 acres of the plaintiffs' land. As is stated, there is no evidence to the contrary tabled before me by the defendant. I think that the plaintiff has demonstrated a prima facie case that the defendant is in occupation of their 9 acres. They deserve to be in use an occupation of this land pending hearing of the suit. The defendant will have his chance to show that he is not in wrongful occupation as alleged, but in so far as what the status should be as we await the case to be determined, I am of the opinion that the plaintiffs should be in occupation of the disputed portion of 9 acres. I do not see how the defendant can be complaining that if the plaintiff moves into the disputed portion, he will be occupying extra acreage because he has not moved from what is claimed by the owner of Plot No. 14. I do not see

how the defendant can complain on behalf of another owner of land who does not seem to have any qualms or else he would have been before this court. That argument, to me is therefore irrelevant.

10. After considering all issues, I make the following orders.

(a) *That pending the hearing and determination of this suit, the defendant to cede possession of the 9 acres in dispute and to remain within the confines of the boundaries demonstrated in the survey map filed in this case.*

(b) *That the defendant and/or his servant/agent, is hereby restrained from putting up a fence which is not in accordance with the survey map filed in this case.*

(c) *That the plaintiff shall have the costs of this application.*

11. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 2<sup>nd</sup> February, 2016.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In presence of :-**

Mr. D M Gatonye for plaintiffs/applicants

Ms. Kipruto holding brief for Mr Chege for defendants/respondent.

CA: Janet

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**