



**REPUBLIC OF KENYA**

**IN THE ENVIROMENT AND LAND COURT OF KENYA AT NAKURU**

**ELC NO. 11 OF 2015**

**DEBORAH WAMBUI KIMANDO.....PLAINTIFF**

**VERSUS**

**JOHN MUIGAI GATIMU.....DEFENDANT**

**RULING**

***(Application for injunction; plaintiff contending that defendant has encroached into her land; facts showing a long running dispute on acreages and boundaries of the parties' respective land parcels; previous suit before the Land Disputes Tribunal pursuant to which a decree was issued which led to eviction of plaintiff from land believed to be owned by the defendant ; best in the circumstances to determine the application on a balance of convenience; balance of convenience tilting towards maintaining the status quo prevailing after execution of the order of eviction)***

1. This suit was commenced on 20 January 2015 by way of plaint. The plaintiff's case is that she is the registered proprietor of the land parcel Nakuru/Molo/Kapsita/418 (the suit land) which is land measuring 2.02 Ha. She has averred that she has been resident on the land since the year 2000 and she has established a home on it. It is pleaded that without notice, the defendant lodged a complaint before the Molo Land Disputes Tribunal, challenging the plaintiff's ownership of the suit land. It is pleaded that the defendant alleged to have purchased the land parcel Nakuru/Molo/Kapsita/419 with reduced acreage. It is averred that the Tribunal proceeded to hear the complaint ex-parte, departing from the rules of natural justice. As a result of the impugned decision, it is contended that the defendant has now trespassed into the suit land and has laid claim to a significant portion of the plaintiff's land. In the suit, the plaintiff has sought orders of permanent injunction to restrain the defendant from the suit land; a declaration that the proceedings before the Molo Land Disputes Tribunal are a nullity; an order recalling the title of the defendant to reflect the correct acreage; costs and interest.

2. Together with the plaint, the plaintiff filed an application for injunction which is the subject of this ruling. In the application, the plaintiff has sought orders to have the defendant restrained from evicting her or encroaching into the suit land. In her supporting affidavit, she has annexed a copy of her title deed; a decree in Molo Land Dispute Case No. 18 of 2008 which adopted the award of the Tribunal; and a letter from the Provincial Surveyor, Rift Valley Province, indicating re-establishment of boundaries of the parcel numbers 418, 419, 420, 421 and 799 all located in Nakuru/Molo/Kapsita. She has deposed that the effect of the award of the Tribunal was to reduce her acreage from 5 acres to 2.7 acres. It is averred that when the defendant lodged the case before the Tribunal, he was not the registered proprietor and had no locus to do so. She has stated that pursuant to the decree, the District Surveyor was to mark the boundaries between the land parcels No. 418 and 419 among other plots. She has contended that the marking of the boundaries have led to a reduction of her land.

3. In his replying affidavit, the defendant has not disputed that the plaintiff is the owner of the land parcel

No. 418. He has however asserted that the acreage thereof is 2.7 acres and not 2.02 Ha as shown in her title deed. He has deposed that he is the owner of the land parcel No. 419 but that the two land parcels do not share a boundary. He purchased the land from one Seroney. The title reflects 5 acres but on the ground it is only 3.5 acres which he states he has accepted. He has deposed that in 2007, he lodged the case before the Land Disputes Tribunal which he avers was heard in the presence of the plaintiff and a decision reached. He has annexed the award of the Tribunal. He has deposed that thereafter the boundaries were established by the surveyors as there was no ownership dispute. He has denied that any land belonging to the plaintiff was given to him. He has deposed that following the decree, an order of eviction was issued and the plaintiff evicted from his land. He has not seen any fault in the award and decree of the Tribunal and has pointed out that the plaintiff has not appealed the same.

4. The plaintiff filed a supplementary affidavit but I have not really seen anything new that she raised.

5. I invited counsels to file submissions but only counsel for the plaintiff filed. I have considered these submissions in my ruling.

6. The application before me is one for injunction. The principles which guide the courts in an application of this nature were laid down by the Court of Appeal in the case of ***Giella vs Cassman Brown (1973) EA 358***. One needs to demonstrate a prima facie case with a probability of success and also show that he/she stands to suffer irreparable loss unless the injunction is granted. If in doubt, the court will decide the application on a balance of convenience.

7. The plaintiff's case of course is that she is entitled to 2.02 Ha of land comprised in her title and she has claimed that the defendant has encroached into it pursuant to irregular proceedings before the Land Disputes Tribunal. It does appear to me as if the parties had a dispute over the acreages of their land and the boundaries thereof. It is this which prompted the defendant to file the case before the Tribunal. A decree was issued which led to the survey of the area. The District Surveyors did establish the boundaries of the parties. I think it is these boundaries which the plaintiff is not agreeable to. But I can see that in a letter dated 25 August 2004, way before the Tribunal proceedings, the Provincial Surveyor did write to state that the land parcels in issue have been re-established and the acreage of the plaintiff's land parcel No. 418 is shown to be 2.7 acres. I have also seen that the plaintiff was evicted from what is considered to be land parcel No. 419 as confirmed in the letter of 17 February 2015 written by Tango Auctioneers.

8. Given the above, I do not think that the issue is as straight forward as put by the plaintiff. I am of opinion that it is best that the application be decided on a balance of convenience, and the balance of convenience tilts towards maintaining the status quo, as it has been, following the execution of the order of eviction.

9. I therefore order that the status quo be maintained pending hearing and determination of this suit and the status quo is the status prevailing after the execution of the order of eviction issued in Molo Land Case No. 18 of 2008.

10. The costs of this application will be costs in the cause.

11. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 18<sup>th</sup> day of May, 2016.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In presence of: -**

Ms. Gitau for plaintiff/applicant

N/A on part of M/s Mugambi Nguthari & Company for defendant/respondent

Court Assistant: Janet

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**