



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC NO. 522 OF 2015

EDDAH WANJIRU MBIYU.....PLAINTIFF

VERSUS

SIMON KIMANI NDUNGU.....DEFENDANT

RULING

When the Plaintiff's application dated **15th June 2015**, came for hearing *ex-parte*, this Court (Mutungi J.) granted a temporary order of injunction restraining the Defendant his agents/servants/employees or anyone claiming title under him from trespassing onto the Plaintiff's land known as **Kajiado/Mailua/4202**, erecting beacons, purporting to sub-divide it, excavating stones and soil from it or in any other way interfering with the land or alienating it.

The Plaintiff seeks a confirmation of this order pending the hearing and determination of the suit. It is the Plaintiff's case that he is the registered owner of **Kajiado/Mailua/4202**, having purchased the same from the Defendant on **25th July 2014**. Upon payment of the full purchase price, he took possession thereof and using the Defendant's mutation form, he hired a surveyor who pointed out all the beacons demarcating the parcel. However, that the Defendant has trespassed on the suit parcel and purported to erect beacons, hiving off a portion of thereof and excavating stones and soil. The Plaintiff deposes that both he and the Defendant separately requested the office of the Lands Registrar Kajiado to re-survey the suit parcel. Following this request, however, the Defendant in the company of the County Surveyor entered the suit parcel purporting to change the positions of the beacons. The Plaintiff expresses his apprehension that unless stopped by an order of the Court, the Defendant will continue with the acts of trespass. Therefore, he stands to suffer irreparable harm and damage which may not be adequately compensated in damages.

The Defendant swore a Replying Affidavit on **10th August 2015** in response to the application. The Defendant deposes that he got into a Sale Agreement with the Plaintiff for a parcel measuring 1.02Ha. However, that during the sub-division, the surveyor made an error by giving the purchased parcel a bigger portion than 1.02Ha and placed beacons with the said error. The Defendant states that he came to learn that the suit parcel has more acreage than **1.02Ha**, that was paid for, after the transaction was complete and title issued to the Plaintiff. The Defendant urged the Court to order that a joint survey be carried out.

The application was canvassed by way of written submissions, which I have carefully read. The uncontested facts are that the Plaintiff purchased 1.02Ha from the Defendant and upon payment of the purchase price, the purchased parcel was transferred and registered in favor of the Plaintiff. From the summary hereinabove, what is in dispute is that the measurement of the purchased parcel is more than

what the Plaintiff paid for, and also what is reflected in the title, that is, 1.02Ha. It is the Defendant's case that this is an error caused by the surveyor. This being a boundary dispute, it falls within the realm of the Lands Registrar under to **Section 19 of the Land Registration Act**. The Registrar, in this section, has the powers to establish and have the boundaries fixed after giving all the parties of adjoining parcels an opportunity to be heard. The section reads, in part,

19.(1) If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land or otherwise the survey of land or otherwise to define in the register, the precise position of the boundaries of a parcel or any part thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.

(2) The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed and the plan shall be deemed to accurately define the boundaries of the parcel.

(3) -----

I agree with the submissions made by counsel for the Defendant that this dispute should be resolved by the Lands Registrar and the Local District Surveyor. In fact, this Court under **Section 18** of the said Act is precluded from entertaining any proceedings relating to a boundary dispute. **Section 18 (2) of the Act** provides:-

18(2) The court shall not entertain any action or proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been fixed in accordance with this section.

Any party aggrieved by or with the decision or by the exercise of any power by the Registrar can under **Section 86** of the Act apply for review of the Registrar's decision by way of a case stated for the court's opinion.

Having now carefully considered the pleadings herein, the written submissions and the relevant provisions of law, the Court makes the following orders:-

1. An order of status quo is hereby entered to the effect that the Defendant shall not interfere with the Plaintiff's quiet possession of the suit parcel, Kajiado/Mailua/4202 and the Plaintiff shall not dispose off the same pending the determination of this suit or until further orders of this Court.

2. The Lands Registrar, Kajiado do summon the parties herein to adjudicate over the boundary dispute, and the decision be filed within 60 days of the date hereof.

3. The Plaintiff be responsible to serve this order upon the Lands Registrar, Kajiado, within 7 days of the date hereof.

4. Costs of the application be in the cause.

It is so ordered

Dated, Signed and delivered this 10th day of June, 2016

L. GACHERU

JUDGE

10.6.2016

In the Presence of:-

No appearance: For the Plaintiff/Applicant

Mr. Nyamwate: For the Defendant/Respondent Date taken in Court

James Court Clerk

L. GACHERU

JUDGE