



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NYERI**

**ELC CASE NO. 128 OF 2016**

**MONICA OKWIRRY.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**KEN MBAU.....DEFENDANT/RESPONDENT**

**RULING**

1. In the Notice of Motion dated **17<sup>th</sup> June, 2016** the plaintiff/applicant seeks an order of injunction against the defendant/respondent to restrain him, his servants, agents or anyone under him from entering, trespassing into, cultivating, harvesting or otherwise dealing with the parcel of land known as **Nginda/Samar/Block 1/2314** (the suit property) pending the hearing and determination of the suit, plus costs.
2. After the instant motion was heard in open court and a Ruling date given, a similar application was filed by the defendant seeking similar orders against the plaintiff on 27<sup>th</sup> October, 2016 in relation to parcel No. **Nginda/ Samar/Block 1/2310**. This application is still pending for hearing and determination.
3. The application dated 17<sup>th</sup> June, 2016 is premised on the grounds on its face and is supported by the affidavit sworn by the applicant on **17<sup>th</sup> June, 2016**. In that affidavit, she depones that she is the registered proprietor of the suit property and has been cultivating therein; that the respondent has now uprooted her maize and started cultivating the suit property himself; that despite her advocates writing a demand letter to the respondent urging him to stop the aforesaid actions, he has blatantly ignored the letter. She prays for an order of injunction to protect her proprietary rights which are being infringed.
4. The application is opposed. The respondent in his replying affidavit sworn on **27<sup>th</sup> June 2016** depones that his company, Circular Distributors Limited, is the registered owner of land parcel **Nginda/Samar/Block 1/2310**. It is his contention that he has no claim over Nginda/Samar/ Block 1/2314 and has therefore been erroneously enjoined in this suit.
5. When the case came for hearing on 18<sup>th</sup> October, 2016 **Mr. Ndegwa** appeared for the applicant and **Mr. Mutali** for the respondent. Mr. Ndegwa relied on his pleadings to lay the background of the suit and on **Sections 24, 25 and 26** of the Land Registration Act, 2012 in support of registered proprietor's rights under the law.
6. In response, Mr. Mutali submitted that the respondent is a director of Circular Distributors Ltd, the registered owner of land parcel **Nginda/Samar/Block 1/2310**; that the company has been experiencing problems with trespassers who have been encroaching on their land since 2009. He submitted that the respondent has no claim or interest in parcel No. Nginda/Samar/Block 1/2314; that his interests are confined to Nginda/Samar/Block 1/2310. He was of the view that the applicant should establish where

**Nginda/Samar/ Block 1/2314** is located.

7. I have considered the application and oral submissions by the respective parties. Being an application for injunction, the principles set out in **Giella v Cassman Brown & Company Limited [1973] E.A 358** must be satisfied for an applicant to succeed, namely: that the applicant must show that she has a *prima facie* case with a probability of success. Secondly, it must be demonstrated that the applicant might suffer irreparable injury if the injunction is not issued. Thirdly, should the court be in doubt, it will decide the application on a balance of convenience. These principles are to be applied sequentially in that the court need not consider the second and third principles if it finds that the applicant has a *prima facie* case.

8. In determining whether the plaintiff has established a *prima facie* case, I shall not delve into the merits of the case but merely look to see whether any of the applicant's proprietary rights have been violated by the respondent as stated in the case of **Mrao Limited Vs First American Bank Kenya Ltd & 2 others [2003] KLR 125**.

9. In support of her case, the applicant has exhibited a title deed in respect of land parcel **Nginda/Samar/Block 1/2314** as the registered owner and photographs of the destruction by the respondent.

10. On his part, the defendant has exhibited a title deed for parcel No. **Nginda/Samar/Block 1/2310** registered in the name of Circular Distributors Limited.

11. Looking the material placed before me and in particular the two title deeds in the names of the applicant and the respondent's company, I am of the opinion that it will be important to first establish whether the dispute before the court relates to two distinct parcels of land as per the title deeds presented or whether the situation on the ground reveals something different. To establish this, I will involve the Murang'a county Land Registrar and County Surveyor.

12. So, has the applicant established a *prima facie* case?

I say no. The applicant has failed to demonstrate how the respondent has encroached on her parcel of land and that he is the person carrying out the destruction in parcel No. **Nginda/Samar/Block1/2314**.

13. The aforesaid notwithstanding, to prevent wastage, damage, alienation, sale, removal or disposition of the suit property, I order as follows:

**(1) Status quo shall be maintained pending the hearing and determination of this suit as follows;**

**Neither the plaintiff nor the defendant shall cultivate or develop on the disputed parcel of land.**

**(2) The County Land Registrar and County Land Surveyor, Murang'a, to visit the suit properties and establish the boundaries of land parcels Nginda/Samar/Block 1/2310 and land parcel Nginda/Samar/Block 1/2314 within 60 days from the date hereof and file their reports with the court within 14 days of the site visit.**

**(3) Costs for the visit for the County Land Registrar and County Land Surveyor, Murang'a shall be shared by the parties.**

14. Mention on 14th March, 2017 to confirm whether the report by the County Land Registrar and County Surveyor has been filed.

**Dated, signed and delivered this 23<sup>rd</sup> day of November, 2016.**

**L N WAITHAKA**

**JUDGE**

In the presence of:

Mr. Mutahi for defendant/respondent

Mr. Kamau h/b for Mr. Ndegwa for the plaintiff

court clerk - Esther