



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

**AT NYERI**

**ELC CASE NO 195 OF 2014 (O.S.)**

**JOSEPH KABURU KIRAGU .....PLAINTIFF/APPLICANT**

**-VERSUS-**

**DUNCAN NDUNG’U NDIRANGU .....DEFENDANT /RESPONDENT**

**RULING**

1. The plaintiff/applicant filed the Notice of Motion dated **19<sup>th</sup> September, 2014** praying that the defendant/respondent his family members, servants, agents or anyone acting under him be restrained from interfering with **Nyeri/Watuka/ 1670** (the suit property) pending the hearing and determination of the suit; that the respondent compensates him for the uprooted crops; that the District Land Registrar be restrained from changing the current boundaries and that costs of the application be borne by the respondent.
2. The application is premised on the grounds on the face of the application and is supported by the affidavit sworn by the applicant **on 19<sup>th</sup> September, 2014**. He depones that he occupied the suit property (which is adjacent to his parcel of land) in 2001 when he realised that the suit property was not being utilised; that since then, he has remained in open, quiet uninterrupted occupation and possession and has carried out extensive developments therein; that it is only recently that the respondent visited the suit property and demanded that he vacates the same and in the process destroyed his maize crop.
3. The application is opposed. In his replying affidavit sworn on **6<sup>th</sup> October, 2014** the respondent depones that he is the registered owner of the suit property and is in occupation of the same together with his son, Peter Kibiri Ndung'u. According to him, the dispute between the applicant and himself is a boundary dispute which was to be heard by the Kieni West District Land Dispute Tribunal before the Tribunal was disbanded. The above notwithstanding, the District Land Registrar had since marked the boundaries. He prays that the application be dismissed for being incompetent and also because the applicant has lied to the court that he is in occupation while he is not.
4. In a rejoinder, the applicant filed a supplementary affidavit which he swore on **15<sup>th</sup> October, 2014**. He depones that he entered into the suit property without consent of the respondent in 2008 and has been in occupation and that the said boundary dispute alluded to by the applicant was nothing but a gimmick to evict him.
5. This application was heard orally in open court on 14<sup>th</sup> July, 2016 with **Mr. Machira** appearing for the applicant and **Mr. Wahome** for the defendant. Mr. Machira relied on the applicant's pleadings and noted that the contempt Ruling by this court was never contested by the defendant. He added that the

plaintiff is in possession.

6. In response, Mr. Wahome submitted that the defendant was issued with a title deed in 2008; that the applicant's suit for adverse possession is not merited as it is only six years since the title deed was issued; that the applicant has not established a *prima facie* case as the District Land Registrar has already made a determination on the boundary dispute as admitted in prayer 4 of the application; that in view of the above, it is clear that the applicant has come to court with unclean hands. Finally he submitted that the contempt of court ruling has no bearing on this application.

7. In a rejoinder, Mr. Machira submitted that prayer 4 in the application which seeks an order prohibiting the Registrar from changing the current boundaries is not an admission that there is a boundary dispute between the parties.

8. This being an application for injunction, the principles as laid down in ***Giella v Cassman Brown & Company Limited [1973] E.A 358*** apply, firstly, the applicant must first show that he 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.

9. Whereas the applicant claims to be in occupation of the suit property, the respondent has refuted this claim and stated that the applicant is not being truthful to the court and has failed to disclose that he is not in occupation. Further, it is the respondent's contention that this is a boundary dispute which has been determined by the Land Registrar and the boundaries marked ( See D 163/1).

10. **Onguto J** in the case of **Esther Muthoni Passaris v Charles Kanyuga & 2 others [2015] eKLR** observed the following:

**“So strong is the rule that where disclosure has not been met the court will not even decide the applicant’s application on its merits. In Ex parte Princess Edmond de Polignac [1917] 1 KB 486, Washington L. J stated as follows at page 509:**

**“It is perfectly well established that a person who makes an ex parte application to the court that is to say, in the absence of the person who will be affected by that which the court is asked to do is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge and if he does not make that fullest disclosure then he cannot obtain any advantage from the proceedings and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him”.**

11. I agree with the respondent that the applicant has to some extent been economical with the truth and has failed to disclose all the facts of the case. The correspondence from the Land Registrar clearly shows that this matter had been addressed by his office and the issue of boundaries dealt with which fact was never disclosed to the court by the applicant.

12. As regards prayer 3 seeking compensation of the applicant's uprooted crops, I am of the view that this prayer should be addressed during full hearing of the suit.

13. As regards prayer 4, I decline to restrain the District Land Registrar from marking out the boundaries as this has already been done. I order that the Land Registrar files his report which was used to establish and mark the boundaries for parcels Nos. **Nyeri/Watuka/1669** and **Nyeri/ Watuka/1670** with this court within 60 days from the date hereof.

14. The upshot of the following is that the applicants application fails and the same is hereby dismissed. In the mean time, *status quo* shall be maintained pending the filing of the report by the Land Registrars.

15. Each party to bear their own costs.

16. The matter is set down for mention on 13th February, 2017 to confirm whether the Land Registrar has filed his report and to take further directions.

Orders accordingly.

**Dated, signed and delivered in open court this 6<sup>th</sup> day of December, 2016.**

**L N WAITHAKA**

**JUDGE**

In the presence of:

Mr. Machira for the applicant

N/A for the respondent

Court assistant – Esther