



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC NO. 307 OF 2014

STEPHANIE WANJIE MWANGI.....PLAINTIFF

VERSUS

JOSEPH GIKONYO MWANGI.....1ST DEFENDANT

MWANGI GIKONYO.....2ND DEFENDANT

RULING

The Plaintiff filed an application dated 13/3/2014 seeking orders that:

1. *Spent*
2. *Spent*
3. *The Defendants jointly and severally be barred by an order of temporary injunction from denying access, barricading and/or interfering with the free movement and access of the Plaintiff's tenants on to premises situate on Plot No. 202 of L.R. No. 13136/16 Muigai Inn. Further they be barred from undertaking any further developments, construction and/or utilization of a portion measuring 6 meters that is situate between the Plaintiff's parcel of land and the Defendants' parcel of land known as Plot Number 201 of L.R. No. 13136/16 Muigai Inn pending the hearing and determination of the suit.*
4. *Costs of the application be provided for.*

The application is based on the grounds outlined on the application and supported by an affidavit sworn by the Plaintiff. He deposes that he is the owner of Plot No. 202 having purchased it from Njemuwa Investments Limited whereas the 1st Defendant is the registered owner of Plot No. 201 whereas the 2nd Defendant who his son is the caretaker thereof. Further that he has constructed in his plot, commercial and residential premises that has been occupied by his tenants. It is the Plaintiff's deposition that in December 2013, he learnt that the Defendants have encroached 6 meters onto his property and also barricaded the access road to the said plots. The Plaintiff deposes that his tenants have a challenge accessing their premises due to the excavation works carried out by the 1st Defendant. Further that the said works, if undeterred, will hinder him from further developing his portion which is detrimental to his proprietary interest.

The application was opposed by the 1st Defendant who swore a Replying Affidavit on 8/4/2014. He denied trespassing onto the Plaintiff's portion and deposed that the construction works is being carried out within the limits of the beacons of his plot as per the Plan issued by the original owner, Njemuwa Investments Limited. The 1st Defendant refuted the claim of barricading or denying the Plaintiff's tenants' access, deposing that none of the said tenants had sworn affidavits to that effect. It was his deposition that all the tenants approach the Plaintiff's premises from the main gate which is situate at the front of the plot.

The Plaintiff swore a Further Affidavit on 21/8/2014, wherein he deposed that the encroachment is 3 ½ m by 6m of the access road leading to his plot. It was his deposition that by his tenants not filing affidavits in itself did not defeat the fact that there is an encroachment. The Plaintiff deposed that what is referred to as the "main gate" was only set up for purposes of construction whereas the official entrance is on the encroached area. The Plaintiff deposed that he was willing to have a surveyor either appointed by the court or mutually by the parties to aid the court in solving the dispute at the earliest opportune time.

The application was canvassed by way written submissions. The Plaintiff's counsel filed submissions dated 18/8/2014. Counsel submitted that the Plaintiff's case is that the access road leading to his property has been partially barricaded by the developments undertaken by the Defendants, and therefore the sole issue for determination is whether there has been an encroachment onto the access road. It was reiterated that the Plaintiff was open to a joint survey either by the parties or their common vendor. Counsel pointed out to the court Section 18 of the Land Registration Act and submitted that the provision barred the court from hearing boundary disputes in respect to registered land. It was counsel's submission that the properties herein lacking title, the court was still able to exercise its jurisdiction pursuant to Section 13 of the Environment and Land Court Act. Counsel urged the court to grant the orders sought in view of the nature of construction undertaken by the Defendants. It was submitted that the Defendants would not suffer any prejudice since in the event they are unsuccessful they would need to demolish the buildings constructed on the disputed portion.

Counsel for the Defendants filed submissions dated 2/6/2014, wherein it was submitted that the Plaintiff had met the threshold set out in the celebrated case of **Giella Vs Cassman Brown & Co. Ltd (1973) E.A 358** to warrant the court to grant an order of injunction. Counsel recapped the 1st Defendant's depositions that the developments were undertaken within the limits of the beacon as per the original owner's plan and therefore there was no encroachment as alleged.

There is no dispute as to the ownership of the properties each party has their own plot clearly identified as Plot No. 201 for the Defendant and 202 belongs to the Plaintiff. Both parties purchased from a common vendor M/s Njemuwa Investments Limited. The Plaintiff's concern is that the Defendant has extended the construction that he is undertaking on his property to an access road that leads to his plot. In support of his allegation, the Plaintiff annexed photographs to show the extension of the construction. The Plaintiff also annexed a report from a Mr. John M. Kanotha Surveyor trading as M/s Terran Map Limited which informs the Plaintiff's allegation of encroachment on to the access road. The Defendants refute the allegation of encroachment and contend that their construction is undertaken within the limits of their plot and that the report by M/s Terran Map Limited may not be objective because the said surveyor was acting under the Plaintiff's instruction.

The Plaintiff refers to this as a boundary dispute. He then refers the court to the provisions of **Section 18 of the Land Registration Act** which deprives this court the jurisdiction to entertain boundary disputes of registered land. However, I differ with the Plaintiff slightly on his submissions. On perusal of the pleadings, the dispute is one of an access road. It is therefore the findings of this Court that the court has jurisdiction to adjudicate over this dispute. Refer to the case of **M'mwirabua M'amwari v M'mbiko Thakuchiana & 2 Others Meru Civil Suit 39 of 2012[2012] eKLR**

As deposed by the Plaintiff, the dispute can easily be resolved by obtaining a report of a Surveyor either appointed by the court or mutually agreed upon by the parties. In the meantime, however, the Plaintiff states that any further construction may prove detrimental to the Plaintiff in the event that he is successful in the suit. To that I agree with the Plaintiff, and direct the Defendant to stop further construction on the 3

½ M by 6 M of the access road for period of 6 months or until further orders of this court, within which time, the Plaintiff should have prosecuted the suit. I will also leave to the parties as the first instance the liberty to agree on a surveyor. Costs of this application shall be in the cause.

The parties to ensure the suit is prosecuted expeditiously within the next 12 months to solve the issue once and for all.

Dated, Signed and Delivered this **24th** day of **February, 2015**

L.N. GACHERU

JUDGE

In the Presence of:-

None attendance for the Plaintiff/Applicant though served.

Mr Obwayo for the Defendants/Respondents

Kamau: Court Clerk

L.N. GACHERU

JUDGE

24.2.2015