



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 84 OF 2015

JOSEPH GICHINA MUHORO PLAINTIFF

VERSUS

DANIEL OTIENO ALARA.....1ST DEFENDANT

JOSEPH MBAUNI NDUGUYA.....2ND DEFENDANT

GERALD MARU.....3RD DEFENDANT

R U L I N G

1. The plaintiff/applicant filed a Notice of Motion dated 17/6/2015 in which he seeks an injunction to restrain the defendants/respondents from interfering with his property comprised in **Title No. LR. No. West Pokot/Keringet "A"/44** (suit land). The applicant is the registered owner of the suit land. He annexed a copy of title deed issued on 25/2/1986.
2. The applicant contends that on the 13th of May, 2015, the respondents came on to the suit property and forcefully curved out **0.12 of an acre** and fenced it off. The applicant contends that he had no agreement between him and the respondents and that the respondents should be restrained from interfering with the suit land.
3. The application was duly served upon all the three respondents. The first and third respondents did not file any response to the application. It is the only the second respondent who filed a replying affidavit and a notice of preliminary objection. The second respondent contends that he is the registered owner of **LR. No. West Pokot/Keringet "A"/46**. He annexed a copy of title deed which shows that he is a co-owner of the property known as **LR. No. West Pokot/Keringet "A"/46**.
4. The second respondent contends that the applicant's application is premature and that it is misconceived. He contends that what is in dispute is a boundary dispute between him and the applicant. The second respondent's plot borders the suit land. The second respondent argues that the applicant should first have referred the dispute to the Land Registrar for resolution of the dispute before coming to court. It is on this basis that the second respondent contends that this court has no jurisdiction to determine the application as well as the entire suit.
5. The second respondent contends that as a result of the boundary dispute between him and the applicant, he invited the Land Registrar West Pokot who came to the disputed plots in the company of a Surveyor. The applicant's plot was measured as well as the second respondent's plot. A report was made which confirmed that there was no encroachment by either the suit land or the second applicant's plot. The applicant was however not satisfied with the report of the Land Registrar.

6. I have considered the applicant's application as well as the opposition to the same by the second respondent. I have also gone through the pleadings filed herein. The issue for determination is whether the applicant has demonstrated that he is entitled to an injunction. The principles for grant of a temporary injunction were well set out in the case of *Giella -vs- Cassman Brown & Co. Ltd [1973] EA 358*. Firstly, an applicant must demonstrate that he has a prima facie case with probability of success. Secondly, an injunction will not normally be issued unless otherwise the applicant will suffer irreparable loss which will not be compensated in damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.

7. In the instant case, the applicant has been economical with the truth. In his pleadings, he has stated that he had charged the suit land to the bank which is threatening to auction the property. As a result of this he wanted to sell a portion of it at Kshs.1,000,000/=shillings. He approached the first respondent who offered to buy 0.25 acres at Kshs.720,000/=. The applicant rejected the offer. The first respondent then offered to get someone who could purchase a portion of the land for Kshs.1,000,000/=. He gave the first respondent a commission of Kshs.50,000/=.

8. On 13/5/2015 the first respondent in the company of the second and third respondents descended on the suit land accompanied by a mob and that they curved out 0.12 of an acre from the suit land. According to a letter dated 4/5/2015 from the County Surveyor's office, he had invited the parties concerned to be present for a survey which was to be carried out on 12/5/2015. The surveyor did visit the disputed plots and did the survey. He later compiled his report which is also annexed.

9. The applicant claims that the respondents invaded the suit land and curved out a portion of the same. This is not true because if there was any fencing, it followed the confirmation by the surveyor that the boundary was at the right place. The applicant did not sell any land to the second respondent. The second respondent has annexed a sale agreement which shows that he bought his land from someone else.

10. It is therefore clear that there is no invasion of the applicant's suit land by any of the respondents. The applicant is trying to introduce a different dispute which he had with a different person which dispute has since been resolved by this court. It has emerged that contrary to the applicant's allegations that the three respondents curved out a portion of his land, it is actually a dispute over boundary which has since been resolved. The surveyors must have been sent to the ground by the Land Registrar. A determination of the boundary was made. I therefore have jurisdiction to entertain both this application and the suit itself. It does not matter whether it is the applicant or the second respondent who prompted the Land Registrar to move and resolve the boundary dispute. The fact is that the position as regards the boundary has been determined. Once a boundary has been determined by the Land Registrar, then this court has jurisdiction to entertain any dispute arising therefrom.

11. The applicant has failed to demonstrate that he has any prima facie case with probability of success. There is no loss which he will suffer which will not be compensated in damages. If he finally manages to show that the surveyor was wrong in his findings, the land is still there and the boundary will be aligned. The second respondent is said to have fenced the land. He cannot be forced to move out of his land for to do so will amount to granting an order of mandatory injunction without any grounds for the same. I therefore find that the applicant's application lacks merit. The same is hereby dismissed with costs to the second respondent.

It is so ordered.

Dated, signed and delivered at Kitale on this **24th** day of **September, 2015**.

E. OBAGA

JUDGE

In the presence of Mr. Waweru for the Second Respondent and the Applicant in person.

Court clerk – Winnie.

E. OBAGA

JUDGE

24/9/2015