



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 1407 OF 2013

MISHECK KERE KIRUNGOPLAINTIFF

VERSES

JAMES KAMAU NJOROGE.....DEFENDANT

RULING

The Plaintiff's Application

The Plaintiff seeks the following outstanding orders in his application by way of a Notice of Motion dated 19th November 2013:

1. A temporary order of injunction restraining the Defendant from trespassing into the Plaintiff's land parcel Lari/Bathi/819 and from interfering with the beacons, destroying the vegetables, crops and/or to interfering with the Plaintiff's possession and quiet enjoyment and use of his land pending hearing and determination of this suit.
2. A mandatory order of injunction for the removal of the beacons placed on the land parcel Lari/Bathi/819 by the Defendant through a private surveyor on or about the 25th October 2013, and for the removal of the roof extending to the Plaintiff's parcel of land.

The application is supported by an affidavit and supplementary affidavit both sworn by the Plaintiff on 19th November 2013 and 22nd January 2014 respectively. The Plaintiff and Defendant are brothers, and the Plaintiff is the registered owner of land parcel Lari/Bathi/819 while the Defendant is the owner of land parcel Lari/Bathi/820 which are adjacent to each other. The two parcels of land were excised from the subdivision of L.R No. Lari/Bathi/61 which belonged to their father.

The Plaintiff contends that on diverse dates in the month of March 2008 the Defendant started constructing a house on his portion of land, and that the said house was built on the boundary beacon with the roof extending to the Plaintiff's portion of land. Further, that in the process of constructing the house, the Plaintiff's vegetables were destroyed by the Defendant's contractors. The Plaintiff alleges that the rain water collected from the roof of the said house escapes into his land causing damage, flooding and general nuisance, hence interfering with his quiet enjoyment of the land. The Plaintiff attached photographs of the two houses.

The Plaintiff avers that instead of removing the nuisance, the Defendant filed a complaint with the area chief who summoned the parties herein on 18th October 2013 and 25th October 2013 with the purpose of aligning the boundary between them. The Plaintiff attached two letters from the said chief with the summons. Further, that the Defendant and assistant chief subsequently invited a private surveyor who aligned the boundary by placing new beacons with a view to accommodate the Defendant's house, by

showing that the said house is not on the boundary. The Plaintiff further stated that the assistant chief has made verbal orders for him to remove the vegetables crops touching on the boundary and not to cultivate near the Defendant's house. It is the Plaintiff's contention that the beacons duly placed by the District Surveyors and registered cannot be altered by a private surveyor, chief or the Defendant, unless pursuant to an order of this court upon due process of the law.

The Defendant's Response

The Defendant swore a Replying Affidavit on 27th November 2013 in response to the Plaintiff's application, wherein he deponed that a District Surveyor from Kiambu beacons the various titles that resulted from the subdivision of LR Lari/Bathi/61, and that the beacons placed by the said District Surveyor are still intact. Further, that his house is within his land, and no roof of the house is over hanging into the Plaintiff's land. The Defendant also denied that rain water exits his roof to destroy the Plaintiff's crops, and attached photographs to show that roof water flows on either side of his land.

It was the Defendant's contention that the Plaintiff is the one who kept raising the boundary issue for no known reason, necessitating involvement of the local chief who advised them to have a professional surveyor mark out the boundary from one original beacon to the other. The Defendant asked for the preservation of the *status quo* that has been in place since 2008, and that an order be issued for a court supervised boundary alignment. Further, that whichever party is found to be occasioning the unnecessary litigation should consequently bear the requisite expenses.

The Submissions

The Court issued directions that the parties do file and exchange submissions. The Advocate for the Plaintiff filed submissions dated 20th February 2014, wherein he reiterated the arguments made in the pleadings and argued that the fresh beacons placed on the boundary are visible in the photographs attached to the Plaintiff's affidavits. He submitted that the Plaintiff had shown a *prima facie* case as the beacons were unlawfully erected.

The Defendant's Advocate filed submissions dated 19th March 2014 wherein they also reiterated the arguments made in the foregoing, and contended that the solution to the dispute herein is to have qualified personnel visit the disputed site and establish the location of the original beacons. He further submitted that the prayer that the Defendant be ordered to remove part of his roof is an attempt to seek demolition of his house, as the said roof lies on a permanent wall.

The Issues and Determination

I have read and carefully considered the pleadings, annexed evidence and submissions made. The question to be determined is whether the Plaintiff has met the threshold for the grant of temporary and mandatory orders of injunction. I will therefore proceed to determine the Plaintiff's Notice of Motion on the basis of the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction, and also to determine if the Plaintiff has in addition shown any special circumstances to entitle him to the mandatory injunctions sought, as held by the Court of Appeal in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109**.

The principles in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

The first question I must answer is whether the Plaintiff has established a *prima facie* case. A *prima facie* case was defined by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others[2003] eKLR** as follows:

“a prima facie case in a civil application includes but is not confined to a “genuine and

arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

It is not disputed in the present application that both the Plaintiff and Defendant are registered owners of their respective parcels of land. What is in dispute is the location of the boundary between the two parcels of land, and whether the Defendant has encroached on to the Plaintiff’s land. This is not a dispute that can be resolved by the photographic evidence that has been submitted by the parties, but by a survey and report to the court on the survey findings. It is also not a dispute that can be determined at this stage, and the Plaintiff’s application in the circumstances can only be resolved on the basis of a balance of convenience.

In this regards, as the orders sought by the Plaintiff will interfere with the structure of the Defendant’s house and his possession of the same, I find that in the circumstances the balance of convenience tilts in favour of the Defendant. I accordingly order as follows pursuant to the provisions of section 1A, 1B, 3A and 63(e) of the Civil Procedure Act:

1. That pending the hearing and determination of the suit filed herein or until further orders, the *status quo* to be maintained by the parties herein shall be as follows:
 - a. Both the Plaintiff and the Defendant by themselves or through their representatives, agents or servants are restrained from removing, and /or in any other manner interfering with the beacons placed on the said land parcels known as Lari/Bathi/819 and Lari/Bathi/820.
 - b. The Plaintiff either by himself or through his representatives, agents or servants is restrained from interfering with the possession and occupation by the Defendant of the house on the land parcel known as Lari/Bathi/820, and from demolishing or in any manner interfering with the structures constructed thereon by the Defendant as at the date of this ruling.
2. The County Surveyor, Kiambu County is hereby ordered to undertake a survey of the joint boundary between the parcels of land known as Lari/Bathi/819 and Lari/Bathi/820, and to prepare a report on the location of the beacons on the said boundary, any structures and crops or vegetation on the said boundary and any encroachment by the Plaintiff’s and Defendant’s structures and crops in this respect.
3. The survey and preparation of the survey report shall be undertaken and prepared within ninety (90) days of the date of this ruling. The Plaintiff shall serve the order herein on the County Surveyor, Kiambu County, within fourteen (14) days of the date of this ruling and shall follow-up on the filing of the survey report in court.
4. The Plaintiff and Defendant shall jointly and equally bear the costs of the said survey and survey report.
5. The Plaintiff’s Notice of Motion dated 19th November 2013 is accordingly hereby dispensed with.
6. The costs of the said Notice of Motion shall be in the cause.

Dated, signed and delivered in open court at Nairobi this ____12th____ day of ____May____, 2014.

P. NYAMWEYA

JUDGE