



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 38 OF 2014

JOTHAM INDIAZI MBONGO.....PLAINTIFF

VERSUS

PRISCILLAH A. NOYCE

CRESCENT SPRINGS LTD.....DEFENDANTS

RULING

1. The applicant brought a notice of motion dated 25/2/2014 in which he sought orders of injunction restraining the defendants from pulling down, altering the original boundary, trespassing into or erecting any new fence or trespassing into LR NO. 2050/4 and 2050/10 pending the hearing and final determination of the main suit. The applicant also sought an order directing the respondents from removing beacons which had been put on his land pending hearing of the case. He also prays for costs of the application.
2. The applicant shares a common boundary with the respondents who own plot No.LR 4838/5. The applicant contends that he has been in occupation of his land parcels for a period of over 50 years. That the respondents have been in occupation of their parcel for 15 years.
3. The applicant contends that in January this year, the respondents brought surveyors to the ground in his absence and the surveyors planted beacons on his land thereby hiving off about 3 acres of his land. The applicant contends that he has never had any boundary dispute with the previous owner of the land now held by the respondents. He further contends that the boundary dispute is being raised for the first time this year. It is on this basis that he seeks for the orders of injunction and removal of the beacons erected on his land pending hearing and determination of this suit.
4. The applicant's application is opposed based on a replying affidavit sworn by Priscillah Ann Noyce on 10/3/2014 as well as grounds of opposition dated and filed on 10/3/2014. The first respondent depones that parcel No. 4838/5 initially belonged to her former husband Davis Nakitare. The property was later transferred to her son Daniel Noyce Napwora Nakitare. That in 2011 a fire gutted the area in dispute. When they went to put out the fire, she stumbled on a beacon which was inside the applicant's land. Davis Nakitare tried to sort out the boundary dispute with the applicant but the applicant was adamant.
5. The first respondent deponed that the existing boundary was hurriedly erected to prevent animals straying to neighbours farms. There was also a previous fire incident in 1999 which affected the disputed area. The beacons were sighted on the applicant's land. The deponent called upon the applicant to discuss on the boundary but the applicant refused. It is after this that she decided to engage the services of a surveyor to determine the boundary. The surveyor came to the ground

- but the applicant who had been invited to be present chose to be away.
6. I have considered the applicant's application as well as the opposition to the same by the respondents. Principles for grant of an injunction are now well settled. First 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 might otherwise suffer irreparable injury which might not be remedied by an award of damages. Thirdly if the court is in doubt, it will decide the application on a balance of convenience.
 7. It is clear that the dispute about the boundary has existed even prior to 2014. The applicant was made aware about the visit by the surveyors. He admits as much in his replying affidavit only that he seems to claim that on the day the survey was to be carried out, it never occurred but was done subsequently in his absence. It is clear that the applicant was not contented with the survey exercise which was carried out. That is why he wrote a letter dated 13/2/2014 addressed to the County Surveyor indicating that he was to engage service of a private surveyor.
 8. The question which then arises is whether the applicant has demonstrated that he has a prima facie case with a probability of success. I do not think that the applicant has demonstrated that he has a prima facie case with probability of success. The boundary dispute has been settled by a County Surveyor who has filed his report. The mere fact that the applicant does not agree with the same cannot entitle him to orders of injunction.
 9. The applicant will not suffer damage which will not be compensated in an award of damages. The land is intact. If the trees growing on the farm are harvested, the same can be quantified and he can be compensated in damages if he finally succeeds in his case. I find that the applicant's application cannot be granted in the circumstances. The same is hereby dismissed with costs to the respondent.

It is so ordered.

Dated, signed and delivered in open court on this 6th day of June, 2014.

E. OBAGA

JUDGE

In the presence of Mr Karani for applicant and Mr Atudo for Respondent.

Court Clerk – Kassachoon.

E. OBAGA

JUDGE

6/6/2014