



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
ENVIRONMENT AND LAND COURT
CIVIL SUIT NO. 446 OF 2013

ISAAC WAIHAKAPLAINTIFF

VERSUS

GICHEHA NJOROGE.....1ST DEFENDANT

JOHN KAHINGA.....2ND DEFENDANT

RULING

1. Before the Court is a Notice of Motion dated **2nd July, 2013** filed by the plaintiff herein, seeking the following substantive order:

That pending hearing and determination of this suit, this Honourable court be pleased to restrain the defendants by themselves, their agents and/or servants from entering, trespassing, ploughing or dealing with the area measuring 2 acres within Nakuru/Olongai Phase 11/85 (hereafter referred to as the suit property) in any manner whatsoever.

2. The application is premised on the grounds stated on the face thereof and is supported by the affidavit sworn by the plaintiff. He depones that he purchased the suit property measuring approximately 2.23 Hectares vide a sale agreement (**IW1**) from **Patrick Kamau Njoroge** dated **30th March, 2005** and took possession; that for the last 12 years he has only been cultivating 3 and a half acres of the suit property as the defendants have encroached on the rest of the suit property that he has enlisted the help of the Provincial Administration to have the defendants evicted, but to no avail.

3. On **3rd November, 2011** the suit property was surveyed after the applicant took the boundary dispute before the Nakuru District Land Registrar. The District Land Registrar and District Land Surveyor accompanied by the respective parties, visited the suit property, took measurements along the boundaries of parcels no. 185,117,116 and 84. The District Land Surveyor filed his report in which he gave his findings and drew a sketch map indicating the boundaries of the suit property (**IW3**).

4. In his ruling dated **3rd November, 2011 (IW2)**, the District Land Registrar found that the defendants had encroached onto the plaintiff land and urged the parties to file a land case as the encroachment was of a high degree and could not be handled at his office as a boundary dispute.

5. The application is opposed vide the 1st defendant's replying affidavit dated **27th February, 2014**. He depones that he owns the adjoining parcel of land (Plot No 117) and has occupied it for over 10 years; that the former owner of the suit property, who had sold the land to the plaintiff, never raised the issue of encroachment. It was his contention that the plaintiff was not sure on the exact acreage he had purchased

and that the ruling of the Land Registrar was that the dispute should be resolved by a court of competent jurisdiction. He urged the court not to grant the orders sought as this would amount to evicting him from his land.

6. The 2nd defendant despite being served on **1st February, 2014** did not respond to the application or attend court.

7. The application was urged before me orally on **18th June, 2014**. Both parties chose to rely on their pleadings.

8. I have considered the application, the supporting affidavits and the annexures thereto. I find the issue for determination to be whether the applicant is entitled to the orders of injunction sought at this interlocutory stage on the facts and circumstances of this case.

9. From the affidavit evidence adduced and in particular the report by the District Land Surveyor dated **7th November, 2011** where he gives his findings as follows; "**it was found that the owners of parcels 115, 116 and 117 had encroached parcel 85 and the water way (valley) should not be used as boundary line** and the District Land Registrar's ruling dated **3rd November, 2011** where he states; "**Having taken measurements along the boundary running from the road to the disputed water way (valley) for all the parcels to check if the claim is true, it was realized as indicated by the Surveyor's report attached, that there was encroachment of great degree which rules out a boundary dispute and hence a land dispute which should be handled by a Court of competent jurisdiction. The defendants have all along assumed the river valley as the boundary and have been utilizing the disputed area of encroachment over a number of years.**", I am satisfied that the applicant has established a *prima facie* case with a likelihood of success that there is encroachment on his land by the defendants.

10. I therefore grant prayer 3 in the notice of motion dated **2nd July, 2013** with costs.

Orders accordingly.

Dated, Signed and delivered at Nakuru this 17th day of October, 2014.

L N WAITHAKA

JUDGE

PRESENT

N/A for Defendant

N/A for Plaintiff

Emmanuel Juma: Court Clerk

L N WAITHAKA

JUDGE