



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 297 OF 2013

ESTHER NJERI NDUNG’U.....1ST PLAINTIFF

MILKA WANJIRU GIBSON.....2ND PLAINTIFF

VIELINA MUKAMI NDUNGU.....3RD PLAINTIFF

VERSUS

DISTRICT LAND SURVEYOR, MURANG’A.....1ST DEFENDANT

DISTRICT LAND REGISTRAR MURANG’A.....2ND DEFENDANT

THE REGISTERED TRUSTEE OF P.C.E.A GITIIBA CHURCH.....3RD DEFENDANT

BOARD OF GOVERNORS OF MUGECHA PRIMARY SCHOOL.....4TH DEFENDANT

BOARD OF GOVERNORS OF MUGECHA SECONDARY SCHOOL.....5TH DEFENDANT

HON. ATTORNEY GENERAL.....6TH DEFENDANT

RULING

This is in respect to the plaintiffs/applicant’s Notice of Motion dated 21st September, 2012 and filed herein on the same day seeking the following substantive orders:-

a. Spent

b. Spent

c. That the respondents either by themselves, their agents, proxies and/or any other persons purporting to act under them be restrained from transferring and/or interfering with the plaintiffs peaceful possession of all those properties identified as Title numbers Loc 4/NAARO/1460, 1461, 1462, 1463 and 1464 situated within Muranga County pending the hearing and determination of this suit inter-parte.

d. A formal declaration by Court that the parcels of land identified hereinabove and situated within Muranga County belong to the plaintiffs absolutely

e. That costs of this application be provided for.

The application is supported by the joint affidavit of the plaintiffs/applicants in which they depone, inter alia, that they are the registered owners of the parcels of land identified as LOC 4 NAARO/1460, 1461, 1462, 1463 and 1464 (hereinafter the suit property) which were initially known as LOC 4/NAARO/433 measuring 26.9 Acres registered in the names of the late NDUNGU KURIA before it was surveyed and sub-divided into the said five parcels subject matter of this suit. However, on or about 9th February 2012, the 1st plaintiff was summoned by the District Commissioner at Muranga where in the presence of the 3rd, 4th and 5th defendants it was alleged that there was a boundary dispute between the plaintiffs' parcels and the 3rd to 5th defendant's parcel and that the said dispute would have to be arbitrated. The 2nd defendant then proceeded to excise a parcel of land from the suit property claiming that the same belong to the 3rd to 5th respondent. With the help of the police, the respondents placed beacons on the suit property notwithstanding the plaintiffs' protestation. That gave rise to this suit and application.

The application is opposed and all the respondents have put in replying affidavits. On behalf of the 1st, 2nd, 4th, 5th and 6th respondents, Mr. F.M. Wanjane the District Land Registrar deponed that there is a boundary dispute involving the parcels of land LOC 4/NAARO/886 and 865 with No. LOC 4/NAARO/433 and when surveyors visited the site, it was discovered that part of land LOC 4/NAARO/433 had encroached on land No. 866 and 865 and therefore the correct boundary had to be fixed.

On behalf of the 3rd respondent, its chairman deponed that the exercise of establishing the true boundaries was done in the presence of the plaintiffs and not arbitrarily as alleged.

Submissions have been filed by counsels for all parties.

I have carefully considered the application, the affidavit by both parties, the rival submissions by learned counsels and the law.

This being an application for an interim injunction, it has to be determined within the principles laid down in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A. 358** and these are:-

- 1. The applicant must show a prima facie case with a probability of success***
- 2. An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not otherwise be adequately compensated by an award of damages***
- 3. If the Court is in doubt, it will decide the application on a balance of convenience.***

It is not in dispute that the suit property is registered in the names of the plaintiffs/applicants. Therefore, under **Section 27 and 28** of the **repealed Registered Land Act** under which the suit property is registered, the plaintiffs/applicants are entitled to enjoy all the rights and privileges belonging or appurtenant thereto. Such rights cannot be defeated except as provided for under the law. According to the District Land Registrar Muranga Mr. F. Wanjane's replying affidavit in paragraphs 5, 6, 7 and 8, having found that there was a boundary dispute between land Loc 4/NAARO/433 and Loc 4/NAARO/866 and 865, he called in a surveyor who discovered that parts of Loc 4/NAARO/433 had encroached into Loc 4/NAARO/866 and 865 so the correct boundary position was marked and the parties were advised to honour the marked boundary and any aggrieved party was given 30 days to appeal. What is not clear however is whether the process complied with the provisions of **Section 22** of the **repealed Registered Land Act** with regard to the fixing of boundaries. There is no evidence that notices were issued to all interested parties and that they were given an opportunity to be heard and thereafter the precise boundaries were defined and a note made in the register that the boundary had indeed been fixed. That is a mandatory procedure under **Section 22 (1) to (3)** of the **repealed Registered Land Act** and if indeed that had been done, the records of this procedure would have been availed for this Court's perusal. That has

not been done and this Court can only go by the plaintiffs/applicants affidavit that their land was excised by placing in new boundaries in the presence of the police and “*arbitrarily*” without giving a hearing to their protestations. That would be a clear violation of the law and I would echo the words of Justice Waki in MOHAMED VS COMMISSIONER OF LANDS & FOUR OTHERS K.L.R (E & L) 1 that in a situation such as this, it is no answer that the applicant may be compensated in damages as no amount of money can compensate the infringement of a right or atone for clear transgressions against the law.

On the material before me, the plaintiffs/applicants have established that they are the registered proprietors of the suit property and therefore have a prima facie case as set out in the GIELLA case (supra) and secondly, a clear transgression of Section 22 of the repealed Registered Land Act has been shown as against the 1st and 2nd defendants/respondents in the manner in which the boundaries were placed on the suit property. The plaintiffs/applicants are therefore entitled to the orders sought of temporary injunction.

The applicants have also sought a formal declaration that the suit property belong to them. That is a remedy that ought to await the full trial once the issue of boundaries has been settled.

Ultimately therefore, I grant the plaintiffs/applicants only prayer (c) of their Notice of Motion dated 21st September, 2012.

Costs shall be in the cause.

B.N. OLAO

JUDGE

28TH NOVEMBER, 2014

28/11/2014

Before

B.N. Olao – Judge

Mwangi – CC

Plaintiffs– absent

3rd 4th and 5th Defendants – present

COURT: Ruling delivered this 28th day of November, 2014 in open Court.

Plaintiffs absent

3rd, 4th and 5th Defendants present

1st, 2nd and 6th Defendants absent.

B.N. OLAO

JUDGE

28TH NOVEMBER, 2014