



REPUBLIC OF KENYA



KENYA LAW
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**Mbaria & another v Patel & 5 others; New Loresho Estate Association
& another (Interested Parties) (Environment & Land Case
E131 of 2024) [2024] KEELC 7312 (KLR) (30 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7312 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E131 OF 2024
LN MBUGUA, J
OCTOBER 30, 2024**

BETWEEN

ROSEMARY WANJIKU MBARIA 1ST PLAINTIFF

ROSE MUMBI MBOCHA 2ND PLAINTIFF

AND

VIPUL PATEL 1ST DEFENDANT

SWASTIK HOLDING LIMITED 2ND DEFENDANT

ROSE MUMBI MBOCHA 3RD DEFENDANT

PAULINE KAGURE KIMANI 4TH DEFENDANT

CHIEF LAND REGISTRAR 5TH DEFENDANT

DIRECTOR OF SURVEYS 6TH DEFENDANT

AND

NEW LORESHO ESTATE ASSOCIATION INTERESTED PARTY

STEPHEN GICHUKI NDIRITU INTERESTED PARTY

RULING

1. The Plaintiff's Notice of Motion dated 20.3.2024 is for determination. She seeks orders directing the 5th and 6th Defendants to establish the abutments and boundaries of her property, LR No. 21080/44 in contradistinction to the Land Reference Numbers of the properties surrounding it and avail a report to the court.



2. She also seeks orders restraining the 1st and 2nd Defendants from dealing/interfering with her rights, occupation /possession of LR No. 21080/44 by constructing on LR No. 21080/41 which the 1st and 2nd Defendants claim to be LR No. 21080/26 and that they be compelled to demolish the part of the perimeter wall denying the Plaintiff access to her parcel within 7 days of the ruling. She also seeks orders that cost be provided for.
3. The application is premised on grounds on its face and on the Plaintiff's affidavit sworn on 20.3.2024 where she avers that she is the registered proprietor of the parcel Land Reference No. 21080/44 which adjoins Land Reference Number 21080/41 and which was hived from LR No. 21080 registered to Jotech Limited.
4. That about December 2023, her attention was drawn to a construction board that had been erected on the adjoining property, which intimated an intention by the proprietors to commence construction. Subsequently, between 25.12.2023 and 4.1.2024, the 2nd Defendant through the 1st Defendant trespassed into her property and maliciously pulled down and destroyed a fence (comprising chain link fence wire and concrete posts), put up as a boundary between her property and the adjoining property, entered her property without consent and dumped soil thereon.
5. That she reached out to the 1st Defendant who claimed that the boundary fence had encroached into the 2nd Defendants property. In a bid to amicably resolve the dispute, she proposed that a joint survey be undertaken to ascertain the boundaries and re-establish the beacons.
6. That the joint survey could not be undertaken as it emerged that deed plans in respect of the 2 parcels could not be reconciled.
7. She contends that she was able to establish that the 2nd Defendant's title over the adjoining property was non-existent and the deed plan forming the basis of his claim over the disputed portion of land was not valid and was cancelled by the 6th Defendant.
8. She avers that on 5.2.2024, she lodged an application with the 5th Defendant for ascertainment and fixing of boundaries pursuant to regulation 40 (1) of part V (Boundaries) of the Land Registration (General) Regulations, 2017), which application was forwarded to the Director of surveys for further consideration.
9. She contends that part of the 2nd Defendant's perimeter wall has been constructed in front of the main gate to her property, thus she is unable to access her property and further, the 2nd Defendant has fenced part of the disputed area.
10. The Plaintiff's application is also supported by the affidavit of one Tom Macharia sworn on 20.3.2024. He avers that the 1st and 2nd Defendant's claim to the disputed property is predicated on an area survey map which was fraudulently prepared by fraudsters to unlawfully appropriate LR No. 21080/40 (a public utility land) that abuts the Plaintiff's parcel of land and which has sparked ELC Petition No. 20 of 2017 that is still pending. That using a fictitious survey map, the fraudsters created fake title documents.
11. In support of the application, the 1st Interested party filed an affidavit sworn by its chairman, Prof. David Kariuki on 15.7.2024 where he contends that the Plaintiff has been their member for a period exceeding 10 years being the registered owner of LR No. 21080/44 and during the period in question, she had put a caretaker on the property who has been residing there with his family.
12. He avers that in contrast, the association has no knowledge of the 1st and 2nd Defendants ever owning any parcel within New Loresho estate. Adding that the soil dumping activity undertaken by the 1st and



- 2nd defendants has ruined the drainage system within the estate and caused unknown flooding and pot holes along the tarmac road within the estate of which the association lodged complaints with Nairobi County Government and the Environmental Management Authority.
13. The application is opposed by the 1st and 2nd Defendants vide a Preliminary Objection dated 2.5.2024. They contend that the court lacks jurisdiction to hear the suit as the issues raised herein are res judicata having been conclusively decided in the Nairobi Environment and Land Court Case No. E369 of 2022; Swastik Holdings Limited v Ann Nyaguthii Kimani and in the Court of Appeal ruling in Civil Application No. E002 of 2023; Ann Nyaguthii Kimani v Swastik Holdings Limited.
 14. It is also contended that the court lacks jurisdiction to determine the suit as it offends the provisions of Section 18 (2) of the Land Registration Act, 2012 to the extent that the Plaintiff's case relates to a boundary issue.
 15. The 1st and 2nd Defendants also filed a replying affidavit sworn on 17.6.2024 by Satishchandra Rameshbhai Patel, the managing director of the 2nd Defendant. He avers that the 2nd Defendant is the legal proprietor as lessee from the Government of the parcel of land known as Land Reference Number 21080/26 measuring 0.2508Ha. He contends that the 2nd Defendant filed a claim before the Environment and Land Court seeking redress against third parties who had illegally and without consent entered into the suit property. That the Defendant in the said suit, Ann Nyaguthi Kimani denied all allegations of trespass and asserted that she was the registered proprietor of the land parcel L.R NO. 21080/41 which property occupied the same space as the 2nd Defendant's parcel L.R 21080/26.
 16. He states that on 27.2.2023, Hon. Judge Mogeni delivered her judgment finding that the 2nd Defendant had good title to the suit property.
 17. Subsequently, the Defendants in that suit lodged an Appeal before the Court of Appeal in Appeal E002 of 2023; Ann Kimani v Swastik Holdings Limited together with an application seeking an order for stay of execution of the Judgment by Hon. Judge Mogeni and in a ruling delivered on 26.5.2023, the court declined to grant the orders on the basis that the Appeal was not arguable, following which the Defendant withdrew the appeal.
 18. It is also averred that the mandate to determine boundary disputes is a preserve of the land registrar and as such, the Plaintiff's Application and suit are premature for failure to exhaust the remedies available prior to escalating the matter before this court.
 19. In response to the 1st and 2nd Defendants' arguments, the Plaintiff filed a further affidavit sworn on 6.8.2024 contending that this suit is not res -judicata as none of the issues raised in Nairobi ELC No. E369 of 2022 where the court determined proprietorship of LR No. 21080/26 and in Civil Application No. E002 of 2023 have been raised in the present suit in which she argues that the 2nd Defendant's claim over the disputed parcel of land emanates from a title that is non-existent and the parties in the two suits are distinct.
 20. She contends that the suit also raises issues of trespass which cannot be determined by the Land Registrar and further, that under Section 18 and 19 of the Land Registration Act, the land registrar would have jurisdiction if there was no survey but the boundaries between her property and the 2nd Defendant have been verified and defined in their respective survey plans.
 21. The 3rd-6th Defendants did not file responses to the application.
 22. The Plaintiff's submissions are dated 5.7.2024 where it is argued that she has met the 3 conditions to warrant grant of an interlocutory injunction as laid down in Giella v Cassman Brown & Co. Ltd.



23. It is argued that a prima facie case is established as the Plaintiff proved proprietorship of LR 21080/80/44 and quiet possession until December 2023 when the 1st and 2nd Defendants unlawfully trespassed on the basis of a fraudulent title. The case of *Dina Management Limited v County Government of Mombasa & others* [2023] eKLR is cited.
24. The Plaintiff relies on the case of *Mary Wanjiru v Lucy Njeri Munyua & Another* [2020] eKLR to submit that she discharged the evidentiary burden to establish a prima facie case as her evidence is not controverted.
25. The Plaintiff also submits that she would suffer irreparable damage if the 2nd Defendant is allowed to continue with construction as it would cause permanent disfiguring and depreciation of her property which cannot be remedied by an award of damages.
26. She also contends that if the orders sought are not granted, she would be inflicted with greater hardship as she would be unable to access her property thus depriving her of her proprietary rights while in contrast, the Defendants have not demonstrated the prejudice that they would suffer.
27. On the contention that the suit is res-judicata, the Plaintiff submits that she specifically pleaded fraud, which cause of action was not pleaded in ELC No. Case No. 369 of 2022. To this end, the case of *Evanson Gachie Kariuki & 2 others v Francis Kariuki Wachira & Another* [2019] eKLR is cited.
28. The Plaintiff submits that the dispute between the parties is not about boundaries as LR No. 21080/26 is a fictitious parcel of land which is in fact LR 21080/41.
29. The court of appeal case of *Menka Limited v Ratilal Ghela Samat Shah & 2 Others* [2019] eKLR is cited to submit that this court has jurisdiction to determine a suit where numerous issues over and above the adjudication of boundaries arise.
30. Reliance is also placed on the case of *R v Kenya Revenue Authority Ex Parte Style Industries Limited* [2019] eKLR to submit that where an administrative body/tribunal cannot provide adequate recourse, a litigant is granted leeway to approach the courts of law for the recourse they intend to seek.
31. The case of *Fredrick Ngaya Thuo v Peter Mungai Njuho* is cited to submit that the jurisdiction of the land registrar is invoked in the instances where no survey to verify the boundaries has been undertaken by the office of survey which is not the case in the instant suit.
32. The 1st and 2nd Defendant's submissions are dated 23.7.2024 where they argue that in ELC E369 of 2021, the court found that the correct reference number for the 2nd Defendant's parcel was LR 21080/26 and that LR No. 21080/41 was the result of an erroneous 2nd survey done on the suit property. That in the matter, the Plaintiff alleges that the said title is fictitious thus it raises similar issues as the previous suit and is res judicata as it offends Section 7 of the Civil Procedure Act. The case of *Kennedy Mokua Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende* [2022] eKLR is relied upon.
33. It is further submitted that though parties in the former suit are different, the issues raised in both suits are similar. To this end, the case of *Nancy Mwangi T/a Worthlin Marketers v Airtel Networks (k) LTD (Formerly Celtel Kenya Ltd) & 2 Others* [2014] eKLR as well as *Gladys Nduku Nthuki v Letshego Kenya Limited; Mueni Charles Maingi (Intended Plaintiff)* [2022] eKLR are relied upon.
34. Relying on the case of *Azzuri Limited v Pink Properties Limited* [2018] eKLR as well as the case of *George Kamau Macharia & Dexka Limited* [2019] eKLR, it is submitted that jurisdiction to determine the boundary issues between the parties herein is with the Land Registrar.



35. The 1st and 2nd Defendants also submit that the Plaintiff failed to meet the threshold set for grant of a temporary injunction in the nature sought. It is argued that the Plaintiff cannot prove trespass without adducing any evidence showing the boundary of her property vis a vis the 2nd Defendants.
36. That further, the 2nd Defendant is currently undertaking development and if restrained from continuing, it would suffer irreparable harm.
37. I have considered all the arguments raised herein. The issues falling for determination are; Whether this matter is res-judicata, whether this matter is a boundary dispute to be resolved by the Land registrar and whether the injunctive orders sought by the plaintiff against the 1st and 2nd defendants are merited.
38. On the issue of res judicata, I make reference to the case of Kenya Commercial Bank Ltd vs Benjoh Amalgamated Ltd [2017] eKLR cited in Cosmas Mrombo Moka v Co-operative Bank of Kenya Limited & Another [2018] eKLR, where it was stated that;
- “The elements of res judicata have been held to be conjunctive rather than disjunctive. As such, the elements reproduced below must all be present before a suit or an issue is deemed res judicata on account of a former suit;
- (a) The suit or issue was directly and substantially in issue in the former suit.
 - (b) That former suit was between the same parties or parties under whom they or any of them claim.
 - (c) Those parties were litigating under the same title.
 - (d) The issue was heard and finally determined in the former suit.
 - (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.
39. In the case ELC E369 of 2021, the court had found that the correct reference number for the 2nd Defendant’s parcel was LR 21080/26 and that LR No. 21080/41 was the result of an erroneous 2nd survey done on the suit property. The current plaintiff was not a party in the former suit.
40. The plaintiff’s claim of ownership herein relates to parcel 21080/44, which she claims that it was trespassed upon by the 1st and 2nd defendants. This far, I find that the claim of ownership and trespass raised by the plaintiff are not issues which were canvassed in the former suit.
41. However, the plaintiff does state that the 1st and 2nd Defendants have encroached onto her parcel of land by constructing on LR No. 21080/41 which they claim to be LR No. 21080/26. The former court had already made a stand that the 1st and 2nd Defendant’s parcel is LR No. 21080/26, thus this particular issue on the identity of the land reference number of the 1st and 2nd defendants parcel was directly in issue in the former suit and is resjudicata. See the case of Independent Electoral and Boundaries Commission v Maina Kiai & 5 others [2017] eKLR.
42. Seeing that some issues herein were not raised or determined in the former suit, I will make a finding that this suit is not resjudicata.
43. Is the dispute herein a boundary one? The Plaintiff contends that the 1st and 2nd Defendants have encroached onto her parcel of land. She has given minute details of how she made attempts to have the dispute resolved. The 1st and 2nd defendants contend that the jurisdiction of the court is ousted under Section 18 of the Land Registration Act as the dispute is a boundary one. In Azzuri Limited v



Pink Properties Limited [2018] eKLR, the court of appeal stated as follows after considering the said provision;

“This means that under the aforesaid provisions, boundary disputes pertaining to lands falling within general boundary areas must be referred to the Land Registrar for resolution.....”.

44. In *Reuben Kioko Mutyaene v Hellen Kiunga Miriti & 4 Others; Ntalala Eric Mutura & Another (Interested Parties)* [2021] eKLR, this court stated as follows while sitting in Meru ELC,

“It is trite law that where the law has given a legal obligation to a department of Government, it is important for the Court to let that department proceed to meet the legal obligations. In this case the office of the Land Registrar is mandated to deal with the general boundary dispute first before the same is escalated to the Court. It is the view of this Court that the dispute is prematurely before the Court.”

45. The Plaintiff averred that she lodged an application with the 5th Defendant for ascertainment and fixing of boundaries which was forwarded to the Director of surveys for further consideration. And plaintiff's prayer no. 3 in her application is for the boundaries to be established by the 5th and 6th defendants.

46. Seeing that the Plaintiff had already kick started the process of ascertaining the boundaries and the law has given the 5th Defendant jurisdiction to do so, it is only just that this entity should be left to do its work. It would be premature to determine the issue which is already in the hands of the 5th Defendant courtesy of the plaintiff.

47. However, in view of the issues of fraud, illegality and corruption raised in the plaint, the court will reserve the resolution of these issues in the main trial.

48. On injunction, I find that the claims of ownership are hotly contested with the plaintiff claiming that the ownership of land by the 1st and 2nd defendants was based on fraud. On the other hand, the 1st and 2nd defendants contend that a court of competent jurisdiction has pronounced their claim of ownership for parcel 21080/26. It is noted that the protagonists have embarked on adducing evidence at this interlocutory stage to buttress their rival claims. However, such conflicting issues ought to be canvassed in the platform of a full trial.

49. In the case of *Cyanamid Co. vs Ethicon Ltd* (1975) 1 ALL ER 504; (1975) A.C 396 HL cited in *Tritex Industries Limited & 3 Others vs National Housing Corporations & Another* [2014] eKLR, it was held that;

“It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend, nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial”.

50. In light of the above analysis, the court will not interrogate the criteria of issuance of injunctive orders as set out in the case of *Giella v Cassman Brown & Co. Ltd*. I find that the appropriate order to give is the maintenance of status quo until the boundary issue is resolved.



51. In the case of Daniel Kinyanjui Gitau & 227 Others v Mary Ruguru Njoroge [2020] eKLR, the court had this to say on the issue of status quo.

“The Court of Appeal defined what ‘status quo’ means in the case of Shimmers Plaza Limited vs. National Bank of Kenya Limited [2015] eKLR as follows:

“Status quo” in normal English parlance means the present situation, the way things stand as at the time the order is made, the existing state of things. It cannot therefore relate to the past or future occurrences or events”.

52. Similarly, in the matter at hand, the legal rights of the parties are yet to be pronounced, hence no party should have leverage over the other, that is why the order of maintenance of status quo is important.

53. In the end, I proceed to give the following orders;

1. **The preliminary Objection dated 2.5.2024 is dismissed.**
2. **The application dated 20.3.2024 is allowed in terms of prayer No 3.**
3. An order of maintenance of status quo is hereby issued. For avoidance of doubts, no activities including constructions are to be undertaken on the disputed and mentioned properties.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30th DAY OF OCTOBER, 2024 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Chege holding brief for Issa for Plaintiff

Maiwa for 1st and 2nd Defendants

Otieno holding brief for Karugu for 1st Interested Party

Court Assistant: Vena

