



REPUBLIC OF KENYA



**KENYA LAW**  
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**Thiong'o v Oliverjoy Properties Developers (Environment & Land Case E338 of 2022) [2023] KEELC 912 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 912 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E338 OF 2022**

**J OMANGE, J**

**FEBRUARY 16, 2023**

**BETWEEN**

**ELIZABETH WAMBUI THIONG'O ..... PLAINTIFF**

**AND**

**OLIVERJOY PROPERTIES DEVELOPERS ..... DEFENDANT**

**RULING**

1. The subject matter of this suit is the Parcel of Land known as Dagoretti/ Riruta/5664 (the Suit Property).
2. Before this court is the plaintiff's notice of motion application dated 13<sup>th</sup> October 2-22 seeking the following reliefs:
  - a. Spent
  - b. Spent
  - c. That pending hearing and determination of the main suit, this Honourable Court be pleased to issue orders restraining the Defendant/ Respondent whether by itself, its employees, servants, or agents or any person or entity working through it from trespassing on, wasting, demolishing, constructing on or otherwise interfering with the Plaintiff's Parcel known as Dagoretti/ Rituta/5665 or any part/ portion thereof.
  - d. That the Officer Commanding Station (OCS), Muthangari Police Station does supervise and ensure that the orders sought are enforced for purposes of maintaining law and order and to protect the Plaintiff/ Applicant's property.
  - e. That the costs of this Application be provided for.



3. The application is based on the grounds inter alia that the plaintiff is the legal title holder of the suit property, the positions of the beacons thereof are well known to the defendant, however the Defendant has been using extra judicial means to extend its parcel which adjoins the suit property.
4. That defendant, guarded by goons have embarked on a construction spree thus destroying the plaintiff's fixtures and this affects the plaintiff's quiet possession of the suit property.
5. It is the plaintiff's contention that the suit property is located in a volatile area hence the defendant's actions are likely to trigger unrest, chaos and strife which will be detrimental and dangerous to the good neighborliness which existed prior to the impugned actions.
6. The application is supported by plaintiff's affidavit sworn on October 15, 2022 where she reiterated the foregoing grounds of her application. She contends that she obtained title to the suit property in the year 2013 before the defendant bought the adjoining property. That she used to live in perfect harmony until March 2022 when she was informed by the Assistant Chief that surveyors had wanted to beacon the land.
7. That since the property had already been mapped, titled and the dimensions known back in 2010, the defendant's conduct aided by the Assistant chief were suspected to be conniving to hive off her parcel of land. That she reported the matter to the Police station who advised her to see the Director of Survey regurgitating her worries. However, the District Surveyor dismissed her concerns.
8. That a local tout under the defendant's whims who recently constructed a makeshift bus stage in front of the suit property was arrested and prosecuted, and though she has made trips to the Director of Survey, the matter is unresolved.
9. The plaintiff adduced copies of her title documents, mutation forms, correspondence with the Police, Survey and land office as well as the Provincial administration.
10. The application is opposed by the defendant. By the replying affidavit of James Mwangi sworn on November 4, 2022, the defendant's director contended that the suit and application were misconceived, fatally defective and incompetent as the defendant does not own any land which is adjacent to the plaintiff's but the same is owned by the said James Mwangi Kibugi.
11. The defendant's Director depones that he owns the property knows as Dagoretti/ Riruta/8818 which he bought from the plaintiff's relatives and upon such acquisition, the beacons on ground were shown to him by his private hired surveyor.
12. He states that he has erected structures on the property and he has tenants in occupation. That though the plaintiff is his neighbor, he has not encroached, trespassed or removed any beacons and has no intention to interfere with the beacons or do anything injurious of the plaintiff.
13. Mr Mwangi asserts that following the reports made by the plaintiff, a resurvey was conducted on 3 August 2022 and a report of August 15, 2022 indicated that he had not in any way encroached, uprooted or tampered with the beacons He therefore sought that the case be dismissed with costs.
14. None of the parties filed submissions to support their respective positions.
15. Nevertheless, I have considered all the pleadings, affidavits and annexures filed in this case.
16. The plaintiff's application seeks to restrain the defendant from interfering with her possession of the property, or be it, the boundaries. On the other hand, the defendant contends that it does not own the adjacent property, its director does, and the Director states that he has not carried out any action to do as the plaintiff alleges.



17. The law on granting interlocutory injunctions is set out under order 40 rule 1 (a) and (b) of the [Civil Procedure Rules](#) as follows:

“Where in any suit it is proved by affidavit or otherwise –

- a. That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- b. That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in execution of any decree that may be passed against the defendant in the suit;

the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

18. The principles for grant of injunction are well settled by the decision of *Giella Vs Cassman Brown & Company Limited* [1973] E.A. 358., where the court stated thus:

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

19. In this case, the plaintiff has demonstrated that she is the owner of the suit property. Her title is not opposed. She has however not demonstrated any actions by the defendant that would interfere with her said title or possession.

20. As a matter of fact, having reported the matter to the authorities, it is clear that a resurvey was conducted and a report dated August 15, 2022 made by the Area Regional Surveyor concluding as follows:

“The Boundary beacon were marked and placed in the presence of the Area Chief, Assistant chief and the Proprietor of Dagoretti/ Riruta/5664. In summary, the ground measurements occupied by the Proprietor are in accordance to the sealed RIM Dagoretti/ Riruta Sheet 8 ”

21. The Plaintiff does not dispute or challenge this report by the Regional Surveyor. The Plaintiff did not adduce any further evidence why these findings would be incorrect. On this basis, this court is not persuaded that the Plaintiff has established a prima facie case with a probability of success.

22. Having failed to establish a prima facie case with a probability of success, there is no need to assess the other limb of irreparable injury or balance of convenience.

23. I note from the plaintiff’s claim, that there seems to be a boundary concern. The outcome of a beacon re- establishment process is alleged to have moved beacons and encroached her property, and this was not in line with the Survey Plan- per her letter dated July 27, 2022. Clearly, the issue here is boundaries.



24. How are boundary disputes determined? sections 18, 19 and 20 of the [Land Registration Act](#) state as follows:

18. Boundaries.

1. Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.
2. The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.
3. Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary:

Provided that where all the boundaries are defined under section 19 (3), the determination of the position of any uncertain boundary shall be done as stipulated in the [Survey Act](#), Cap. 299.

19. Fixed boundaries.

1. If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.
2. The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.
3. Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section.

20. Maintenance of boundaries.

1. Every proprietor of land shall maintain in good order the fences, hedges, stones, pillars, beacons, walls and other features that



demarcate the boundaries, pursuant to the requirements of any written law.

2. The Registrar may in writing, order the demarcation within a specified time of any boundary mark, and any person who fails to comply with such an order commits an offence and is liable on conviction to a fine not exceeding two hundred thousand shillings.
  3. The Registrar may in writing, order which of adjoining proprietors shall be responsible for the care and maintenance of any feature demarcating a common boundary, and any proprietor so ordered to be responsible for the care and maintenance of the boundary feature who allows the boundary feature or any part of it to fall into disrepair, be destroyed or removed commits an offence and is liable on conviction to a fine not exceeding two hundred thousand shillings.
25. I have taken the liberty to outline the above provisions to inform the Plaintiff on the process of resolving a boundary concern.
26. Section 18(2) of the [Land Registration Act, 2012](#), prohibits this Court from entertaining any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in that section. Under section 19 of the [Land Registration Act, 2012](#), the duty to fix boundaries to registered land is vested in the Land Registrar.
27. The Court of Appeal as well as this court has emphasized the need to exhaust the foregoing procedures prior to invoking the jurisdiction of this Court.
28. In [Azzuri Limited v Pink Properties Limited](#) [2018] eKLR, the court stated as follows;
- “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... From this analysis of the law, it should be clear from the above that, we are in agreement with the learned Judge’s conclusion that the dispute ought to have been heard by the Land Registrar as stated in the statute. Jurisdiction is everything. It has been said many times before, that, without it a court has no powers to make one more step, irrespective of the strength and nature of evidence in the parties’ possession”.
29. The Court of Appeal in [Estate Sonrisa Ltd & another v Samuel Kamau Macharia & 2 others](#) [2020] eKLR , similarly stated thus;
- “It is the [Land Registration Act](#) that makes provisions relating to the determination of boundaries. Those provisions are found in sections 16 to 19. Specifically, for this dispute, the Registrar is empowered, after giving notice to all the affected parties, in this case, the 1st appellant and 1st respondent, indeed as well as any owner whose land adjoins the boundaries in question, and with the assistance of the surveyor, to ascertain and fix the disputed boundaries... Under that Act, the Registrar carries out his functions without any restrictions and may rely on any other relevant document and existing records in order to resolve any dispute between landowners. Because a title deed is only prima facie evidence of the matters shown therein, the Registrar’s investigations, of necessity must encompass all entries in the register, rely on any other relevant document and existing records, conduct



proceedings in accordance with section 14(1) and cause a survey to be carried out and determine the dispute...

It is only after determining the dispute can parties move to court to challenge it.

30. I find that the Registrar of Land has not yet conducted investigations and made a finding as required by the Act, therefore, this court's jurisdiction was inappropriately and prematurely invoked. Due to this, I have no hesitation to down my tools as I hereby do.

### **Conclusion**

31. The upshot of the foregoing is that the plaintiff's application fails, it is dismissed, and the suit herein is struck out for want of jurisdiction.
32. However, to enhance good neighborliness as advanced by the parties, I make no orders as to costs.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 16TH DAY OF FEBRUARY 2023.**

**JUDY OMANGE**

**JUDGE**

**In the presence of: -**

**Ms Babu for Plaintiff**

**Steve - Court Assistant**

