REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 191 OF 2017

ALLAN NJUKI MURAGE

WILLIAM MWEMA MURAGE (Suing as the legal Representatives of the Estate of)

JOHN MURAGE NATHAN GATHERU.....PLAINTIFF/APPLICANTS

VERSUS

BETH NJERI RIMUI (sued in her capacity as the Administratrix of the Estate of

AYUB RIMUI MUCHINA.....DEFENDANT/RESPONDENT

RULING

1. Before me for determination is the Notice of Motion dated 5th August 2016 wherein the Plaintiff/Applicants sought for interim orders of injunction against the Defendant/Respondents prohibiting them from interfering with the Plaintiff's 13 acres of land parcel number Nyandarua/Oljororok /2205. The said application was premised on the grounds on the face of it as well as on the supporting affidavit sworn on the 5th August 2016 by William Mwema Murage.

2. The said application was opposed by the Defendant/Respondents through their replying affidavit and grounds of opposition dated the 24th October 2016 and filed on the 25th October 2016.

3. By consent parties agreed to dispose of the application by way of written submissions wherein the Applicants filed their submissions on the 17th November 2017. On application for leave, the Respondent filed her written submissions on the 23rd April 2018 after the court granted them leave to file the same.

The Applicants' case

4. The application was premised on the fact that whereas the late Mr. John Murage Nathan Gatheru was the proprietor of land parcel No. Nyandarua/Oljoro-orok Salient/200 measuring about 9.2, hectares from the year 1998, the deceased, Mr. Ayub Murage Muchina on the other hand was the registered proprietor of land parcel No. Nyandarua/Oljoro-orok/2205 measuring 2.2 hectares. That both parcels of land were separated by an access road.

5. That subsequently the deceased Mr. John Murage Nathan Gatheru subdivided his parcel of land which resulted into land parcels No.9502 and 9503 measuring 3.21 hectares and 0.81 hectares respectively.

6. The Respondent deceased Mr. Ayub Murage Muchina also subdivided his parcel of land into several pieces of land which he disposed of to third parties which gave rise to the present situation being that with this subdivision, there was trespass onto the deceased Applicants' land by the Respondent with the result that the deceased Applicant's acreage reduced whilst that of the deceased Respondent increased.

7. That the Applicants then caused a survey to be carried out on their parcel of land wherein it was discovered that the Respondent's land No. Nyandarua/Oljoro-orok/2205 had trespassed by 13 acres into their parcel of land. They filed suit to have the said 13 acres excised from land parcel No. Nyandarua/Oljoro-orok/2205.

8. That it was during the subsistence of the suit that the Respondent herein with fill knowledge of the same brought building materials on the suit land with the intent to construct a permanent house thereon.

9. That the said activities by the Respondent were likely to subject the Applicants to irreparable loss, damage and harm and that the said action ought to be stopped through the issuance of the orders sought to avert gross miscarriage of justice to them.

10. The Applicants relied on the provisions of Section 63(c) of the Civil Procedure Code and Order 40 of the Civil Procedure Rules, which governed the circumstance under which the issuance of temporal injunction could be effected.

11. The Applicants submitted that they had met the conditions set out for granting of an interlocutory injunction as is stipulated in the decided case of **Giella vs, Cassman Brown & Co. Ltd (1973) E.A 358**, namely that they had established a *prima facie* case with a probability of success; that they would otherwise suffer irreparable injury, which cannot adequately be compensated by an award of damages unless the injunction is granted; and that the balance of convenience tilted in their favour.

12. The Applicants relied on the report by district surveyor marked as annexure WMM2 in their supporting affidavit to confirm that indeed land No. Nyandarua/Oljoro-orok/2205 had encroached by 13 acres into land parcel No land No. Nyandarua/Oljoro-orok/200.

13. On the issue of irreparable loss. It was the Applicant's submission that the Respondent took advantage of the road that run diagonally on land parcel No. Nyandarua/Oljoro-orok/200 thus dividing the land into two measuring 10 and 13 acres respectively, to start constructing on the 13 acres of land, as per their annexure marked as WMM3.

14. That her continued construction on the suit land violated their right to property and if not stopped, they would continue to suffer irreparable loss and /or damage. That no amount of an award for damages could compensate them as no one parcel of land could be equated to another. That the suit land was their inheritance from their deceased father and was of sentimental value to them therefore damages was not a suitable remedy. They relied on the decided cases of **Hoffman *LaRoche& Co. Industry vs. Secretary of State for Trade and Industry [1975] AC 295 at 355***

15. They also relied on a second case of **Suleiman vs. Amboseli resort Limited [2004] 2 KLR589** to submit that on a balance of convenience the same tilted in their favor as they had demonstrated that the Respondents had encroached on their land and had begun constructing on the same and further that the suit land was at a risk of being disposed of to third parties.

16. While praying for this Application to be allowed, the Applicants also prayed for cost of the suit on the basis that they had established a prima facie case that their rights had been infringed by the Respondent when she encroached on their land thus forcing them to seek the court's intervention and incur costs thereto.

Respondent's case.

17. The Application was opposed by the Respondent herein through her replying affidavit and grounds of opposition dated the 24th October 2016 and filed on the 25th October 2016.

18. The respondent submitted that she was aware of the fact that her husband, the deceased Mr. Ayub Murage Muchina was the proprietor of land parcel No. Nyandarua/Oljoro-orok Salient/14456 and that upon his demise and completion of the Succession Cause, the property was sub divided resulting into No. Nyandarua/Oljoro-orok Salient /2205 which was subsequently transmitted to her as one of the deceased's beneficiaries.

19. That the said Nyandarua/Oljoro-orok Salient /2205 was quite different from Nyandarua/Oljoro-orok/2205, land upon which the Applicants sought injunctive/prohibitive orders, orders which she submitted, could not be enforced against her title being Nyandarua/Oljoro-orok Salient /2205 because it was a different land. That parcel No. Nyandarua/Oljoro-orok/200 also did not exist. The proper reference number ought to have been Nyandarua/Oljoro-orok Salient/200.

20. That in this regard thereof the whole suit was a nonstarter and deserved to be dismissed since the orders sought to be issued against land parcel No. Nyandarua/Oljoro-orok 2205 could not be enforced.

21. The Respondent's submission was further to the effect that orders of injunction/Prohibition could not be issued against only a portion of the property in this case being 13 acres.

22. It was submitted that there could not be a possible that the Respondent had encroached on the Applicant's land because not only had both parcels of land been separated by Kanguu public road but they were opposite each other as evidenced by the mutation Map marked as BN 1b, and the original Registry Index Map (RIM), for Oljoro-orok Salient scheme, (sheet 8) herein marked as annexures BN3a and BN3b.

23. That her husband the deceased Mr. Ayub Murage Muchina had been allocated land parcel No. Nyandarua/Oljoro-orok Salient/14456 now known as No. Nyandarua/Oljoro-orok Salient/2205 in the year 1973.The public road was in existence then as it is still now. There could therefore have been no way that her land could have encroached into parcel No. Nyandarua/Oljoro-orok Salient/200.

24. That further the Applicants had not established exactly which portion of the Respondents land had encroached onto their 13 acres of land.

25. The Respondent submitted further to the effect that the Applicants had not established a prima facie case as was stipulated in the **Giella vs. Cassman Brown Case** (supra) to the effect that from mutation map and the original Registry Index Map (RIM), for Oljoro-orok Salient scheme, it was clear that the two parcels of land being Nyandarua/Oljoro-orok Salient/200 and Nyandarua/Oljoro-orok Salient/2205 were separated by a road. There was also a fixed boundary making them completely distinct and separate from each other. That the cadastral map of the area had not been altered from the colonial era to date and if any encroachment was to occur, it would first affect the road reserve and the public road which was not the case in the instant case.

26. The Respondent submitted that the Applicants also not established a prima facie case because the suit herein was a nonstarter, the Applicants having failed to include the word 'Salient' in the definition of the parcels of land. That the omission was in excusable since it

referred to different parcels of land.

27. That the parcels of land were allocated in 1973 and the respective parties have been occupying their respective parcels of land where there has been no complaint of encroachment until 2015 when this suit was filed. The Applicants cannot therefore claim that they would suffer irreparable loss. Issuing the orders prayed for would thus disturb the peace and co-existence in the circumstance.

28. That the balance of convenience did not tilt in the Applicants favour either because by granting the orders sought, it would mean giving the Applicant part of the Respondent's land and secondly, it would mean altering the public road that separated the two pieces of land thus affecting the acreage of the neighboring parcels of land. Third, that since the Applicant's suit was a non-starter, if anything, the balance of convenience tilted in her favour. That the Applicant's should also pay the cost of the suit for dragging her into this suit that had no possibility of success. The Respondent prayed for the dismissal of the application.

Determination.

29. Having heard submissions by both sides as well as having regard to the annexures filed herein, consequently the pending issue for determination is whether this court should grant the Applicant an interim injunction pending the hearing of the suit.

30. However before I make my determination, I must first consider first the Preliminary Objection raised by the Respondent herein. She has argued that the present case is a non -starter and should be dismissed all together for reason that the Applicants have quoted and referred to the wrong registration number of the parcel of land they wish to have the injunctive orders issued against.

31. That land parcel No. Nyandarua/Oljoro-orok/2205 and No. Nyandarua/Oljoro-orok/200 do not exist. That what actually exists are parcel numbers Nyandarua/Oljoro-orok Salient /2205 and No. Nyandarua/Oljoro-orok Salient /200. To this effect thereof, the orders the Applicants seek to be issued against land parcel No. Nyandarua/Oljoro-orok 2205 cannot be enforced.

32. I have also considered the effect and/or meaning of a preliminary objection as stated in the case of **Mukisa Biscuits Manufacturing Co. Ltd –v- West End Distributors Limited (1969) EA. 696** to wit**,** a preliminary objection per Law J.A. was stated to be thus:-

> *"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."*

33. In the same case Sir Charles Newbold, P. stated:

> *'….a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.'*

34. I have further considered this line of arguments, the pleadings as well as the annexures herein specifically the titles to the suit parcels of land in issue herein and the same is clear that these parcels of land were registered as land parcels numbers Nyandarua/Oljoro-orok Salient/2205 and No. Nyandarua/Oljoro-orok Salient /200 respectively. I also note that the official documents refer to these parcel of land by their registered numbers, however in the pleadings both parties have tended to sometimes omit the word 'salient' a good example being the Applicant's Plaint, filed on the 29th January 2015, from paragraph 4 as well as the Respondent's Defence filed on the 10th April 2015 at paragraph 6.

35. I find that the omission of the word 'Salient' did not prejudice any party as nothing has been advanced to show that they were not aware of the subject matter herein. I thus find that this point of Preliminary Objection has not discharged the onus placed on it as enumerated in the case of **Mukisa Biscuits Manufacturing Co. Ltd** (supra) but has been improperly raised and does nothing but is intended to unnecessarily confuses and delay the issue in this case.

36. Under sections 1A and 1B of the Civil Procedure Act Cap 21 Laws of Kenya the court is enjoined to foster and facilitate the overriding objective of the Act to render justice to parties in all civil proceedings in a just, expeditious, proportionate and affordable cost to the parties. Article 159 (2) (a) (b) (c) and (d) of the Constitution further underscore the role of the court in the administration of Justice. To this effect thereof, I find no merit in the preliminary objection and proceed to dismiss it in its entirety.

37. On whether or not to grant the interim injunctive orders, the celebrated case of **GIELLA versus CASSMAN BROWN (1973) EA 358** set out conditions for the grant of an interlocutory injunction which principles were authoritatively captured in the famous Canadian **case of R. J. R. Macdonald vs. Canada (Attorney General) [1994] 1 S.C.R. 311** where the three part test of granting an injunction were established as follows:-

i. Is there a serious issue to be tried(prima facie case)

ii. Will the Applicants suffer irreparable harm if the injunction is not granted;

iii. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (often called "balance of convenience").

38. On the first issue as to whether the Plaintiff/Applicants in this matter had made out a prima facie case with a probability of success. I am guided by the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, where a prima facie case was described as follows:

> *"a prima facie case in a Civil Application includes but is not confined to a 'genuine and arguable case'. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."*

39. Have the Plaintiff/Applicants herein demonstrated that they have a genuine and arguable case? I have considered the annexures and the submission herein.

40. The bone of contention herein is that whereas the Applicants claim is to the effect that Nyandarua/Oljoro-orok Salient/2205 had encroached 13 acres into parcel No land No. Nyandarua/Oljoro-orok Salient/200, the Respondents on the other hand contend that this cannot be possible since the two parcels of land being Nyandarua/Oljoro-orok Salient/200 and Nyandarua/Oljoro-orok Salient/2205 are separated by a road and there is a fixed boundary making them completely distinct and separate from each other.

41. It is not in dispute that a boundary dispute involving these two parcels of land was referred to the District Land Registrar, Nyandarua wherein it was directed that there be a re-survey carried out on the parcels of land. The same was carried out on the 25th October 2013 wherein vide a report dated the 30th October 2013, it was established that indeed the owner of suit parcel No Nyandarua/Oljoro-orok Salient/2205, the Respondent herein, had encroached onto parcel No. Nyandarua/Oljoro-orok Salient/200 by an area of 5.26 hectares. On this point alone, I find that the Applicants have established a prima facie case with the probability of success.

42. On the second principle as to whether the Applicants would suffer irreparable harm if the injunction is not granted; I have anxiously pondered over this issue, on one hand the Applicants' submission was to the effect that that the Respondent had started constructing on the 13 acres of land, and her continued construction on the suit land if not stopped, would subject them to continued suffering and thus causing irreparable loss and /or damage. That no amount of an award for damages would compensate them as no one parcel of land can be equated to another.

43. On the other hand, the Respondent's submission is that the parcels of land were allocated in 1973 where the respective parties have been occupying their respective parcels of land unto the 2015 when this suit was filed. That issuing the orders prayed for herein would indeed disturb the peace and co-existence in the neighborhood.

44. I have considered the decision of Mabeya J in **Jan Bolden Nielsen vs. Herman Philliipus Steya Also Known As Hermannus Phillipus Steyn & 2 Others (2012) eKLR** where he cited Ojwang Ag. J (as he then was)in the case of **Suleiman vs. Amboseli Resort Ltd (2004) eKLR 589** as follows:-

> ***'I believe that in dealing with an application for an interlocutory injunction, the court is not necessarily bound to the three principles set out in the Giella Vs Cassman Brown case. The court may look at the circumstances of the case generally and the overriding objective of the law. In Suleiman vs Amboseli Resort Ltd (2004) eKLR 589 Ojwang Ag. J (as he then was) at page 607 delivered himself thus:-***
>
> ***'……counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago in Giella Vs Cassman Brown, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of Films Rover International made this point regarding the grant of injunctive relief (1986) 3 All ER 772 at page 780-781:- " A fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong"…."***

45. Against these submissions, and in consideration of the **circumstances of the case generally and the overriding objective of the law,** as well as the fact that granting the orders sought will amount to an eviction of the Respondents and 3rd parties who are on the suit land, in my view, this would be premature at this stage.

46. Since at this stage the court is not required to make final findings of contested facts but to weigh the relative strength of the parties cases as observed by Lord Diplock in **American Cyanamid Co. V Ethicon Limited (1975) 1 ALL ER 504; (1975) A.C. 396 HL** at 510 where he stated as follows:

"*It is no part of the Court's function at this stage of the litigation to try and 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.",*

47. **I find that the** balance of convenience does not tilt in favour of granting the injunctive orders sought and do find the order that best commends itself in the circumstances of this case is an order of status quo which I hereby proceed to pronounce that parties do maintain the status quo prevailing today, pending the hearing and determination of the suit.

i. Further that they shall set down this matter for hearing expeditiously by complying with the provisions of Section 11 of the Civil Procedure Rules within the next 21 days upon delivery of this ruling

ii. Costs to be in cause.

Dated and delivered at Nyahururu this 26th day of June 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE