



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC CASE NO. 964 OF 2017**

**(Formerly Nairobi ELC Case No. 10 of 2014)**

**NETWORK COOPERATIVES**

**SAVINGS AND CREDIT SOCIETY LIMITED.....PLAINTIFF**

**DAU INVESTMENTS COMPANY LTD.....2<sup>ND</sup> PLAINTIFF**

**LENIN KIMUTAI.....3<sup>RD</sup> PLAINTIFF**

**JOSHUA WACHIRA.....4<sup>TH</sup> PLAINTIFF**

**ALOISE MWANGOMBE.....5<sup>TH</sup> PLAINTIFF**

**VERSUS**

**SHIRIM OLE ROLORUASI KASENJI.....DEFENDANT**

**RULING**

What is before Court for determination is the Plaintiffs Notice of Motion application dated the 20<sup>th</sup> December, 2018 brought pursuant to Order 40 of the Civil Procedure Rules and Rule 3 (1) and (2) of the High Court (Practice Procedure) Rules. The Plaintiffs seek restraining orders against the Defendant, his servants/agents or anyone claiming under him, in respect of land parcel numbers KAJIADO/ KITENGELA/ 4001; KAJIADO/ KITENGELA/ 4002; KAJIADO/ KITENGELA/ 4003 hereinafter referred to as the 'suit lands', pending the outcome of this suit. Further, that this order be served upon the OCS Kitengela Police Station for enforcement.

The Application is premised on the summarized grounds that the Defendant has in the past and as recently orchestrated willful destruction of property on the suit lands belonging to the Applicants herein. The Plaintiffs are bona fide proprietors and exclusive owners of the suit lands and have legitimate including verifiable title documents. The Defendant has colluded with Mr. Mamicha, a director with KAGUMO DAIRIES LIMITED to destroy property on suit lands belonging to the Plaintiffs.

The application is supported by the affidavit of JOSEPH KARANJA NDUNGU a Director to the 2<sup>nd</sup> Plaintiff where he avers that the Plaintiffs are in possession of the suit lands. He contends that sometime in 2018 they decided to develop the suit lands by erecting a hoisted container/trailer. He explains that on 12<sup>th</sup> December, 2018 one Mamicha, a director with Kagumo Dairies Limited was seen roaming around the suit lands and later headed to the Defendant's house. Further, that thereafter at night, the Plaintiffs' properties were invaded and destroyed. He contends that the same individuals who destroyed the container proceeded to uproot the erected perimeter fence. He claims the conduct of the Defendant is borne on impunity and is unlawful as this is not the first time that the Defendant has destroyed the Plaintiffs' property either himself or has issued instructions on the same. He reiterates that upon taking possession of the suit lands and fencing them, the Defendant and unknown persons destroyed the said fence. Further, that they wish to enjoy the use of their property but are unable to do so due to the imminent and real threat to their safety posed by the Defendant and unknown persons. He insisted that the actions of the Defendant are unlawful and warrant the timely intervention of the court. He is apprehensive that the Defendant might cause more damage on the suit lands unless the orders herein are granted.

In opposition to the Application, the Defendant SHIRIM OLE ROLORUASI KASENJI filed a replying affidavit where he deposes that he is not aware of the existence of the suit lands registered in the names of the Plaintiffs as alleged. He denies trespassing on the suit lands either by himself, his agents or servants as alleged. He confirms knowing Mr. Mamicha, the Director of Kagumo Dairies Limited and admits that together with his co proprietor Jeremiah Mutunkei Kiponyi they sold to them land parcel number Kajiado/ Kitengela/ 2085 measuring 12.14

hectares. Further, that Kagumo Dairies Limited charged their land Kajiado/ Kitengela. 2085 to Equity Bank in December, 2011 which position subsists today. He contends that after the sale and transfer of the said land, he has no claim over it. He avers that as the duly registered and bona fide owner of Kajiado/ Kitengela. 2085, Kagumo Dairies Limited can and have a right to protect its interests on the said land including ensuring that trespassers are not allowed into the property and any attempt to put up illegal structures is resisted. He insists the Plaintiffs have not demonstrated any actions of impunity he has committed. He states that this application is mischievous as it seeks to obtain final orders at an interlocutory stage. Further, that the orders sought by the Plaintiffs are incapable of being enforced as against him as he is not aware of the suit lands and not in possession of the same. He denies trespassing thereon and contends that the Plaintiffs' application is without any basis, unmerited and ought to be dismissed.

Both the Plaintiffs and the Defendant filed their respective submissions, which I have considered.

### **Analysis and Determination**

Upon perusal of the Notice of Motion application dated the 20<sup>th</sup> December, 2018 including the respective affidavits and submissions, the only issue for determination is whether the Plaintiffs are entitled to orders of temporary injunction pending the outcome of the suit.

The Plaintiffs submitted that they are entitled to the orders sought in the instant application and relied on the cases of **Mrao Ltd Vs First American Bank of Kenya Limited (2003) KLR 125** and **Kenleb Cons Limited V New Gatitu Service Station Limited & Another (1990) KLR 577** to buttress their argument.

The Defendant opposed the application and submitted that the Plaintiffs had not met the threshold to grant the orders sought. He relied on the following cases: **Margaret Muthoni Wanyee V Mukenia Cooperative Society Limited (2018) eKLR**; **Munyu Maina v Hiram Gathiha Maina (2013) eKLR**; **Mrao Ltd Vs First American Bank of Kenya Limited (2003) KLR 125**; **Nguruman Limited V Jan Bonde Nielsen & 2 Others (2014) eKLR** and **Mbuthia V Jimba Credit Finance Corporation & Another (1988) KLR 1** to support his case.

The principles for consideration in determining whether temporary injunction can be granted or not is well settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358**.

In the first instance as to whether the plaintiffs have demonstrated a prima facie case with probability of success, I wish to refer to the case of **Mrao V First American Bank of Kenya Ltd & 2 others (2003)KLR 125** where the Court defined what a prima facie case is. The Plaintiffs hold title to the suit lands, which they claim was a resultant subdivision of land parcel number Kajiado/ Kitengela/ 2085. The Defendant contends that he was the original owner of land parcel number Kajiado/ Kitengela/ 1852 from which 30 acres was excised therefrom and sold to Kagumo Dairies Limited, which land is now registered as Kajiado/ Kitengela/ 2085. He denies the existence of the suit lands which was a resultant subdivision of Kajiado/ Kitengela/ 2085. The Plaintiffs claim the Defendant has interfered with their peaceful occupation of the suit lands by destroying their property. The Defendant claims he has no interest in the land he sold to Kagumo Dairies Limited that later charged it to Equity Bank Limited. As per the Certificate of Official Search dated the 4<sup>th</sup> December, 2012, it shows Kagumo Dairies Limited as the proprietor of Kajiado/ Kitengela/ 2085 from 14<sup>th</sup> September, 2011. On a keen perusal of the two documents of Title, I note the title to Kagumo Dairies Limited actually precedes the Plaintiffs' titles which were issued as follows: Kajiado/ Kitengela/ 4001 on 26<sup>th</sup> November, 2013; Kajiado/ Kitengela/ 4002 on 15<sup>th</sup> March, 2013; while Kajiado/ Kitengela/ 4003 was issued on 8<sup>th</sup> November, 2011. Further, I note that the Plaintiffs have not included Kagumo Dairies Limited in the suit herein but only blame the Defendant for trespassing thereon. From the averments in the supporting affidavit, except for the fact that a Mr. Mamicha was seen heading to the Defendant's house, there is no clear indication that it is the Defendant or his agents who destroyed the structures on the suit lands. Further, the Defendant has clearly indicated that he has no interest on the suit land which he sold to Kagumo Dairies Limited. Based on the facts before me, it seems the Plaintiffs and Kagumo Dairies Limited all have titles relating to the suit lands. I note the Plaintiffs have failed to enjoin the said Kagumo Dairies Limited in this suit. From the Plaintiffs' averments, they blame the Defendant for interfering with the suit lands but from the supporting affidavit, except for stating that one Mr. Mamicha was seen heading to the Defendant's house, there is no indication it is the Defendant who destroyed their property. I opine that it is incumbent upon them to prove that their titles were acquired legally as opposed to Kagumo Dairies titles which was obtained irregularly as well as illegally.

In the case of **Mureithi V City Council of Nairobi (1979) eKLR** the Court of Appeal reaffirmed that object of interlocutory injunction is to protect the Plaintiff against injury by violation of his right. With the facts as presented and relying on the above decision, I find that the Plaintiffs have not demonstrated a prima facie case as against the Defendant herein.

On the second principle as to whether the Plaintiffs stand to suffer irreparable loss, which cannot be compensated by way of damages. Since a third party also hold titles in respect of the suit lands herein and is not a party to the suit. Further, since the Defendant has expressly stated he has no interest in the suit lands, which he already sold to Kagumo Dairies Limited. I wish to associate myself with the case of **Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012, where** the Court of Appeal held that in an application seeking injunctive relief, speculative injury cannot suffice and there must be more than unfounded fear and the injury should be actual as well demonstrable that cannot be compensated by damages. From the averments in the Plaintiffs' affidavit, it is not clear that the Defendant is actually the person who destroyed the container. They claim the Defendant colluded with Mr. Mamicha of Kagumo Dairies Limited to destroy the container but this is not clear from the supporting affidavit. Since a third party also holds a title to the suit lands, I find that the Plaintiffs' can be compensated by way of damages.

On the question of balance of convenience, from the evidence presented by the parties, I am not in doubt that at this juncture, the balance indeed tilts in favour of the Defendant as the Plaintiffs have failed to demonstrate if he indeed interfered with the suit lands. Further, the Defendant has categorically stated that he has no interest in the suit lands.

It is against the foregoing that I find the application dated the 20<sup>th</sup> December, 2018 unmerited and will proceed to dismiss it with costs.

**Dated signed and delivered in open court at Kajiado this 28<sup>th</sup> October, 2019.**

**CHRISTINE OCHIENG**

**JUDGE**

**IN THE PRESENCE OF**

M/S.Nyangai holding brief for Nyakundi for the plaintiff

M/S. Wakarura for the defendant

Court assistant- Mpoye