



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYAHURURU**

**ELC CASE NO. E008 OF 2021**

**TELKOM KENYA LIMITED.....PLAINTIFF**

**VERSUS**

**NAMUNYAK CONSERVANCY LTD.....1<sup>ST</sup> DEFENDANT**

**SAPACHE GROUP RANCH.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. By a notice of motion dated 17<sup>th</sup> March, 2021 based upon **Order 40 Rule 1 (a) , Order 51 Rules 1 & 3, Section 3A of the Civil Procedure Act (Cap. 21) and all enabling provisions of the law** the Plaintiff sought the following orders:

a. ...spent

b. ...spent

c. *That pending the hearing of this suit this Honourable court be pleased to issue an orders of temporary injunction restraining the 1<sup>st</sup> and/or 2<sup>nd</sup> Respondent either by themselves, their agents, servants and/or employees with interfering with Applicant's the operations on Ol Donyo Sabachi Radio Repeater Station, herein the suit property by denying the Applicant and its agents/tenants/lessees access to it, and from doing anything that will prejudice the operations and use of the suit property by the Applicant and its tenants and/or lessees.*

b) *That this honourable court be pleased to order the OCS Isiolo Police Station or any such nearby police station to provide security to the Applicant and its tenants and/or lessees, or otherwise to ensure and facilitate compliance with any such orders as the honourable court may be pleased to issue in respect to this application or suit.*

c) *That the costs of this application be provide for.*

2. The application was based on the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Plaintiff's internal counsel, Anne Mwangi, on 17<sup>th</sup> March, 2021 and the exhibits thereto. The Plaintiff contended that the Defendants had wrongfully interfered with its property known as Ol Donyo Sabachi Radio Repeater Station in Samburu County (*the suit property*) measuring about 0.5 acres. The Plaintiff contended that it had been in occupation of the suit property since 1973 and that it had leased it to Safaricom PLC and ATC Kenya Operations Ltd (*the Lessees*).

3. The Plaintiff further pleaded that sometime in February 2021, the Defendants wrongfully claimed ownership of the suit property and prevented the lessees from accessing it for the purpose of servicing and utilizing the telecommunication equipment thereon thereby risking the disruption of telecommunication services offered by the lessees to the people of Kenya.

4. The 1<sup>st</sup> Defendant filed a replying affidavit sworn by its Chairman, Kinyua Lengashor, on 30<sup>th</sup> September, 2021 whereby the Plaintiff's ownership of the suit property was disputed. The 1<sup>st</sup> Defendant further denied having claimed ownership of the suit property and stated that the land in issue fell within **Sapache Group Ranch** which held title thereto. The 1<sup>st</sup> Defendant exhibited a copy of a Title No. **Samburu/West Wamba/2** as evidence of the 2<sup>nd</sup> Defendant's ownership of the property. The 1<sup>st</sup> Defendant further disputed that the letter dated 8<sup>th</sup> October, 1973 exhibited by the Plaintiff was a letter of allotment for the suit property.

5. The 2<sup>nd</sup> Defendant filed a replying affidavit sworn by its Chairman **Jackson Rick Lesirko**, on 2<sup>nd</sup> July, 2021 in opposition to the

application. The 2<sup>nd</sup> Defendant disputed that the Plaintiff had any title or rights over the suit property which fell within **Sapache Group Ranch**. It denied that to the Plaintiff the letter of 8<sup>th</sup> October, 1973 was a letter of allotment and stated that it was merely an advisory letter advising that private land should be acquired through negotiations.

6. The Defendants also filed a notice of preliminary objection dated 30<sup>th</sup> April, 2021 raising the following objections to the suit:

(a) *The suit discloses no cause of action against the defendants for they are not the registered owners of the suit property.*

(b) *That the claim against the 1<sup>st</sup> Defendant is an abuse of court process in that 1<sup>st</sup> Defendant can only be sued through the 2<sup>nd</sup> Defendant (Board of Directors).*

(c) *The suit is bad in law, misconceived and discloses no reasonable cause of action against Defendants thus rendering it fatally and incurably defective.*

7. When the application was listed for directions, it was directed that the same shall be canvassed through written submissions. It was further directed that the Defendants' notice of preliminary objection shall be argued in opposition to the application.

8. The parties were consequently given timelines within which to file and exchange their written submissions. The record shows that the Defendants filed theirs on 8<sup>th</sup> November, 2021 whereas the Plaintiff filed its submissions on 19<sup>th</sup> January, 2022.

9. The court has noted that the Plaintiff's amended plaint which was filed after service of the notice of preliminary objection has substantially resolved the issues raised in the notice. Accordingly, the court shall only deal with issues arising from the Plaintiff's application for interim orders.

10. The principles to be considered in an application for an interim injunction were summarized in the case of **Giella v Cassman Brown & Co Ltd [1973] EA 358** as follows:

**(a) The applicant must demonstrate a *prima facie* case with a probability of success at the trial.**

**(b) An injunction will not normally be granted unless the applicant might otherwise suffer irreparable damage.**

**(c) If the court is in doubt on (b), it shall determine the application on a balance of convenience.**

11. The court is aware that at this interlocutory stage, it is not required to make conclusive findings on the matters in controversy in the main suit. The court is also aware that it should refrain from making any observations which may prejudice the fair trial of the action. The role of the court at this juncture is to examine whether on the material on record the Plaintiff has made out a *prima facie case* with a probability of success without delving in great detail into the merits of the suit.

12. It would appear from the material on record that the Plaintiff and its predecessors have been in possession of the suit property for a considerable period of time. On the other hand, the 2<sup>nd</sup> Defendant appears to have obtained a title document only in the recent past. There is no indication that the 2<sup>nd</sup> Defendant has taken any legal steps or proceedings to recover the suit property from the Plaintiff. The court is accordingly satisfied that the Plaintiff has demonstrated a *prima facie case* on the basis of the material on record.

13. The court has further considered the material on record in relation to the second principle of irreparable loss. The material reveals that the Plaintiff has leased the suit property to two companies which are operating telecommunication services in the country. One of them is Safaricom PLC which is the largest telecommunication service provider in Kenya. The court takes judicial notice that telecommunication is an essential service whose disruption cannot be adequately compensated by an award of damages.

14. The court is further of the opinion that since the Plaintiff has been in possession of the suit property for several decades, the balance of convenience clearly tilts in favour of granting the injunction. The court is of the opinion that it would cause greater hardship to the Plaintiff by denying the injunction than it would cause the Defendants by granting it. Accordingly, the court is inclined to grant the interim injunction sought.

15. Since the material on record shows that the 2<sup>nd</sup> Defendant is the registered owner of **Sapache Group Ranch** and not the 1<sup>st</sup> Defendant, the court shall not grant any orders against the 1<sup>st</sup> Defendant. Only the 2<sup>nd</sup> Defendant shall be commanded to abide by the interim orders.

16. The upshot of the foregoing is that the court finds merit in the Plaintiff's application for interim orders dated 17<sup>th</sup> March, 2021. Accordingly, the court makes the following orders for disposal thereof:

**a. An interim injunction is hereby granted in terms of Order No. 3 thereof against the 2<sup>nd</sup> Defendant pending the hearing and determination of the suit.**

**b. The prayer for the OCS Isiolo Police Station to ensure compliance with the order is hereby declined since enforcement of injunction orders requires employment of the civil process.**

**c. Costs of the application shall be in the cause.**

**RULING DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 20TH DAY OF JANUARY, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

In the presence of :

**MR. MURIITHI FOR THE PLAINTIFF**

**MR. LEKOONA FOR THE DEFENDANTS**

.....

**Y. M. ANGIMA**

**ELC JUDGE**