



**REPUBLIC OF KENYA.**

**IN THE ENVIRONMENT & LAND COURT AT KITALE.**

**LAND CASE NO. 165 OF 2014.**

**THE TRUSTEES OF KITALE CLUB ::::::::::::::::::::::::::::::::::: PLAINTIFF.**

**VERSUS**

**FRANK WAFULA ::::::::::::::::::::::::::::::::::: DEFENDANTS**

**RULING**

1. The applicant brought a notice of motion dated 11/11/2014 in which they seek the following reliefs:-

***(a) That the application be certified urgent and service thereof be dispensed with in the first instance and interim orders issued in terms of prayer (b) and (c) herein.***

***(b) A temporary injunction restraining the defendant/respondent or his agents, servants, and/or family from encroaching on or in any way interfering with the plaintiffs ownership and peaceful enjoyment of the entire parcel of land comprised in LR. No. 2116/4/VIII.***

***(c) A declaration that the defendant/respondent's encroachment on and annexation of the plaintiffs' land LR No. 2116/4/VIII as well as his wilful felling of trees is illegal and amounts to trespass.***

***d. (d) A mandatory injunction to compel the defendant/respondent to remove the fence he has erected on the plaintiff's land and compelling him to maintain the previous common boundaries that existed between their said parcel of land to his encroachment.***

***(e) Cost of this application be provided.***

2. The respondent who was duly served did not put in any replying affidavit or grounds of opposition. The application was therefore argued ex-parte. The respondent only entered appearance on 5/12/2014 two days after the application had been argued ex-parte and date for ruling set down.

3. The applicants contend that they are the owners of land known as **LR. No. 2116/4/VIII** which measures 182.5 acres. There is a club on the said land known as Kitale Club which has among other facilities a golf course. The respondent acquired an adjacent land which initially belonged to Kenya Agricultural Research Institute (KARI).

4. The applicants contend that the respondent acquired land which was public land and that he has since encroached on to the applicants' land and fenced part of it and has gone ahead to fell down two mature eucalyptus trees worth Ksh. 95,000/= which were planted by the applicants. The applicants contend that the respondent's actions amount to trespass and are likely to affect the applicants' Golf Course and the trees may even fall on the golfers and injure them. The applicants

also contend that the felling of the trees are interfering with the environment.

5. I have considered the applicants' application together with the supporting affidavit and its annexures. Though the applicants' application was not opposed, I must be satisfied that the applicants have met the threshold for grant of the reliefs which they seek before the same can be granted. Prayer (a) has already been spent. The applicants' application was placed before the High Court judge on 13/11/2014 who ordered that the same be served for hearing inter partes before the Environment and Land Court. No interim orders were granted.
6. Prayer (b) is for a temporary injunction. The principles for grant of temporary injunction are now well settled. They were settled in the famous case of **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358**. First an applicant must show a prima facie case with a probability of success. Secondly, an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury. Thirdly when the court is in doubt, it will decide the application on the balance of convenience.
7. Having set out the principles, in the Giella Case above, the question which then arises is whether the applicants have demonstrated that they have a prima facie case with probability of success. From the pleadings of the applicants' it appears that the applicants are contending that the respondent acquired public land which should not have been the case. If this be the case, the applicants are not the right persons to raise this issue and in any case, there is no material placed before the court to prove the said allegations. The applicants allege that the respondent has encroached on to their land and felled two mature trees. There is no material upon which the court will ascertain whether this is the position. The applicants have not annexed any document to show the extent of their land or that the respondent has encroached on to the same. The mere annexation of the map of the applicants' land to the supporting affidavit is not enough. The map cannot show any encroachment. Encroachment can only be established after a survey is carried out and the boundaries of the disputed plots ascertained.
8. The next point for determination is whether the applicants have shown that they will suffer irreparable injury if an injunction is not granted. The applicants have annexed photographs showing two felled eucalyptus trees. The applicants have put a sum of Ksh. 95,000/= to the two felled trees. If this is the case, then the applicants will not suffer any loss which will not be compensated. The purpose of a temporary injunction is to preserve the subject matter of the suit. Already the trees have been felled. What is there to be preserved? What danger is there to the golfers being injured by trees which have already been felled? The applicants have not indicated in their application that there are more trees to be felled by the respondent so as to call for orders to restrain further felling of trees.
9. Prayer (c) cannot be granted in the interim. This is a relief which can only be granted after a full hearing of the case. There is no prima facie evidence of encroachment and therefore the prayer is premature.
10. The applicants are seeking mandatory injunction compelling the respondent to remove his fence and maintain a previous common boundary. In **Locabail International Finance Ltd. vs. Agro-Export and Another (1986) 1 ALL ER 901**, the principles for grant of mandatory injunction were set as follows:-

***“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high sense of assurance that at the trial, it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”***

11. In the instant case, the issue in dispute is not a clear and straight forward one where a court can order removal of the fence. If there could have been evidence of encroachment given, then the court would have issued the mandatory injunction. In the absence of any evidence of

encroachment, no order can be given. This is not a straight forward case. The boundaries have to be ascertained first. It is for the reasons given above that I find that the applicants' application cannot be allowed. The same is hereby dismissed with no order as to costs.

It is so ordered.

**[Dated, signed and delivered at Kitale on this 14th day of January, 2015.]**

**E. OBAGA.**

**JUDGE.**

In the presence of Mr. Akello for Professor Sifuna for applicant.

Court clerk – Kassachoon.

**E. OBAGA.**

**JUDGE.**

**14/1/2015.**