



**REPUBLIC OF KENYA**  
**HIGH COURT OF KENYA AT KITALE**

**CIVIL CASE NO. 25 OF 2012**

**JOSEPH WANYAMA KIBIRA..... PLAINTIFF**

**VERSUS**

**BOARD OF GOVERNORS**

**ST. TERESA SECONDARY SCHOOL.....1ST DEFENDANT**

**HASSAN NDAMWE WAKOLI..... 2ND DEFENDANT**

**R U L I N G**

1. The first defendant/applicant filed a Notice of Motion dated 22/1/2015 in which it seeks orders of injunction restraining the plaintiff/respondent by himself or his servants from interfering with the applicant's **Plot No. 61** comprised in **L.R.No.5777/3**. The applicant is a Secondary School known as St. Teresa Secondary School. The school had been allocated about 5 acres of land in a farm known as **Chepkorok Farm Company Limited** who are the registered owners of L.R.No. 5777/3.
2. The farm has not been sub-divided because there have been wrangles as to how many members should get individual titles. One group wants the land subdivided into 126 plots and the other wants the land subdivided into 856 plots. The applicant contends that the respondent has taken about 2 ½ acres of its land. That in January, 2015 the applicant who is a son of a member of Chepkorok Farm Co. Ltd constructed a road next to the school and that this road is dusty and is used by motorcycles and is thus a danger to the students. The applicant contends that the road has been created on the school's land and that the respondent should be enjoined from interfering with the applicant's land.
3. The applicant contends that a surveyor was sent to the ground and established the school's land but despite that, the respondent has ignored that report and continues to interfere with the school land thus hampering the school's development projects.
4. The respondent has opposed the applicant's application in which he contends that he is a member of Chepkorok Farm in his own right and that the road being complained of has been in existence and that it is the one which marks the boundary between his land and that of the applicant. The respondent states that the road in issue is reflected in the map. He has annexed a copy of an area list which shows that Plot 105 belongs to the applicant and Plot 106 belongs to him. He has also annexed a map showing a road in between Plot No. 105 and 106 which he says is the one separating his land and that of the applicant. He denies that the applicant's plot is Plot No. 61 as alleged. The respondent contends that the applicant is occupying 5 acres and is not entitled to more than the 5 acres.
5. The respondent contends that he is not the administrator of the estate of his late mother who was a

party to Kitale CMCC.Land Case NO. 12 of 1999 and that the decree resulting therefrom cannot be executed against him.

6. I have carefully considered the applicant's application as well as the opposition to the same by the respondent. The principles for grant of an interlocutory injunction are now well settled. First an applicant must demonstrate that he has a prima facie case with probability of success. Secondly an injunction will not normally be granted unless the applicant might otherwise suffer loss which may not be compensated in damages. Thirdly if the court is in doubt it will decide the application on a balance of convenience.

7. In the instant case, the applicant is contending that the respondent has created a road through its land. On the other hand the respondent contends that the road being complained of has been in existence and that it is the one which separates his land and that of the applicant. It is apparent that there has been a long standing dispute as to the boundary of the school land and the land originally held by the respondent's mother. This dispute went before court and it was resolved that the applicant's land was 5 acres and that no member of Chepkorok Farm should interfere with the school's land. This case was Land Case No. 12 of 1999 at Chief Magistrate's Court at Kitale. The plaintiff was the present applicant and the defendants were Veronica Kibira and Isaac Kiboi Kisemberi. By a decree from the said case, the Government Surveyor was mandated to go and confirm the five acres belonging to the school.

8. On 27/7/2011 the District Surveyor went to the ground and curved out 4.4 acres for the school. According to the survey report, Isaac Kiboi Kasemberi had already surrendered 2.2 acres to the school from his Plot No. 60. The surveyor also curved out 2.2 acres from Veronica Kibira's land but his sons protested. From the survey report it is not clear what plot Veronica Kibira was occupying. However from the map annexed to the applicant's further affidavit, Veronica Kibira is shown to be occupying Plot No. 1 which neighbours Plot 61.

9. The respondent has annexed a different area list to his replying affidavit which shows different numbers. According to the respondent's area list he is shown as owner of Plot No. 106 and that of the applicant as Plot 105. There is also a map dated 5/3/2009 which is quite different from that exhibited by the applicants. However be that as it may, the fact remains that one cannot decipher from the report of the surveyor whether the respondent had encroached on to the school land and if so from which side. The surveyor appears to have gone to the ground and his mission was to create 5 acres for the school. He was not clear as to whether the school's land had been encroached by one person or two persons. This is because it appears that there were no boundaries fixed on the ground as a result of the subdivision which appears to be problematic. It is therefore difficult to hold that the applicant has demonstrated that it has a prima facie case with a probability of success.

10. The road has already been created and it appears to be outside the boundary enclosing the school. If it turns out that the area where it is does not belong to the school this is something which the school can always claim compensation. There is therefore no loss which is likely to be suffered or the school has suffered which cannot be compensated in damages as to call for grant of an injunction. In any case an injunction is meant to stop what has not already happened. Even the balance of convenience does not tilt in favour of the applicant. I therefore find that the application for injunction cannot be granted. The applicant's application is hereby dismissed with costs to the respondent.

It is so ordered.

Dated, signed and delivered at Kitale on this 26th day of May, 2015.

**E. OBAGA**

**JUDGE**

In the presence of Mr. Ndarwa for plaintiff/respondent.

Court clerk – Isabella.

**E. OBAGA**

**JUDGE**

**26/5/2015.**

**MR. NDARWA**

I pray for a date for the hearing of the main suit.

**COURT**

Hearing of main suit on **1/10/2015**. Hearing Notice to issue.

**E. OBAGA**

**JUDGE**

**26/5/2015**