



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 507 OF 2013

DANIEL OLE PARSAPAYET

JOSEPH OLE PARSAPAYET

(SUING AS THE ADMINISTRATORS OF THE ESTATE

PARSAPAYO OLE OLUWUAS (DECEASED)PLAINTIFF

VERSUS

TULITO OLE ROITEIDEFENDANT

RULING

The Plaintiffs in their Notice of Motion dated 26th April 2013 are seeking orders for a temporary injunction against the Defendant. They want the Defendant restrained from trespassing, carrying out any developments, disposing of, or in any other manner dealing adversely with Title No. Kajiado/Loodariak/116 (hereinafter “the suit property”), pending the hearing and determination of this suit. The said suit property is registered in the name of Parsapayo Ole Oluwuas, the Plaintiff’s deceased father, and the Plaintiffs are the administrators of their deceased father’s estate.

The gist of the Plaintiffs’ case is that the Land Disputes Tribunal Kajiado North District (as it then was) after hearing the parties herein ordered the Defendant to vacate the suit property on 3rd February 2011, which decision was subsequently adopted and a decree issued by the Kajiado Senior Resident Magistrate Court in Land Disputes Tribunal case No. 19 of 2011 on 5th day of July 2011. However, that the Defendant has ignored and/or neglected the said Court order and decree by encroaching/trespassing on the Plaintiffs’ parcel of land Title No. Kajiado/Loodariak/116 and moreover he has unlawfully alienated about 20 hectares of the said parcel of land, started cutting down trees, burning charcoal, grazing his cattle and goats, as well as erecting structures (a boma) on the said parcel of land.

Further, that the Defendant has closed the only access road to the source of water hence denying the Plaintiffs and other dependants of the Deceased access rights to and use of water to themselves and their livestock. The Plaintiffs attached copies of the certificate of title of the suit property, the grant of limited letters of administration *ad litem* issued to them by this court on 22nd August 2011 and of a certificate of official search showing that the Defendant is the registered owner of Title No. Kajiado/Loodariak/126.

The Defendants opposed the Notice of Motion in a replying affidavit he swore on 22nd May 2013. He states that he is the registered proprietor of Kajiado/Loodariak/126 which measures approximately 95.85 hectares, and shares a common boundary with the suit property. Further, that both parcels of land were part of the Loodariak Scheme, before the scheme was subdivided by Loodariak Committee, and that he

was shown all the beacons on his parcel of land by the Committee members.

He also stated that he was shown the beacons on the common boundary with the suit property in the presence of the late Parsapayo Ole Oluwuas (Deceased). Further, that the alleged 20 hectares which he is alleged to have trespassed on in actual fact forms part of his parcel of land, wherein his family has lived for more than 50 years and are still in possession, occupation and use of. The Defendant further stated that the Decree issued by the Kajiado Senior Resident Magistrate Court in Land Disputes Tribunal Case No. 19 of 2011 was stayed by the lower court pending appeal, and he annexed a copy of the said order issued on 17th November 2011.

The parties were directed to file written submissions, which they relied upon for the ruling herein. The Plaintiffs' counsel in submissions dated 5th June 2013 relied on various sections of the Environment and Land Act of 2012 that give this court jurisdiction to deal with the dispute. It was also argued that the Defendant is not deserving of any equitable rights as he did not comply with the stay of execution orders in the lower court, which required him to file his appeal within 21 days.

The Plaintiffs' counsel further submitted that the Plaintiffs had shown that they are the registered owners of the suit property which measures approximately 95.85 hectares. Further, that the certificate of official search dated 19th February 2013 they produced in evidence showed that the Defendant is the registered owner of Title No. Kajiado/Loodariak/126 which measures approximately 62 hectares and not 95.85 hectares as he alleged. It was submitted that the Plaintiffs had therefore shown a *prima facie* case, and met the tests in in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** . Further that the balance of convenience tilts in their favour arising from the developments they had made on the disputed land, and that they will suffer irreparable damage if the Defendant proceeds to damage, waste or alienate the disputed land.

The Defendant's counsel filed submissions dated 15th July 2013 and argued that the Defendant is resident on the disputed land, and an injunction cannot issue to stop an act that has already taken place and that will result in the loss of his home. Counsel relied on the decision in **Samaire ole Muntet & Another vs Lirian Senkento & 2 Others, HCCA No. 219 of 2010** in this regard. Further, that the injunction sought would amount to a mandatory injunction which ought to be granted only in clear and incontrovertible cases as held in **Hotel Hermes (Nairobi) vs Stanley Munga Githunguri, HCCC No. 331 of 1999**. The counsel urged that the Plaintiff had not met the test set out in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** for the grant of an injunction, and that the balance of convenience tilted in favour of the Defendant and the status quo obtaining should therefore be maintained.

I have carefully read and considered the pleadings and arguments made by the parties herein. The issue for determination is whether the Plaintiff has met the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction. These are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

The Plaintiff has provided evidence of the title to the suit property issued to their deceased father on 28th June 1990 showing that the said property measures 254 acres. They also brought evidence of a certificate of official search showing that Kajiado/Loodariak/126 was registered in the name of the Defendant on 31st May 1990, and that it measures approximately 62 hectares. The Defendant admits that he is the registered proprietor of Kajiado/Loodariak/126 but did not produce any title document in evidence, which would have also confirmed his averments that the said land measures approximately 95.85 hectares.

It is not however disputed that both the Plaintiffs and Defendant are registered proprietors of neighbouring parcel of land, and the dispute herein is therefore essentially a boundary dispute. This dispute can only be effectively solved by the parties' respective lands being surveyed to determine the location of the beacons and their respective sizes. It is for this reason that I will decide the Plaintiff's

Notice of Motion on the basis of a balance of convenience. I note in this regard that there are stay orders in place of the Tribunal's decision, and that the Defendant has constructed structures and resides on the disputed portion of land. To this extent the balance of convenience tilts in the Defendant's favour. I accordingly order as follows:

1. That the *status quo* to be maintained with regard to the disputed portion of land measuring approximately 20 hectares situated on the common boundary between the parcels of land known as Kajiado/Loodariak/116 and Kajiado/Loodariak/126 pending the hearing and determination of the suit filed herein or until further orders shall be as follows:
 - a. The Plaintiffs and Defendants by themselves, their servants, agents, employees or any other person acting under their instructions shall not sell, transfer, dispose of, carrying out any further developments or construction on, cut any trees, or in any other manner dealing adversely with the disputed portion of land.
 - b. The Plaintiffs shall not interfere with the Defendant's possession of the disputed portion of land.
 - c. The Defendants shall grant the Plaintiffs, their dependants and livestock ingress and egress into, out of and through the disputed portion of land for purposes of accessing any access roads and water points.
2. The Plaintiff and Defendant shall within 60 days of the date of this ruling agree on an independent joint surveyor that shall carry out a survey, and prepare and file in court a survey report on the area and sizes of the parcels of land known as Kajiado/Loodariak/116 and Kajiado/Loodariak/126; the beacons on the two parcels of land, and of the common boundary between the two parcels of land; and of the location of the disputed portion of land.
3. The Plaintiffs and Defendant shall jointly meet the costs of the said survey and of the preparation of the survey report.
4. Parties shall be at liberty to apply
5. The costs of the Plaintiffs' Notice of Motion dated 20th May 2013 shall be in the cause.

Dated, signed and delivered in open court at Nairobi this ____23rd____ day of ____October____, 2013.

P. NYAMWEYA

JUDGE