



**REPUBLIC OF KENYA**

**High Court at Machakos**

**Miscellaneous Application 129 of 2010**

**KILI OLE SANKAIRE ..... APPLICANT/ INTERESTED  
PARTY**

**VERSUS**

**1. THE KAJIADO NORTH LAND DISPTUES TRIBUNAL .....  
RESPONDENT**

**2. SAILOJI OLE KALUNCHU PARANTOI ..... RESPONDENT/ EX PARTE  
APPLICANT**

**R U L I N G**

Before me is an application dated 28<sup>th</sup> September 2011, by way of Notice of Motion filed by Kili Ole Sankaire, described as applicant/interested party. The application was filed under Order 40 Rules 1, 2, and 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act (Cap 21). The application has five (5) prayers, two of which have been spent, as follows:-

1. **(Spent).**
2. **(Spent).**
3. **That this Honourable Court be pleased to issue temporary injunction restraining the ex parte applicant/2<sup>nd</sup> respondent, employees and/or agents from disposing of, trespassing or in any other manner whatsoever interfering with the land in dispute/LR No. KJD/OLCHORO-ONYORE/27 and LR No. KJD/OLCHORO-ONYORE/26 both of which were original numbers of the respondent and the applicant that were adjacent to one another pending the hearing and determination of the judicial review.**
4. **That the OCS Kiserian Police Station does ensure compliance of these orders.**
5. **That the costs of this application be provided for.**

The application has grounds on the face of the Notice of Motion. The grounds are that the interested party/applicant (interested party) is the registered owner of land known as KJD/OLCHORO-ONYORE/26 while the *ex-parte* applicant/respondent (2<sup>nd</sup> respondent) was the lawful owner of land known as KJD/OLCHORO-ONYORE/27 which parcels of land have currently emerged with new portions of land created due to unlawful subdivisions and trespass to the interested party's property by the respondent. That the 2<sup>nd</sup> respondent had, without any colour of right, started disposal of the subject land to 3<sup>rd</sup> parties in breach of pending Misc. Cause No. 129 of 2010 (the present proceedings). That therefore

there was justification in granting the temporary injunction to restrain the putting up of beacons or constructing fences on the disputed land.

The application was filed with a supporting affidavit sworn by the interested party on 28<sup>th</sup> September 2011. It was deponed *inter alia*, that the interested party was the lawful owner of the parcel of land known as LR KJD/OLCHORO-ONYORE/26 adjacent to the 2<sup>nd</sup> respondent's land known as LR KJD/OLCHORO-ONYORE/27. That the land had currently been subdivided by the 2<sup>nd</sup> respondent to many portions of land with new registration numbers; that the interested party and the 2<sup>nd</sup> respondent had been having a boundary dispute on LR KJD/OLCHORO-ONYORE/26 and KJD/OLCHORO-ONYORE/27 since 1976; that the Kajiado North Land Disputes Tribunal had solved the disputes and made a ruling on the 10<sup>th</sup> December 2009; that though the 2<sup>nd</sup> respondent was given time to appeal to the Rift Valley Provincial Land Disputes Committee, he through his advocate Nyende & Company lodged these judicial review proceedings in Misc. Cause No. 129 of 2010 and got orders that leave granted operates as a stay of the award of the Tribunal; that the judicial review proceedings (herein) were still pending; that the 2<sup>nd</sup> respondent sold part of the disputed land to 3<sup>rd</sup> parties who had done survey, put beacons and fenced the land; that unless restrained, the 2<sup>nd</sup> respondent would continue with his unlawful acts causing the interested party loss and damage.

The interested party through his counsel M/s Onyancha, Nyakundi & Company advocates filed written submissions. It was contended that the orders of stay granted by the judicial review court at the grant of leave herein meant maintenance of the *status quo*. It was contended that consequently, the actions of the 2<sup>nd</sup> respondent in allowing 3<sup>rd</sup> parties to enter the land and carry out fencing meant that he had no respect for the rule of law. In addition, it was argued that the advocate for the 2<sup>nd</sup> respondent M/s Nyende & Company advocates was actually acting for one Ferdinand Mwangi, a 3<sup>rd</sup> party, and that was why they annexed a copy of the title document in the name of the said Ferdinand Mwangi in their replying affidavit.

The application is opposed. The 2<sup>nd</sup> respondent filed a replying affidavit on 7<sup>th</sup> November 2011. It was admitted that there were sales and excisions on both parcels of land in dispute since the 1980s. Annexed to the affidavit was a title document under the Registered Land Act (Cap 300) in the name of Ferdinand Mwangi for 2.02 hectares issued on 11<sup>th</sup> December 1987. It was further deponed that the 2<sup>nd</sup> respondent had no control over actions of 3<sup>rd</sup> parties who were landowners; that the dispute that went to the District Land Registrar and District Land Disputes Tribunal culminating in these proceedings, was merely on boundaries and not ownership of land; that the interested party now wanted to transform the dispute herein to a dispute on ownership of the land through the backdoor; that the 2<sup>nd</sup> respondent did not dispose of any land in question during the pendency of these proceedings; that the orders sought in the present application would affect innocent 3<sup>rd</sup> parties who were not subject to these proceedings; and that the application lacked merit.

On the hearing date, counsel for the interested party Mr Obare, informed the court that hearing notice had been served on M/s Nyende & Company advocates for the 2<sup>nd</sup> respondent. However, neither counsel nor the 2<sup>nd</sup> respondent attended court.

I have considered the application documents filed and written submissions of the interested party. This is an application for a temporary injunction pending determination of these judicial review proceedings. The parameters to be considered by the court in such an application have been long established since the decision in **Giella –vs- Cassman Brown Ltd (1973) EA 358**. An applicant has to show that he has a *prima facie* case with probability of success. Secondly, an injunction will not be granted unless the applicant will suffer irreparable loss if the injunction sought is not granted. Thirdly, if the court is in doubt, it will decide the application on the balance of convenience.

The interested party and the 2<sup>nd</sup> respondent all agree that there has been a long standing dispute on their adjoining two plots since the 1980s. The proceedings herein are part of the attempt to address the issues

in dispute. A substantive decision herein is yet to be made. I cannot determine the merits of the matters herein either way at this preliminary stage. The matter between the parties is arguable. With the facts placed before me, I hold that the interested party has shown a *prima facie* case with probability of success. He has an arguable case in the proceedings herein.

Will he suffer irreparable loss if the temporary injunction sought is not granted? In my view, the answer is yes. The issues and disputes involved cannot be quantified or reduced to ascertainable damages. They relate to land and interests in land. I therefore find that the applicant will suffer irreparable loss if an interlocutory injunction is not granted. An award of damages cannot be an adequate compensation. Though the 2<sup>nd</sup> respondent claims that the orders sought affect 3<sup>rd</sup> parties, in my view they are all directed at the 2<sup>nd</sup> respondent and not 3<sup>rd</sup> parties. In any case, if they affect 3<sup>rd</sup> parties accidentally, the said 3<sup>rd</sup> parties are at liberty to come to court and put their respective positions and claims for consideration.

The balance of convenience is also in favour of the interested party. If the injunctive orders sought are not granted, then any orders that might arise in his favour may be in vain. The injunctive orders will primarily preserve the existing *status quo*.

In granting prayer 3 however, I must state very categorically that it should not affect innocent purchasers for value, as at the date of issuing these orders. I will therefore grant orders that are clear and specific and which do not affect innocent purchasers for value or adversely affect the rights of the two parties in contest.

I therefore allow the application and order as follows:-

- 1. A temporary injunction be and is hereby issued restraining the *ex-parte* applicant/2<sup>nd</sup> respondent, employees and/or agents (who do not include innocent purchasers for value as at the date of this order) from disposing or in any manner interfering with the current status quo of the land in dispute (LR No. KJD/OLCHORO-ONYORE/27 and LR NO. KJD/OLCHORO-ONYORE/26(both of which were original numbers of the 2<sup>nd</sup> respondent and the interested party that were adjacent to one another), pending the hearing and determination of the judicial review proceedings herein.**
- 2. The OCS at Kiserian Police Station does ensure compliance with these orders.**
- 3. Costs in the cause.**

It is so ordered.

Dated and delivered at Machakos this 16<sup>th</sup> day of August 2012.

**George Dulu**  
**Judge**

**In presence of:-**  
Mutinda – Court clerk

Mr Kaluu holding brief for Mr Onyancha Nyakundi for Applicant.