REPUBLIC OF KENYA

High Court at Eldoret

Civil Case 112 of 2010

KERIO VIEW INVESTMENTS CO. LTD.....PLAINTIFF

VERSUS

LORNAH KIPLAGAT.....1ST DEFENDANT

LANDS REGISTRAR KEIYO DISTRICT.....2ND DEFENDANT

RULING:

The Application is brought by way of Notice of Motion dated the 13th February, 2012 under the provisions of Articles 22, 2, 40 of the New Constitution of Kenya 2010 and under the provisions of Order 40 Rules 1 & 2 of the Civil Procedure Rules and under Sections 20 (1) and 21(1) of the Registered Land Act and all other enabling provisions of the law.

The Applicant relies on the grounds on the face of application and the Supporting Affidavit made by **JOHN ERIC BUTLER WILLIAM** made on 13th February, 2012.

the Applicant is seeking for conservatory orders/ temporary injunction restraining the Defendant/Respondents jointly and severally from trespassing upon the Applicants land known as **IRONG/ITEN/2742.** Alternatively the Applicant seeks for orders of "Status Quo" that it be maintained pending the fixing of the boundary beacons between the parcels of land known as **IRONG/ITEN/2743** and **IRONG/ITEN/2742.** The Applicant also prays for costs.

The Applicant avers that it is the registered owner of the parcel of land known as **IRONG/ITEN/2742** having purchased the said parcel of land for the purposes of hosting and conducting para gliding and parachuting exercises.

That the Applicant took possession of the land and had uninterrupted use of the land for a period of seven (7) years.

All the time the Applicant took possession of the parcel of land, the said land was not formally subdivided or surveyed and the boundary beacons had not been fixed.

There exists a boundary dispute between the Applicant and the 1st Respondent and the Applicant contends that the 1st Respondent and the 2nd Respondent purported to rectify a non existent boundary and have unilaterally invented a new boundary between the land parcels **IRONG/ITEN/2742** and **IRONG/ITEN/2742.**

That the 1st Respondents action of encroachment onto the para gliding path has interfered with the

Applicants para gliding business.

The Applicant prays that the injunctive orders sought be granted as its business is likely to suffer irreparable loss.

The 1st Respondent opposed the application and avers in her Replying Affidavit that the boundary dispute was resolved by the Lands Disputes Tribunal and attached proceedings of the tribunal case to the Affidavit. The annextures are marked JK -1 (a).

The 1st Respondent further avers that the survey was done by the 2nd Defendant and the boundaries delivered between the two properties.

The 1st Respondent avers that the Applicant has not made out a prima facie case in support of the orders it is seeking.

The Applicant also put in written submissions to support its arguments and submissions whereas the Respondents failed to file any written submissions in support.

After considering the averments, arguments and submissions this court finds the following issues for determination;

a) Boundary dispute

b) Injunctive Orders

c) Costs

It is not in dispute that there exists a boundary dispute between the Applicant and the 1st Respondent related to the properties they own that is **IRONG/ITEN/2742** which belongs to the Applicant and **IRONG/ITEN/2743** which belongs to the 1st Respondent.

The Applicant claims usage of seven (7) years of the portion in dispute and also utilizes the same for its paragliding business.

On the second issue the court has to be satisfied that the Applicant has in its application met the thresh-hold set down in the case o**f GIELLA -VS- CASSMAN BROWN (1973) E.A .**

The principles laid down in the cited case are that;

a) The Applicant has made out a prima facie case with a probability of success.

b) The Applicant will suffer or sustain irreparable loss that is not capable of being compensated by damages.

c) If in doubt, the court may decide the matter on a balance of convenience.

This court finds that the boundary dispute is an issue that should proceed to full hearing for final determination by the trial court.

There is a common boundary in issue and the irreparable loss likely to be suffered could be on both sides.

Nevertheless, the Applicant has made out a case arising from usage. This court finds that the “balance of convenience” tilts in favour of the Applicant.

This court finds that the Application has merit and is hereby allowed.

It is ordered that;

(1) The "Status Quo" be maintained on the ground pending final hearing and determination of the main suit.

(2) The costs shall be in the cause.

It is so ordered.

DATED and DELIVERED at ELDORET this 19th day of December 2012.

A.MSHILA
JUDGE

Coram: Before Hon. A Mshila J
CC: Winnie

Counsel for the Applicant: Marube holding for Angu Kitini

Counsel for the Respondent: Omusundi holding brief for Katwa Kigen

A.MSHILA
JUDGE