



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 106 OF 2019

JOSEPHAT MVOI MWANG'OMBE & 8 OTHERS.....PLAINTIFFS

VERSUS

KENYA WILDLIFE SERVICESDEFENDANT

RULING

(Application for injunction; plaintiffs claiming that the defendant is erecting an electric fence within their properties thus seeking that this be stopped pending hearing of the suit; survey report commissioned subsequently demonstrating that the fence does not encroach into the plaintiffs' land; no prima facie case established; application dismissed with costs; defendant at liberty to complete its fence)

1. The application before me is that dated 17 June 2019 filed by the plaintiffs. The application seeks the following substantive orders which are prayers (c) and (d) in the application, as follows (slightly paraphrased for brevity) :-

(c) That a permanent injunction be issued against the defendant and its agents from erecting and/or constructing an electric fence, alienating, trespassing or in any way interfering with the plaintiffs' properties and rights known as Taita Taveta/Mwachabo Scheme/973, 1113, 1159, 1111, and 111, and all that property of the Alia Community land adjacent thereto or pertaining thereto pending the determination of this suit.

(d) That the honourable court be pleased to order the defendant to stop arresting, molesting, and harassing the plaintiffs and the community members in the aforementioned Alia Community area.

2. The application is opposed.

3. The application was filed contemporaneously with the plaint. In the plaint, it is pleaded that the 1st, 2nd, 3rd, 4th and 5th plaintiffs are respectively the owners of the land parcels Taita Taveta/Mwachabo Scheme/973, 1113, 1159, 1111, and 111 (the suit properties). It is pleaded that the defendant (KWS) is unlawfully erecting an electric fence on the said parcels of land without the authority of the plaintiffs. It is further pleaded that at all material times the land was the ancestral land of the Alia Community (9th plaintiff) and that the community has used the land for cultivation and mining. The plaintiffs aver that they have been in occupation and possession of this land as their ancestral land. It is averred that in March 2019, the defendant illegally encroached and trespassed into the land of the plaintiffs and commenced erecting an electric fence thus depriving the plaintiffs the use of their land. In the suit, the plaintiffs seek a declaration of ownership of the suit properties; a further declaration that the fence is illegal and an order for its removal; a permanent injunction against the defendant; general damages for trespass and loss of income; and costs of the suit.

4. It will be seen that in this application, the plaintiffs seek restraining orders pending completion of the case.

5. The application is opposed by Zainab W. Salim, a Senior Warden of the defendant. She has deposed inter alia that the defendant has embarked on erecting a 30 kilometre electric fence to alleviate human-wildlife conflict and to also assist in elimination of illegal poaching. She has deposed that stakeholder meetings were held which involved the Alia Community and other stakeholders, and the project obtained support of the stakeholders. She has deposed that 24km of the electric fence had been done by July 2019 and the remaining 6km is where there have been complaints by the Alia Community. She denied that the defendant has trespassed on the plaintiffs' land or blocked the plaintiffs' access to their land. She has deposed that on 13 and 14 February 2019, the 6th and 7th plaintiffs, alongside two other people, incited members of the public to burn down their fencing posts and they were arrested and charged.

6. When the application first came before me for inter partes hearing, I thought that the issue may be resolved if a joint survey was carried out. This took a while, but the ground was eventually visited in August 2020 and a report prepared in September 2020. The long and short of that report is that there is no encroachment on the land of the plaintiffs. With regard to land parcel No. 111, the fence is 12.6 km away. For the plot No. 1111 the same borders KWS land but the fence is 8 metres from the boundary. It is noted that it is the owner of this plot who

has encroached into KWS land by an area of 3.17 Ha. For the plot No. 1113, the fence is also 8 metres away from its boundary with KWS land and it is the owner of the plot who has encroached into KWS land by 1.17 Ha. For the plot No. 1167, it is the owner who has encroached into KWS land by 2.34 Ha. For the plot No. 1159, the fence is 280 metres away from this land and this land does not even share a boundary with KWS land. The plot No. 111 was noted to be 1.3 km away. The report concludes that the fence does not in any way encroach into the land parcels of the plaintiffs and that it is in fact some of the plaintiffs who have encroached into KWS land.

7. I have taken into consideration the above report and from it I do not see how the plaintiffs can claim to have established a prima facie case with a probability of success. The report speaks for itself and it is conclusive that the defendant's fence does not encroach into the plaintiffs' land. The plaintiffs have not presented any report to contradict the findings of what is on record. I do not see what substantial loss the plaintiffs stand to suffer by KWS proceeding with the fence, as from the material before me, it does not affect their land. Even if I was to consider the balance of convenience, it tilts towards allowing the completion of the fence, which, out of 30 km, is already 24km done. If at all the plaintiffs succeed in their case, then the fence can be pulled down.

8. Given the above, the plaintiffs have not satisfied this court that they deserve the orders of injunction. Their application is hereby dismissed with costs. The effect is that the defendant is at liberty to complete the fence.

9. Orders accordingly.

DATED AND DELIVERED THIS 9TH DAY OF MARCH 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT

MOMBASA
