



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ELC CASE NO.61 OF 2017**

**ALBERT BOYO KIRUI.....PLAINTIFF**

**VERSUS**

**BENJAMIN KIPROTICH A. KIGEN.....1<sup>ST</sup> DEFENDANT**

**KIPKURUI CHERUTICH.....2<sup>ND</sup> DEFENDANT**

**ERICK KIPTUM KIMOSOP.....3<sup>RD</sup> DEFENDANT**

**THE COUNTY LAND REGISTRAR**

**TRANS-NZOIA.....4<sup>TH</sup> DEFENDANT**

**THE COUNTY SURVEYOR .**

**TRANS-NZOIA.....5<sup>TH</sup> DEFENDANT**

**THE ATTORNEY GENERAL.....6<sup>TH</sup> DEFENDANT**

**RULING**

**The Application**

1. In the Notice of Motion dated 20/1/2021 and filed in court on 21/1/2021 and which has been brought under Sections 1A, 1B, 3 & 3A of the Civil Procedure Act and Order 40 Rule 1, 2, 3 and 4, Order 46 Rule 18, Order 51 Rule 1 of the Civil Procedure Rules and Section 3 and 13 (1) (7) of the Environment and Land Court Act 2011, the 3<sup>rd</sup> defendant, Erick Kiptum Kimosop, seeks the following orders:-

(1) That this application be certified urgent and the same be heard forthwith *ex parte*.

(2) That there be a temporary order of injunction restraining the plaintiff/respondent, his servants, agents, employees or any other person acting under his directions or authority from trespassing into, fencing, surveying, ploughing, selling, transferring, encumbering, laying any claim thereto or otherwise interfering with the parcel of land No. KWANZA/NAMANJALALA BLOCK 4/KAPSITWET/131 measuring five (5) acres or thereabouts pending hearing and determination of this application *inter partes*.

(3) That there be a temporary order of injunction restraining the plaintiff/respondent, his servants, agents, employees or any other person acting under his directions or authority from trespassing into, fencing, surveying, ploughing, selling, transferring, encumbering, laying any claim thereto or otherwise interfering with the parcel of land No. KWANZA/NAMANJALALA BLOCK 4/KAPSITWET/131 measuring five (5) acres or thereabouts pending hearing and determination of this suit.

(4) That the Report of the County Surveyor dated 5/7/2019 and filed in court on 9/7/2019 be adopted as judgment of this court.

(5) That costs be paid by the plaintiff/respondent herein.

2. The application is supported by the affidavit of the applicant sworn on 20/1/2021. The grounds at the bottom of the application are that: in

a ruling that the court made on **28/2/2019** it directed the County Surveyor to visit Plot No. **Kwanza/Namanjalala/Kapsitwet Block 4/45** and **Kwanza/Namanjalala/Kapsitwet Block 4/131** to confirm the acreage of each of the parcels and whether there is encroachment by any of the parties; that the surveyor prepared and filed a report in court on **9/7/2019** which established that the plaintiff has encroached on the 3<sup>rd</sup> defendant/applicant's portion of land measuring **2.562 acres**; that the surveyor did place beacons on the ground which the plaintiff has now removed and that it is necessary that appropriate orders be made to bring the dispute to an end.

### **The Response**

3. I have perused the court file and I have found no response to the application filed by the plaintiff.

### **Submissions**

4. The applicant filed his written submissions on **19/2/2021**. I have perused the court record and found no submissions filed by the plaintiff respondent.

### **Determination**

5. The issues arising for determination in the instant application are whether an interim injunction should issue restraining the plaintiff from interfering with the 3<sup>rd</sup> defendant's land and whether the report of the county surveyor dated **5/7/2019** should be adopted as a judgment of this court.

6. This court has considered the fact that there is no evidence that the parties have agreed on the surveyor's report as filed. Consequently it has to be produced at a hearing by the appropriate witness for it to form part of the evidence in this file record. For that sole reason this court will not accede to **prayer no 4** of the application.

7. This court has also observed that the contents of that report appear to indicate that the plaintiff has encroached on land that is not his. He is also alleged to have interfered with the beacons that the surveyor fixed on the ground in the process of determining the true and correct boundary between the two parcels subject matter of this suit. However this court's opinion which is based on the observation that the surveyor's report has not yet been produced in evidence is that it is unsafe to proceed to issue orders of injunction at this stage as urged even though the application is unopposed.

8. The upshot of the above is that the application dated **20/1/2021** is hereby rejected. The court has however noted that this is a matter that should have been concluded long ago had the plaintiff been keen to prosecute his case and finalize it. The plaintiff has not fixed any hearing dates since the filing of the surveyor's report. Consequently this court on its own motion hereby directs a priority hearing date ought to be allocated to this suit. Consequently, I order that the hearing of the main suit will be on **27/4/2021**. The **3<sup>rd</sup> defendant shall secure from the court and serve witness summons** upon the **County Surveyor** to enable him attend court to produce the report as evidence. The parties shall avail all his witnesses on the same date in readiness for conclusion of their respective cases. On the hearing date, the witnesses shall adopt their written witness statements on the record and be cross-examined.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 3RD DAY OF MARCH, 2021.**

**MWANGI NJOROGE**

**JUDGE, ELC, KITALE.**