



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MIGORI

ELC CASE NO. E007 OF 2021

JOSEPH ONDORO ODONGO.....PLAINTIFF/APPLICANT

VERSUS

JOHN OKUNA OGANGO.....1ST DEFENDANT/ RESPONDENT

MIGORI LAND REGISTRAR.....2ND DEFENDANT/ RESPONDENT

HON. ATTORNEY GENERAL.....3RD DEFENDANT/ RESPONDENT

RULING

INTRODUCTION

1. By Notice of Motion dated 2nd June, 2021 the Plaintiff/ Applicant sought for the following orders: -

a) Spent.

b) THAT Respondents, agents, servants and/or one claiming under the authority of the Respondents be restrained by order of injunction from entering, grazing onto, tilling and/or obstructing the Applicant, agents, servants and/or any one claiming under the authority of the Applicant from entering, cultivating and/or using **Land Reference No. Kamagambo/ Kanyajuok/332** (herein known as the suit property) pending the hearing and determination of this Application.

c) THAT Respondents, agents, servants and/or one claiming under the authority of the Respondents be restrained by order of injunction from entering, grazing onto, tilling and/or obstructing the Applicant, agents, servants and/or any one claiming under the authority of the Applicant from entering, cultivating and/or using **Land Reference No. Kamagambo/ Kanyajuok/332** (herein known as the suit property) pending the hearing and determination of this Suit.

d) THAT the Costs of this Application be in the cause.

2. The application is based on the 6 grounds thereof and the Supporting Affidavit sworn by JOSEPH ONDORO ODONGO on 02.06.2021. The applicant herein avers that he is the registered proprietor of L.R No. Kamagambo/ Kanyajuok/332 which had initially shared a common boundary with L.R No. Kamagambo/ Kanyajuok/333; which has remained the same despite the actual boundaries and measurements thereon being fraudulently changed in the RIM Map.

3. It is the Applicant's contention that the 1st Defendant/ Respondent without any lawful cause, consent or authority destroyed the original boundaries that separates the suit land L.R No. Kamagambo/ Kanyajuok/332 to form L.R No. Kamagambo/ Kanyajuok/988. He further asserts that the changes are fraudulent and unlawful since he has never entered into any lawful contract with the 1st Defendant/ Respondent to warrant the changes appearing in the RIM Map.

4. He further contends that the 1st Defendant/ Respondent has begun fencing and curving out a portion of the suit land without any authority, consent and/or color of right whatsoever thus destroying sugarcane plantation, cereal crops and trees thereon and which actions amounts to trespass.

5. Further, it is his claim that unless the honourable court grants the orders sought, the 1st Defendant/ Respondent and his agent Omolo Okuna are hell-bent to continue with the unlawful alienation and in the process, the suit property may be totally wasted and his rights to peaceful possession, development, occupation and use stands to be prejudiced and rendered nugatory.

6. The application was opposed. The 1st Defendant/ Respondent filed a Replying Affidavit sworn on 07.10.2021. He averred that he is the legal owner of L.R No. Kamagambo/ Kanyajuok/988 and has a title deed over the same and maintained that he has never claimed authority, entered, grazed, tiled or in any way interfered with the said L.R No. Kamagambo/ Kanyajuok/332 or destroyed any boundaries of the suit property as accused.

7. He further stated that the portions curved from L.R No. Kamagambo/ Kanyajuok/333 are L.R No. Kamagambo/ Kanyajuok/1262 and L.R No. Kamagambo/ Kanyajuok/1263 and not parcel No. 988 which belongs to him.

8. It was his claim that to the contrary of the Applicant's claim; the Applicant and his agents have cut his fence and continue to interfere with his land and thus urged the court to restrain them from further interference with his land.

9. It is his contention that he has been occupation and possession of his land parcel no. L.R No. Kamagambo/ Kanyajuok/988 for over 30years and therefore the claims of trespass and encroachment do not have any factual or legal basis whatsoever. It was his position that the Application did not meet the parameters for issuance of temporary orders; that no prim facie case had been established, the suit land and his land parcel are two different parcels and further that an order of injunction if granted would sanction continued trespass and interference with his land.

10. On 28.10.2021, this court issued directions on the disposal of the Application herein by way of written submissions. The 1st Defendant/ Respondent filed, through the firm of Omondi Odegi & Company Advocates filed their submissions dated 16.11.2021 which I have read and considered and I have taken the same into account in arriving at my decision. However, on a perusal of the court record, I have noted with concern that the Applicant has not filed his submissions as directed. Be that as it may, I will proceed to determine the Application as hereunder.

ISSUES FOR DETERMINATION

11. I have taken into account the entire application, the Affidavit in support together with the annexures thereto, the Replying Affidavit and the annexures therewith and the 1st Respondent's submissions. Consequently, it is my considered view that the sole issue arising for determination therefrom is;

a) Whether the Applicant has met the requirements for the grant of a temporary order of injunction sought.

ANALYSIS AND DISPOSITION

A) Whether the Applicant has met the requirements for the grant of a temporary order of injunction sought.

12. The law relating to injunctions is provided under Order 40 (1) (2) of the Civil Procedure Rule which provides as follows:

1. "Where in any suit it is proved by affidavit or otherwise: -

(a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree;

(b),

the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders."

13. Section 13 (7) (a) of the Environment and Land Court Act, 2015 equally mandates this court to grant interim preservation orders; including an interim injunction as sought in the present Application.

14. The principles that govern the grant of injunctions are now well settled. An applicant seeking orders of injunction must satisfy the 3-limb test set out in the celebrated case of **Giella vs Cassman Brown and Co. Ltd [1973] EA. 358 at 360** as follows: -

a). where he is required to demonstrate that he has a prima facie case with serious triable and arguable issues with a probability of success against the respondent. The test on prima facie case does not mean establishing a case beyond reasonable doubt;

b). He will suffer irreparable harm/injury which cannot be adequately compensated by damages;

c). Balance of convenience: In granting an injunction under this condition the court must be satisfied that the hardship or inconvenience which is likely to be caused to the applicant by declining the injunction will be greater than that which is likely to be caused to the respondent.

(See also *American Cyanamid vs Ethicon Limited [1975] AC 396*)

15. The three pillars on which rests the foundation of any order of injunction, interlocutory or permanent are as explained above. It is now well established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which an applicant for

an Order of Injunction is expected to surmount sequentially. See **Kenya Commercial Finance Co. Ltd V. Afraha Education Society** [2001] Vol. 1 EA 86.

16. I will now proceed to discuss each of the 3 grounds as hereunder. The first ground that an Applicant must establish is that he has a *Prima Facie* case which raises arguable and triable issues with a probability of success. The Court of Appeal in **Mrao Ltd vs First American Bank of Kenya Ltd & 2 (Supra)** explained what amounts to a prima facie case and stated as follows:

“a prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

17. The Applicant herein avers that the 1st Defendant/ Respondent has trespassed and/or encroached into his parcel of land L.R No. Kamagambo/ Kanyajuok/332 and further has curved out portions from his parcel and is thus interfering with his possession, occupation and use hence the need to have him restrained from continuing with his actions further.

18. The 1st Defendant/Respondent on the other hand avers that he has been in occupation of his rightful portion of land parcel L.R No. Kamagambo/ Kanyajuok/988 for over 30years, registered in his name; the said land parcel is distinct and totally unrelated from the Applicant’s suit parcel L.R No. Kamagambo/ Kanyajuok/332. He further states that the allegations that he curved out portions from his parcel are not only false but also misguided. It is his position that the portions curved out from L.R No. Kamagambo/ Kanyajuok/333 are No. Kamagambo/ Kanyajuok 1262 and 1263 respectively.

19. Further, the 1st Respondent has claimed that the Applicant and his agents are the ones guilty of encroachment and interference with his peaceful possession, occupation and use of his own land parcel and even annexed photos to prove the said interference and thus urged the court to dismiss the present Application. He maintains that if the Application is granted then the same would sanction continued interference by the Applicants and his agents to trespass and disrupt his peaceful use and occupation of his own parcel of land and hence lead to irreparable loss.

20. It is therefore clear that the 1st Defendant/Respondent is in occupation of the own land parcel L.R No. Kamagambo/ Kanyajuok/988, lawfully registered in his own name and which land is distinct and unrelated from the suit property herein though the 2 parcels are neighboring each other. He has been occupying the said land parcel for over 30 years since the registration in 1977.

21. Thus in order to clearly and conclusively establish the allegations raised herein, it would be necessary to adduce evidence which cannot be done at an interlocutory stage, but would require a main hearing where both parties will testify and adduce evidence in support of the rival claims.

22. In view of the circumstances; I find that the Applicant herein has failed to satisfactorily prove to this court that he has a prima facie case against the 1st Defendant/Respondent.

23. The second limb is that an Applicant must demonstrate that he will suffer irreparable harm which cannot be adequately compensated by damages, if an Order of Injunction is not issued. The burden is on the applicant to demonstrate the nature and extent of the injury. The same must not be an imagined, speculative injury or an apprehension on the part of the applicant but must be an injury which is substantial.

24. In **Pius Kipchirchir Kogo versus Frank Kimeli Tenai (2018) eKLR** in defining what amounts to an irreparable injury the court stated as follows;

“irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”

25. An irreparable loss is that which cannot be quantified in monetary terms. The Applicant contends that the 1st Defendant/ Respondent has encroached/ trespassed onto his land, destroyed the original boundary and has begun acts of interference with his peaceful occupation and use of his suit property. It is important to point out that the suit property L.R No. Kamagambo/ Kanyajuok/332 is different from the 1st Defendant/Respondent’s land parcel and the same has been acknowledged by the Applicant. The Applicant further contends that a portion was curved out from L.R No. Kamagambo/ Kanyajuok/333 and which is encroaching into his land suit parcel. According to him, the said curved out portion forms part of the 1st Defendant’s portion, a fact which has been denied by the 1st Defendant, who in addition clarified that the curved out portion forms part of L.R No. Kamagambo/ Kanyajuok/12622 & 1263, a fact which has neither been denied nor confirmed by the Applicant. There if no proof whatsoever of the irreparable loss and inconvenience that will be suffered by the Applicant if the orders sought are not granted.

26. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is actual, substantial and demonstrable injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or is in such a nature that monetary compensation, of whatever amount, will never be adequate remedy. See **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR; Civil Appeal No. 77 of 2012 (Nairobi)**

27. Consequently, I find that the Applicant has not demonstrated the irreparable loss that he is likely to suffer that cannot be compensated by an award of damages to the required threshold.

28. The final element that must be established is on the balance of convenience. The court needs to be satisfied that the inconvenience likely to be caused to the Applicant by declining the injunction is greater than that which is likely to be caused to the Respondent. The court balances the inconveniences of both parties and possible injuries to them and their properties.

(See *Charter House Investment Limited vs Simon K. Sang and 3 Others [2010] eKLR*.)

29. From the above illustration; it is clear that the 1st Defendant/ Respondent is in occupation of his own parcel of land No. 988 which is entirely different from the suit property herein; he has been in possession, occupation and has been using and carrying out other farming activities; planting crops and trees for over 30 years. Therefore, the inconvenience likely to be caused to the 1st Respondent by the grant of the orders sought to restrain him is greater than that which is likely to be caused to the Applicant in the circumstances

30. Moreover, the 3-limb test must be established sequentially. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. The Applicant has neither demonstrated a *prima facie* case against the 1st Defendant/Respondent nor irreparable loss that he is likely to suffer unless the orders sought are granted, it therefore follows that the balance of inconvenience cannot tilt in his favor. I accordingly find that the balance of convenience tilts in favour of the 1st Defendant/ Respondent herein in not granting the temporary injunction sought.

31. Lord Diplock noted in *American Cyanamide Co. vs Ethicon Limited [1975] AC 396; [1975] 2 W. L. R. 316*

“The whole point of temporary injunction is to keep matters in status quo until the main issue in the case can properly be heard.”

CONCLUSION

32. In conclusion, I accordingly find that the Application dated 2nd June, 2021 is **not merited** and I proceed to dismiss the same with costs to the 1st Defendant/ Respondent. Further, pending the hearing and determination of the suit herein, all parties are hereby ordered to maintain the status quo pertaining their respective occupation. No party should interfere with another’s party’s use, occupation and possession of their respective land parcels in any manner whatsoever. Parties are hereby directed to comply with Order 11 within 14days from the date of this ruling and to fix the suit for hearing on a priority basis. It is so Ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MIGORI ON 1ST DAY OF FEBRUARY, 2022.

MOHAMMED N. KULLOW

JUDGE

RULING DELIVERED IN THE PRESENCE OF:-

NON APPEARANCE FOR THE APPLICANT

MR. ODEGI FOR 1ST DEFENDANT/RESPONDENT

NON APPEARANCE FOR 2ND AND 3RD DEFENDANT/RESPONDENT

TOM MAURICE - COURT ASSISTANT