



**Koyopel v Lomukerang & another (Environment & Land Case
8 of 2022) [2022] KEELC 20 (KLR) (5 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 20 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 8 OF 2022**

FO NYAGAKA, J

MAY 5, 2022

BETWEEN

SOLOMON KIPRUGUT KOYOPEL PLAINTIFF

AND

CHARLES LOMUKERANG 1ST DEFENDANT

**THE CHIEF OFFICER, LAND & PHYSICAL PLANNING, WEST POKOT
COUNTY 2ND DEFENDANT**

RULING

1. The Plaintiff's Application for determination is dated 03/02/2022. It was filed on 07/02/2022 and seeks the following reliefs:
 1. ...spent
 2. ...spent
 3. The interim order be confirmed at the inter partes hearing pending the final determination of the suit herein;
 4. The order be enforced by the OCS Kaibos Police Post;
 5. Any other relief the Court shall deem fit to grant.
2. The "interim order (to) be confirmed at the interpartes hearing" in terms of prayer No. (3) above was the one in prayer (2) of the Application and was to the effect that "pending hearing interpartes and thereafter pending hearing and determination of this application there be a temporary injunction restraining the defendants from entering into, wasting, damaging, taking measurements, constructing or carrying out any further construction, erecting structures thereto, conducting any business, fencing off, laying claim thereto regarding ownership or in any other manner trespassing thereto or interfering



with the plaintiff's title comprised in land parcel No. West Pokot/Siyoi/372 measuring 6.8 Hectares (16.8 acres) or thereabouts".

3. When the Application came before this Court on 07/02/2022, the interim order was granted and lasted to time of the determination of the Application. The Application is supported by the grounds on the face of it and by the Affidavit of Solomon Kiprugut Koyopel sworn on 03/02/2022. I proceed to summarize and analyze the facts and the law forthwith. From the facts of the Application, the Applicant is prima facie the registered owner of all that property namely West Pokot/Siyoi/372 measuring 6.8 Hectares. To his Affidavit, he annexed a copy of the Title together with a Valuation Report and marked as SKK1 and SKK2 respectively. The 1st Respondent is his adjacent neighbour who owns Plot B1 in Kaibos Centre. The Plot measures 50 by 100 feet. He purchased it from Benard Mnaibei.
4. It was his contention that sometime in November 2021, the 1st Respondent deposited building materials on his property. Some of the materials were deposited on a portion of the Applicant's property. When the Applicant raised the issue, the 1st Respondent dismissed him and stated that the said portion was part of his property. The Applicant lodged this complaint at Kaibos Police Post. He annexed to his Affidavit an Occurrence Book (OB) Extract and marked it as SKK3. Thereafter, the Applicant lodged another complaint at the 2nd Respondent's offices to where both parties were summoned. After hearing them, the 2nd Respondent vide its letter dated 21/12/2021, a copy of which was marked as SKK4 authorized the 1st Respondent to proceed with his works after concluding that the said portion of land belonged to the 1st Respondent.
5. The Applicant lamented that based on the directions of the 2nd Respondent, the 1st Respondent has continued to trespass on his property and damaged the same with intent to develop it. For this assertion, the Applicant annexed photographs evincing the damage to his property. He marked the photos as SKK4 (a), (b), (c), (d) and (e). He further annexed a survey sketch map detailing the location of the property, the plots and area hived off from his parcel of land all marked SKK5 (a), (b) and (c) respectively. He deposed that unless restrained, the 1st Respondent would erect a permanent structure on his property hence cause interference, irreparable harm and damage.
6. The 1st Respondent opposed the Application. In his Replying Affidavit sworn on 17/02/2022 and filed the same date, he did not dispute that he owns Plot B1 in Kaibos Centre save to add that he stated that he purchased it from one, Regina Naliaka Dickson. For this assertion, he produced a copy of the sale agreement and marked it as CL1. He also annexed the transfer document marked CL2 in support of his assertion that he owns the said property. He denied trespassing onto the said parcel of land. He maintained that the plot's boundaries were ascertained using fencing posts erected in 1972. He confirmed that indeed deliberations were made before the 2nd Respondent who ultimately found in his favor. He annexed a copy of 2nd Respondent's letter and marked it as CL3 and an invitation letter for arbitration by the 2nd Respondent and marked it as CL4. He added that the Applicant lodged a complaint at Kapenguria Police Station. He was consequently served with a Requisition to compel attendance, which he marked as CL5. He alleged that the investigating officer heard both parties and dismissed the Applicant's allegations. On 05/02/2022, the Applicant uprooted the fencing posts on his plot. He reported the issue as a matter of procedure to the Kapenguria Police Station. He annexed a copy of the OB extract and marked it as CL6. He maintained that his plot is a portion of the public utility plots BI to BII on parcel number West Pokot/Siyoi/374. He dismissed the Applicant's annexure SKK4 (b) stating that it emanated from a road reserve. On annexure SKK4 (a), he maintained that Plot B2 belongs to the Applicant's brother. He maintained that he had since completed construction of the building an annexed a photo marked in his Affidavit as CL7 for this assertion. He urged this Court to dismiss the Application with costs.



7. The Applicant, in a rejoinder, filed a Further Affidavit on 10/03/2022. He stated that the 1st Defendant does not own a title to the property. His argument was that the name of the purchaser was retrieved from the 2nd Respondent's letter. When he reported the trespass, the land was surveyed and it was found that the 1st Respondent had encroached on his land. He annexed SKK1 the sketch map showing that the encroached area was marked with red dots. He added that the boundary between his land and the center is a known cemented beacon and physical feature. He maintained that there were no posts erected as at the time the 1st Respondent purchased the parcel of land. He accused the 1st Respondent of removing his boundary posts and fast tracking the construction process to hoodwink this Court that he had already settled on the property. He stated that the 2nd Respondent lacked jurisdiction to ascertain boundaries.

Submissions

8. Parties agreed to canvass the Application by way of written submissions. The Applicant on the one hand submitted that he satisfied the conditions for the grant of temporary injunction. The 1st Respondent on the other hand submitted that the Applicant failed to satisfy the principles for the grant of temporary injunction.

Analysis and Determination

9. I have considered the Application, the Affidavits filed in support and the opposition to the Motion. I have also considered the submissions filed by both parties. First, I remind myself that an injunction is an equitable remedy that is granted on the basis of discretion that is to be exercised judiciously. That I will do. The conditions precedent for grant of injunction were set out in the locus classicus case of *Giella -vs- Cassman Brown* (1973) E.A. 358. The Court held:

“An Applicant has to demonstrate firstly, that he has a prima facie case with probability of success. Secondly, an Applicant has to show that he will suffer irreparable loss or damage if the interlocutory injunction is not granted, that is that an award of damages will not adequately compensate the damage. Thirdly, if the Court is in doubt on the above 2 requirements, then it will decide the application on the balance of convenience.”

10. I will thus address the Application under those heads:

(a) Does the Applicant have a prima facie case?

11. The Applicant submitted that he is the registered proprietor of all that parcel of land namely West Pokot/Siyoi/372 measuring 6.8 Hectares. He further stated that the 1st Respondent has encroached onto a portion of his parcel of land. On the other hand, the 1st Respondent maintained that he had not encroached on the Applicant's parcel of land. He contended further that the disputed portion was part of his parcel of land.
12. A prima facie case was explained by the Court of Appeal in *Mrao Limited -vs- First American Bank of Kenya Limited & 2 others* [2003] eKLR as follows:

“So what is a *prima facie* case? I would say that in civil cases, it is a case in 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.”



13. I must hasten to caution myself that I am not conducting a mini trial to establish the merits of the case. All I need to ascertain is whether from the facts of the case before me, there is a case made on a balance of probabilities that there is a right infringed or about to be violated so as to form a basis for the need to protect it through issuance of an order of injunction. To lay emphasis, it was held by the Court of Appeal in *Nguruman Limited -vs- Jan Bonde Nielsen & 2 others* [2014] eKLR, “All that the Court is to see is that on the face of the person applying for an injunction has a right which has been or is threatened with violation.”
14. It cannot be gainsaid that the Applicant and the 1st Respondent alleged Plots are adjacent to each other thereby making the two parties neighbours. From the facts before me, there is a portion of the parcel of land that is the centre of the tug of war between the parties. Both parties lay claim to the portion. The Applicant attached a copy of his title advancing that he was the registered proprietor of the subject parcel of land. He further presented a copy of the sketch map to demonstrate the portion that the 1st Respondent had encroached. It was his submission that the 1st Respondent proceeded with the construction of the structure pursuant to the 2nd Respondent’s letter dated 21/12/2021 by which the 2nd Respondent found that the 1st Respondent had not encroached on the Applicant’s parcel of land. The 1st Respondent was of the view that he had not infringed on the property. Be that as it may, he was cleared by the 2nd Respondent to continue with his construction on the portion. The Applicant has annexed various documents to prove that his proprietary rights have been violated. Ownership of the disputed portion is the crux of this matter. The Applicant has a title issued from the lawful office to evidence his ownership. As to whether the title is indeed genuine, full proof of his ownership or even was indeed issued against a proper existing parcel of land, that will be a matter of evidence at the trial. In light of the above, I find that the Applicant has demonstrated that he has a merited case with a probable chance of success.

(b) Will the Applicant suffer irreparable harm?

15. It is not disputed that the 1st Respondent has commenced construction of a structure. There is evidence that he offloaded building materials that were also placed on the disputed portion of the property. The materials and the construction have hived off a portion of the Applicant’s alleged parcel of land. If allowed to continue with the construction and placement of the building materials, it would be tantamount to granting the 1st Respondent ownership of the disputed parcel of land without determining the matter on its merits first. Moreover, construction or the continued construction on the parcel of land, will most likely change the character of the parcel of land to the detriment of the alleged owner - the Applicant. I am persuaded that on these grounds alone, the Applicant will suffer irreparable harm that will not be adequately compensated by an award of damages.
16. I find that the Applicant has satisfied the first two conditions precedent for the grant of injunction. That, regardless, I still find that the balance of convenience shifts in favor of granting the injunction rather than denying it. This will enable the Court determine the issue on the merits by upholding the doctrine of audi alteram partem. For the above reasons, I make the following consequential orders:
 - a. A temporary junction be and is hereby granted restraining the Defendants from entering into, wasting, damaging, taking measurements, constructing or carrying out any further construction, erecting structures on or in any other manner trespassing thereto or interfering with the Plaintiff’s title comprised in land parcel number West Pokot/Siyoi/372 measuring 6.8 hectares pending the hearing and determination of the suit.
 - b. Costs will abide by the outcome of the matter.



17. I bear in mind that under Order 40 Rule 6 of the *Civil Procedure Rules*, the life of an injunction is twelve (12) months from the date of the grant unless otherwise directed by the Court. Therefore, the injunction herein shall remain for twelve (12) months subject to extension as provided for under Order 40 Rule 6 upon the Court being moved before the period lapses that there shall be sufficient reason to do so. In order to manage the 'life' this matter, it is hereby directed that the parties shall forthwith comply with Order 11 of the *Civil Procedure Rules* together with the 2014 Practice Directions, given under Gazette Notice No. 5178 dated 25/07/2014, including filing of an indexed paginated trial bundle and serving the same on the other parties, within the next thirty (30) days of this order. The suit shall be mentioned virtually on 06/06/2022 to confirm compliance and fixing a hearing date.

Orders accordingly.

**RULING, DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS
5TH DAY OF MAY, 2022.**

DR IUR FRED NYAGAKA

JUDGE ELC KITALE.

