



**REPUBLIC OF KENYA**

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

**ELC NO. E024 OF 2021**

**ALFRED KIPSABUL .....1<sup>ST</sup> PLAINTIFF**

**URBANO MELI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**SIMION LANGAT.....1<sup>ST</sup> DEFENDANT**

**JOSEPH NGOBIRO.....2<sup>ND</sup> DEFENDANT**

**ELIM EBEL.....3<sup>RD</sup> DEFENDANT**

**THOMAS CHESEREM.....4<sup>TH</sup> DEFENDANT**

**JOSEPH MONG'ONY.....5<sup>TH</sup> DEFENDANT**

**THE COUNTY LAND SURVEYOR UASIN-GISHU COUNTY.....6<sup>TH</sup> DEFENDANT**

**THE LAND SETTLEMENT FUND TRUSTEE.....7<sup>TH</sup> DEFENDANT**

**THE ATTORNEY GENERAL.....8<sup>TH</sup> DEFENDANT**

**RULING**

1. The 1<sup>st</sup> Plaintiff/Applicant filed a Notice of Motion dated 12<sup>th</sup> April 2021 in which the Applicant seeks the following orders: -

- a) That this application be certified as urgent and service of the same be dispensed with in the first instance.
- b) That temporary orders of injunction do issue restraining the Defendant/Respondents, their servants, agents and/or assigns in any way from dealing, erecting illegal structures, cultivating and/or interfering with the Plaintiffs/Applicants quiet possession, use and/or enjoyment and whatsoever stop any act that is inconsistent with the 1<sup>st</sup> Plaintiff/Applicant's right as the registered owner of those land parcels **UASIN-GISHU/KAHUNGURA/220,UASIN-GISHU/KAHUNGURA/ 221, UASIN-GISHU/ KAHUNGURA /222**, pending the hearing and determination of this application inter-parties.
- c) That the Honourable Court be pleased to restrain the 4<sup>th</sup> and 5<sup>th</sup> Defendants/Respondents from re-establishment of Road access on the Plaintiffs/Applicants parcel of land namely **UASIN-GISHU/KAHUNGURA/220,UASIN-GISHU/KAHUNGURA /221,UASIN-GISHU/KAHUNGURA/222**, pending the hearing of this application.
- d) That the Honourable Court be pleased to issue an order against the Defendants/Respondents compelling them to remove the illegal structures, construction and/or carrying out any operations on the Plaintiff's suit land namely **UASIN-GISHU/KAHUNGURA/220,UASIN-GISHU/KAHUNGURA /221, UASIN-GISHU/ KAHUNGURA /222**,
- e) That Wauni for Police Station to ensure compliance of the orders issued herein.
- f) That the costs of the application be on the cause.

2. The 1<sup>st</sup> Applicant is the registered owner of **LR NOS UASIN-GISHU/KAHUNGURA/220, 221 and 222** (Suit Properties). The 1<sup>st</sup>

Applicant contends that the 1<sup>st</sup> to 5<sup>th</sup> Defendants/Respondents have without any justifiable reason laid claim to ownership of the suit properties and have started erecting structures on the suit properties without his consent or authority.

3. The 1<sup>st</sup> Applicant states that the 6<sup>th</sup> Respondent has communicated his intention of re-establishing a road of access passing on the suit properties without telling him the preconditions of carrying out the exercise. It is on this basis that the 1<sup>st</sup> Applicant is seeking an order of injunction restraining the Respondents from laying any claim to the suit properties and for an order of demolition of the structures which have been erected thereon.

4. The 1<sup>st</sup> Respondent has opposed the Applicant's application based on a replying affidavit sworn by on 26<sup>th</sup> April, 2021. The 2<sup>nd</sup> to 5<sup>th</sup> Respondents have associated themselves with the contents of the 1<sup>st</sup> Respondent's affidavit. The 1<sup>st</sup> to 5<sup>th</sup> Respondents contend that the 1<sup>st</sup> Applicant is guilty of non-disclosure of material facts. They contend that the 1<sup>st</sup> Applicant has failed to inform the court that he is the one who petitioned the 6<sup>th</sup> Respondent through the area Chief to go and re-establish the road of access. The 6<sup>th</sup> Respondent duly complied and moved to the ground and re-established the access road as it should be.

5. The 1<sup>st</sup> Applicant was not satisfied with the re-establishment hence the filing of this suit. The 1<sup>st</sup> to 5<sup>th</sup> Respondents contend that if the 1<sup>st</sup> Applicant was not satisfied with what the 6<sup>th</sup> Respondent did, he should have engaged his own surveyor to carry out the work instead of bringing up a suit and an application which does not meet the threshold for grant of an injunction.

6. The parties were directed to file written submissions. The Applicants filed their submissions dated 1<sup>st</sup> July, 2021. The 1<sup>st</sup> to 5<sup>th</sup> Respondents filed their submissions dated 23<sup>rd</sup> June, 2021. I have considered the Applicants' application together with the opposition thereto by the 1<sup>st</sup> to 5<sup>th</sup> Respondents. I have also considered the submissions filed. The only issue for determination is whether the Applicants have met the threshold for grant of either a temporary or mandatory injunction as prayed for.

7. To begin with, the 1<sup>st</sup> Applicant did not disclose that he is the one who petitioned the 6<sup>th</sup> Respondent through the area chief to come and re-establish the boundaries of the road of access. The 6<sup>th</sup> Respondent re-established the boundaries as requested and it is therefore ironical for the 1<sup>st</sup> Applicant to claim that he had been notified of an intended re-establishment of the road of access without disclosure of the pre-existing conditions for the exercise.

8. The 1<sup>st</sup> Applicant has made general allegations against the Respondents. There is no issue of ownership dispute over the suit properties. The road of access was re-established as per the request of the 1<sup>st</sup> Applicant. If there is any construction of structures being put up by the Respondents, those structures must be within the boundaries as set out by the 6<sup>th</sup> Respondent unless the 1<sup>st</sup> Applicants demonstrate otherwise which they have not done.

9. The principles for grant of a temporary injunction are well set out in the case of **Giella vs= Cassman Brown & Co. Ltd [1973] EA 358**. First an Applicant must demonstrate that he has a prima facie case with probability of success. Second, an injunction will not be granted unless the Applicant is likely to suffer loss which will not be compensated in damages. Third, if the court is in doubt, it will decide the application on a balance of convenience.

10. In the case of **Mrao Ltd vs= First American Bank of Kenya Ltd & 2 others [2003] eKLR**, the Court of Appeal defined a prima facie case 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.”***

11. I have looked at the materials placed before me. The materials clearly show that the 1<sup>st</sup> Applicant has not demonstrated that he has a prima facie case with probability of success. Even on consideration of whether the damages should be adequate compensation should he succeed in the case, it is clear that the encroachment he alleges is capable of being valued and he will be compensated or in other words, if the re-established access road is found not to have been correctly re-established the same can always be reverted to the right place and any damage caused will be compensated for purposes of restoration to the original status of the suit property.

12. The allegations by the 1<sup>st</sup> Applicant are not clear and no mandatory injunction can be granted at this interlocutory stage. The court is not in doubt as to call for the determination of the application on a balance of convenience. The upshot of this is that the 1<sup>st</sup> Applicants' application fails. The same is dismissed with costs to the 1<sup>st</sup> to 5<sup>th</sup> Respondents.

***It is so ordered.***

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 4TH DAY OF NOVEMBER, 2021.**

**E.O. OBAGA**

**JUDGE**

**IN THE VIRTUAL PRESENCE OF: -**

**MR. OMBOTO FOR APPLICANT**

**1ST DEFENDANT IN PERSON**

**COURT ASSISTANT – MERCY**

**E.O. OBAGA**

**JUDGE**