



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC. CASE NO. E011 OF 2021

YIALE OLE MERERU.....PLAINTIFF

VERSUS

SIMINTEI OLE MERERU.....1ST DEFENDANT

LAND REGISTRAR, NGONG.....2ND DEFENDANT

RULING

What is before Court for determination is the Plaintiff's Notice of Motion application dated the 23rd February, 2021 where he seeks a temporary injunction restraining the Defendants including their servants, agents or any person working under their instructions from interfering with the registration, alienating, selling, transferring, developing, charging or using for personal gain, land parcel number KJD/EWASO KEDONG/1451 as well as KJD/EWASO KEDONG/5831 hereinafter referred to as the 'suit lands', pending the outcome of this suit.

The application is premised on the grounds on the face of it and the supporting affidavit of YIALE MERERU where he deposes that he is the son of the late MERERU OLE PARMUAT, who died intestate on 15th March, 2002 and was owner of the suit lands. He confirms obtaining Limited Grant Ad Litem in respect to his late father's estate, at the Ngong Law Courts on 29th January, 2021. He contends that the 1st Defendant who is his brother owned land parcel number Kajiado/Ewaso Kedong/1452 which neighbours the suit lands. He claims sometime in 2006 to 2007, the 1st Defendant started interfering with the suit lands by fencing off part of it whereupon, he filed a suit against him and he stopped the interference. He explains that in 2015, the 1st Defendant resumed interference with part of the suit lands by farming, excavating stones including burning charcoal all for commercial purposes and due to his complaints to the village elders, he ceased doing so. Further, in 2017, together with his brothers, they realized the 1st Defendant had resumed activities to interfere with the suit lands and obtained a title of the said suit lands after consolidating them with his land resulting into KJD/EWASO KEDONG/5831. Further, with assistance from the 2nd Defendant, without legal representation, the 1st Defendant has illegally and fraudulently assumed ownership of KJD/EWASO KEDONG/1451 as well as 1452 resulting in land parcel number KJD/EWASO KEDONG/ 5831 in his name. He sought for intervention from the National Land Commission that referred the matter to the 2nd Defendant and Deputy County Commissioner, Kajiado West Sub County. Further, the 1st Defendant declined to heed to the summons from the Deputy County Commissioner, Kajiado West Sub County where they were directed to get a joint surveyor to establish beacons and for the stone harvesting on disputed land to be stopped immediately. He reiterates that the 1st Defendant claims the additional hectares of land were given to him by the surveyor called Mr. Nginya. He insists the 1st Defendant could not have acquired their late father's estate without grant of representation.

The 1st Defendant opposed the application by filing a replying affidavit where he deposes that he is a son to the deceased MERERU OLE PARMUAT. He confirms being the owner of land parcel number KAJIADO/EWASO KEDONG/1452. He explains that KAJIADO/EWASO KEDONG/1451 belonged to their late father but there is a public access road between his land and the said land. Further, that he resides on his land while his brothers reside on their father's land. He insists he has done extensive development on his land and has no reason to operate a quarry. He is ready to await for the successful distribution of his late father's estate and contends that the allegations of intermeddling with the said estate is malicious as well as farfetched. He claims he started operating a quarry before their father passed on, while his parents were buried on KAJIADO/ EWASO KEDONG/1452. He avers that in 2017 his land was resurveyed in the presence of neighbours including the Applicant and it was discovered the acreage on the ground was more than the one indicated in the title, which title was rectified. Further, he was member No. 903 in Phase (I) one Ewaso Kedong Group Ranch while their father was member No. 90 and they were both shown their respective parcels of land. He states that the Applicant was a member in Phase 2 of Ewaso Kedong Group Ranch and was issued with land that overlaps their father's land. Further, that parcels of land in Phase 1 along boundary with Phase 2 within a stretch of over 10 kilometres have got issues. He made reference to **Nairobi HCCC No. 1317/2003 Mutunkei Ole Kimiti & 14 Others V Simintei Ole Nkomeya & 3 Others** and subsequent orders made therein culminating in the Kajiado District Surveyor and Land Registrar visiting the disputed site, presenting a report to court which on 20th June, 2005 made orders for rectification of Registry Index Map but the same was never implemented. He denies his title emanated from a consolidation and insists the Applicant has failed to furnish court with a copy of

Green Card for Kajiado/Ewaso Kedong/1451 so as to hoodwink it. He further denies the allegations of illegality. He reiterates that in 2007, the Applicant together with his two brothers sued him alleging he was excavating and residing on the deceased land but eventually withdrew the case.

The Applicant filed a further affidavit reiterating his claim and disputing the Defendant's averments.

The application was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Notice of Motion application dated the 23rd February, 2021 including the respective affidavits and rivaling submissions, the only issue for determination is whether the Plaintiff is entitled to orders of temporary injunction restraining the Defendants from interfering with the suit land pending the outcome of the suit.

The Plaintiff in his submissions states that he has established a prima facie case with a probability of success. He contends that he will suffer irreparable harm which cannot be compensated by way of damages as the 1st Defendant uses the land as a quarry. Further, he insists the balance of convenience tilts in his favour. To buttress his averments, he has relied on the following decisions: **Giella Vs Cassman Brown & Company (1973) EA 358; Kenya Electricity Transmission Company & another v Maryann Sheikh Abdikadir, Nuh Nassir Abdi & 120 others [2020] eKLR; Mrao Ltd Vs First American Bank of Kenya & 2 Others (2003) KLR 125; Nguruman Ltd. Vs. Jan Bonde Nielsen (2014) eKLR and Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others [2016] eKLR.**

The 1st Defendant in his submissions contend that the Plaintiff has not established a prima facie case to warrant the orders sought as he has not provided proof that his title was consolidated with their late father's parcel. Further, no evidence was provided to prove Kajiado/Ewaso Kedong/1451 no longer exists. He reiterates that the Applicant's prayer for injunction to issue against him is unfounded in law. Further, the Applicant has no proprietary rights over the suit land and is guilty of concealment of material facts. To support his arguments, he relied on the following cases: **Giella Vs Cassman Brown & Company (1973) EA 358; Kenya Commercial Finance Company Limited V Afraha Education Society (2001) and Nguruman Ltd. Vs. Jan Bonde Nielsen (2014) eKLR.**

In line with the principles established in the case of **Giella Vs Cassman Brown & Company (1973) EA 358**, I will proceed to analyze whether the Plaintiff has established a prima facie case with probability of success at the trial.

The Plaintiff claims the 1st Defendant who is his brother owned land parcel number Kajiado/ Ewaso Kedong/1452 which neighbours the suit lands. He contends that in 2017, together with his brothers, they realized the 1st Defendant had resumed his previous activities of interfering with the suit lands. Further, with assistance from the 2nd Defendant, without legal representation, the 1st Defendant has illegally and fraudulently assumed ownership of KJD/ EWASO KEDONG/1451 as well as KAJIADO/EWASO KEDONG/1452 resulting in land parcel number KJD/ EWASO KEDONG/5831 in his name. The 1st Defendant in his response confirms being the owner of land parcel number KAJIADO/EWASO KEDONG/1452 while his father owned KAJIADO/EWASO KEDONG/1451 but there is a public access road between his land and the said land. He contended that he resided on his land where he has undertaken extensive developments thereon while his brothers reside on their father's land. He confirmed operating a quarry on his land. He explained that in 2017 his land was resurveyed in the presence of neighbours including the Applicant and it was discovered the acreage on the ground was more than the one indicated in the title, which title was rectified. He made reference to **Nairobi HCCC No. 1317/2003 Mutunkei Ole Kimiti & 14 Others V Simintei Ole Nkomeya & 3 Others** and subsequent orders made therein culminating in the Kajiado District Surveyor and Land Registrar visiting the disputed site, presenting a report to court, which on 20th June, 2005 made orders for rectification of Registry Index Map, but the same was never implemented.

From the annexures in the respective affidavits, I note the Plaintiff did not furnish court with a recent Certificate of Official Search to confirm the 1st Defendant took over the deceased land. Further, there is no indication the 1st Defendant's title emanated from a consolidation of his title including their late father's title. The Plaintiff did not deny that together with his two brothers they had sued the 1st Defendant but eventually withdrew the case. Further, the Plaintiff did not inform court of the outcome of the succession proceedings in respect to their deceased father's estate. From the 1st Defendant's averments including the annexures he presented, I note he is the registered proprietor of his land and resides thereon. Further, there seems to be an overlap of some of the parcels of land that emanated from the Ewaso Kedong Group Ranch. I opine that these issues can only be determined once viva voce evidence is adduced and not at this interlocutory stage.

Based on the facts as presented by the respective parties, while associating myself with the decision cited above, at this juncture I find that the Plaintiff has not established a prima facie case to warrant the orders of injunction sought as against the 1st Defendant who owns and resides on his land. Further, in relying on the Case of **Nguruman Ltd. Vs. Jan Bonde Nielsen (2014) eKLR** where it was held that in instances when a party fails to establish the first limb on injunctions, the court need not proceed to make a determination of the other two limbs, and I will decline to do so.

It is against the foregoing that I find the Plaintiff's Notice of Motion application dated the 23rd February, 2021 unmerited and will dismiss it.

Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 4TH DAY OF NOVEMBER, 2021

CHRISTINE OCHIENG

JUDGE