



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC CASE NO. E 006 OF 2020**

**LEMARON MUSHAO TERTA.....PLAINTIFF**

**VERSUS**

**LEMETOYU NTIRORI.....DEFENDANT**

**RULING**

What is before court for determination is the Plaintiff's Notice of Motion application dated the 13<sup>th</sup> October, 2020 brought pursuant to Sections 1A, 1B, 3 and 3A of the Civil Procedure Act as well as Order 40 Rule 10 and Order 51 Rule 1 of the Civil Procedure Act. The Plaintiff seeks for orders of injunction against the Defendant, his servants, agents, or employees from in any way trespassing on land parcel number Kajiado/ Dalalekutuk/ 1865 hereinafter referred to as the 'suit land' pending the determination of this suit.

The application is premised on the grounds on the face of it and the supporting affidavit of LEMARON MUSHAO TERTA where he deposes that he is the registered proprietor of the suit land. He explains that on 26<sup>th</sup> September, 2020 he realized that the Defendant was constructing his new home on the suit land and has completely encroached therein. He contends that he was never consulted by the Defendant on his intended actions of trespass. Further, that the Defendant has begun clearing the suit land and putting up structures with an aim of constructing a new home thereon. He claims despite several visits and engaging with the Defendant to find a solution to the matter, he has declined to stop the encroachment. Further, despite the several interventions from the community, imploring upon the Defendant to stop construction pending the amicable resolution of the dispute, he has failed to do so. He reiterates that he has established prima facie case with a probability of success and is concerned with the preservation of the subject matter.

The Defendant opposed the application by filing a replying affidavit where he deposes that he is the owner of land parcel number Kajiado/ Dalalekutuk/ 1866 which he bought from the Plaintiff and gave to his son KULANGASH LEMETOYU as a gift. He confirms that his son has been in occupation of the said land from 2002 to date and has put up permanent structures thereon. He avers that the land Kajiado/ Dalalekutuk/ 1866 borders the suit land but is not part of the Plaintiff's land as claimed. He insists the Plaintiff has not proved the grounds for granting an injunction. He explains that the case herein is more of a boundary dispute and sought for the application to be dismissed.

The Plaintiff filed a further affidavit where he reiterated his claim and insisted that the Defendant's averments are untrue and misleading. He states that the Defendant has no permanent structures on the land, acknowledged existence of a boundary dispute and could have trespassed on the suit land.

The application was canvassed by way of written submissions.

**Analysis and Determination**

Upon consideration of the Notice of Motion application dated the 13<sup>th</sup> October, 2020 including the respective affidavits and rivaling submissions, the only issue for determination is whether the Plaintiff is entitled to orders of temporary injunction pending the outcome of the suit.

The Plaintiff in his submissions contended that he has established a prima facie case to warrant the orders sought. He relied on the following decisions: **Garden Cottage Food Limited V Milk Marketing Board ( 1984) AC 130; Giella Vs Cassman Brown & Company Limited (1973) 1 EA 358; RJR Macdonald Vs Canada (Attorney General) (1984) 1SCR 311; American Cynamid Co. Vs Ethicom Limited (1975) A AER 504; Mbuthia V Jimba Credit Corporation Ltd ( 1988) KLR 1; Kenleb Cons Ltd V New Gatitu Service Ltd & Another ( 1990) KLR 557; and Moses C Muhia Njoroge & 2 Others V Jane W Lesaloi & 5 Others ELC Case No. 514** to support his claim.

The Defendant in his submissions insists the Plaintiff has not established a prima facie case as the dispute herein revolves around a boundary of Kajiado/ Dalalekutuk/ 1865 and Kajiado/ Dalalekutuk/ 1866 respectively. Further, there is a twelve (12) metre road between the two

parcels of land. He reiterates that the Plaintiff is the source of the dispute since he is the one who sold to the Defendant his parcel of land. Further, that he has proceeded to destroy all the property on site erected by the Defendant.

In line with the principles for granting an injunction which are well established in the case of **Giella Vs Casman Brown (1973) E.A 358**, I will proceed to decipher whether the Plaintiff has established a prima facie case with a probability of success. It is not in dispute that the Plaintiff owns Kajiado/ Dalalekutuk/ 1865 while the Defendant owns Kajiado/ Dalalekutuk/ 1866. It is further not disputed that it is the Plaintiff who sold to the Defendant his parcel of land. What is in dispute is the Plaintiff's averments that the Defendant has trespassed on his land and commenced clearing the disputed site to construct thereon. In the case of **MRAO VS FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS C.A CIVIL APPEAL No. 39 of 2002 (2003) K.L.R 125** the Court described a prima facie case as follows:

***“..... 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”.***

The Defendant in his replying affidavit furnished a copy of the Sale Agreement; Mutation Form for the two parcels of land, and a Boundary Dispute Summon dated 16<sup>th</sup> October, 2019 for Kajiado/ Dalalekutuk/ 1865 and 1866. Upon perusal of the said Boundary Dispute Summon, I note the Land Registrar who was mandated to determine the same has already issued the said summons to the Plaintiff, Defendant and other parties not in this suit. From the Mutation Form, I note Kajiado/ Dalalekutuk/ 1865 and 1866 were resultant subdivisions of Kajiado/ Dalalekutuk/ 683 which was owned by the Plaintiff. Further, from the map annexed to the replying affidavit, it is further clear that there is actually a twelve metre road between Kajiado/ Dalalekutuk/ 1865 and 1866. The Plaintiff in his affidavits has not indicated whether the Defendant crossed the said road.

From the averments in the respective affidavits including the annexures thereon, I find that since there were summons in respect to a boundary dispute over the two parcels of land, it is pertinent for the Plaintiff and Defendant to adhere to the same to enable the Land Registrar who issued the said summons, confirm the position of the respective boundaries. Further, since it the Plaintiff who sold the suit land to the Defendant, he must have been the one who pointed out to the Defendant the positions of the boundaries. Based on the facts as presented while associating myself with the two decisions cited thereon, at this juncture, I find that the Plaintiff has not established a prima facie case with a probability of success as against the Defendant.

Further, in line with the findings in the case of **Case of Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, when a party has failed to establish the first limb on injunction, the court need not proceed to make a determination of the other two limbs and I will hence decline to do so.

It is against the foregoing that I find the Notice of Motion application dated the 13<sup>th</sup> October, 2020 unmerited and will proceed to dismiss it.

Costs will be in the cause.

**DATED SIGNED AND DELIVERED IN VIRTUALLY AT KAJIADO THIS 26TH DAY OF JULY, 2021.**

**CHRISTINE OCHIENG**

**JUDGE**