



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC CASE NO. 36 OF 2021

JAMES MUSA TAPOYO.....PLAINTIFF

VERSUS

SAMSON TAPOYO.....1ST DEFENDANT

FREDRICK PKEMOI ANDIEMA...2ND DEFENDANT

RULING

The Application

1. The application dated 17/6/2021 and filed in court on 18/6/2021, has been brought under Sections 1, 1A, 3, 3A & 63(e) of the Civil Procedure Act, Order 40 Rule (1) and Order 51 Rule (1) of the Civil Procedure Rules. The defendants seek the following orders:-

a. ...spent

b. That this honourable court do issue an order of temporary injunction restraining the defendants/respondents whether by themselves, their agents, servants, employees and/or any other persons acting on their behalf from selling, leasing, transferring, constructing, trespassing, occupying, cultivating, rearing animals and/or in any other way dealing or doing any other acts inconsistent with the plaintiff's/applicant's rights in all that parcel of land namely LR WEST POKOT/KERINGET "A" 3943 pending hearing and determination of this application *inter partes*.

c. That upon *inter partes* hearing of this application order (b) above be confirmed pending hearing and determination of the main suit.

d. That the costs of this application be provided for

2. The application is supported by the affidavit sworn on 17/6/2021 by the plaintiff. The application is premised on the grounds that the plaintiff is the proprietor of the suit land and the 1st defendant trespassed onto a portion thereof on 7/3/2018 and on which he now grazes his cattle; that on 1/4/2019 the 2nd defendant trespassed onto a portion of the suit land too; that the plaintiff filed suit against the defendants but the magistrate's court Kapenguria struck out the suit for want of jurisdiction hence the instant suit; that the relevant land officials having visited the land have established that the claim is not a land boundary dispute but a claim of land and that fracas arose on the suit land upon invasion by the 2nd defendant leading to the arrest of the 2nd defendant. The applicant avers that he has been deprived of quiet possession of the suit land and seeks redress from this court.

The Response

3. The 1st defendant filed his defence to the suit on 21/6/2021. He filed no replying affidavit. I will consider his documents on the record in determining this application. I have perused the record and I have found that there is no response to the suit or the application filed by the 2nd defendant.

Submissions

4. This court issued directions to the effect that the application be disposed by way of written submissions. The plaintiff filed his written submissions on 29/6/2021. I have perused the court record and I have found no submissions filed on behalf of the defendants.

Determination

5. The main issue arising from the instant application is whether an order of temporary injunction should issue in the plaintiff's favour pending the hearing and determination of the main suit.

6. I have perused the record of the dispute attached to the application. The report of the county surveyor is that the portions claimed by the defendants lie within the portion of land claimed by the plaintiff being portion No. **LR West Pokot/Keringet "A" 3943**. The defendants have no title to the said portion. The plaintiff is the registered owner of the land.

7. The report of the Land Registrar states that the 2nd defendant was utilizing the portion he claims prior to demarcation and survey which exercise this court must presume gave rise to the plaintiff's title to plot number **LR West Pokot/Keringet "A" 3943**.

8. However the source of the dispute according to the 1st defendant appears to be the plaintiff's alleged annexation of the land allocated to the parties' grandmother to the exclusion of, at least the 1st defendant who claims that the annexed portion was to be shared between him and the plaintiff.

9. Since the 2nd defendant is silent in these proceedings and his co-defendant does not profess to speak on his behalf, I can not presume that he was entitled to any share of the annexed land. However his alleged invasion of the parcel that is alleged by the 1st defendant to host the annexed portion speaks volumes about his stand.

10. I have considered that there is a concession that there was demarcation and survey that gave rise to the portions that the parties were registered as proprietors of and that none of the parties is really desperate for land to live or work on. The plaintiff having been registered as the owner of the parcel in question that has been invaded by the defendants must of course receive protection of the law until the claims of illegal annexation by the 1st defendant have been addressed and determined by this court.

11. The provisions of **Section 25** of the **Land Registration Act** protect the rights of a registered proprietor. They are as follows:

"25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee."

12. Further the certificate of title is proof of ownership and shall be respected until it has been proved that it was obtained illegally or fraudulently. **Section 26** of the **Land Registration Act** states as follows in that regard:

"26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."

14. I have observed that each party appears to have their own parcel of land and I have observed earlier in this ruling that they have not painted a picture of persons desperate for farming land or residential space.

15. It appears that given the provisions of the statutory provisions set out earlier that the applicant has the upper hand at the moment and his title must be respected until it is proved to be tainted with any element of fraud or misrepresentation to which the person is proved to be a party. It would be quite grievous if his right was not protected and his title is found to have been proper all along. I find that the plaintiff has established a prima facie case against the defendants.

16. I have however not found that he would suffer loss that can not be compensated for by way of damages and he has not demonstrated so. It would be possible for him to include in his pleadings a claim for such loss and obtain redress. That notwithstanding, I find that owing to the protection of the right to own property envisaged by the law and the constitution, and in the absence of any evidence by the defendants at least at this point that they have any legal claim to the suit land, I find that it would be of greater value to rule on the instant application on a balance of convenience. Convenience in the circumstances favours the protection of the existing boundaries until the dispute at hand has been firmly resolved by this court or amicably between the parties in a family forum.

17. Consequently I find that the application dated **17/6/2021** has merit and the same is granted in terms of **Prayer No. (c)** thereof. The costs of the application shall be in the cause. This suit shall be mentioned on 22/9/2021 for issuance of a hearing date.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 6TH DAY OF JULY, 2021

MWANGI NJOROGE

JUDGE, ELC, KITALE.