



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC. CASE NO. 124 OF 2018

DR. KITAMBALA MARCELLIN & PROF BADRU DUNGU KATEREGA

(as registered Trustee of EAST AFRICAN UNIVERSITY).....PLAINTIFF

VERSUS

KAPITI DAIRIES LIMITED.....DEFENDANT

RULING

What is before court for determination are the Plaintiffs' Notice of Motion application dated the 11th June, 2018, the Defendant's Notice of Motion application dated the 30th August, 2018 together with the Preliminary Objection dated the 28th July, 2018.

In the application dated the 11th June, 2018, the Plaintiffs seek orders of temporary injunction against the Defendant in respect to land parcel number KJD/KAPUTIE-NORTH/5489 hereinafter referred to as the 'suit land'. The said application is supported by the affidavit of DR. KITAMBALA MARCELLIN where he confirms the East African University is the registered proprietor of the suit land. He claims on 5th January, 2018 and 6th April, 2018 the Defendant through its directors encroached on the suit land, pulled down a fence that was erected right from inspection of the boundaries. Further, the Defendant claimed a portion of the suit land insisting there was a miraculous increase of their land. He explains that they sought clarification from the government and County Land Surveyor who undertook an inspection of the boundary and confirmed there was no increase of the Defendant's land.

The Defendant opposed the said application and filed a replying affidavit sworn by GITONGA WAMBUGU KARIUKI its Managing Director who confirms it is the registered proprietor of land parcel number Kajiado/Kaputiei North/104459 which shares a common boundary with the suit land. He claims in 2018 when the Plaintiffs fenced off the suit land, it exceeded its acreage as it fenced off 114 acres instead of 100 acres. Further, that the Plaintiff filed the instant suit by deliberately failing to disclose the existence of the Survey Report. He contends that vide a letter dated the 5th January, 2018 the Defendant instructed the Plaintiffs' to rectify their boundary but it has failed to do so. He insists since the Land Registrar has scheduled a hearing of the dispute on 21st August, 2018, this suit offends the provisions of Section 18 of the Land Registration Act. He reiterates that the Plaintiffs' suit should not be entertained by the court and the Land Registrar should first be allowed to determine the dispute herein.

The Defendant further filed a Notice of Preliminary Objection dated 28th July, 2018 against the Plaintiffs' application dated the 11th June, 2018 and main suit on the grounds that this court does not have jurisdiction to deal with this suit since the dispute has been referred to the Land Registrar in accordance with the provisions of Section 18 of the Land Registration Act and the interim injunction was obtained without disclosure of material facts known to the Plaintiffs.

The Defendant also filed an application dated the 30th August, 2018 seeking for stay of these proceedings and striking out of the Plaintiff's suit for being an abuse of the court process. The said application is supported by the affidavit of GITONGA WAMBUGU KARIUKI, HANEEM ATIZOYO KATEREGGA and DUNCAN ONKOBA MOMANYI. They claim the Plaintiffs have stated on oath that they are the only two registered trustees of East African University yet Dr. Kitambala Marcellin has never been appointed as a trustee in the said trust. Further, that Prof. Badru Dungu Katerega is a complete stranger in the said trust as Prof. Badru Dungu Katerega is not Bandu Dungu Katerega who is named in the Trust Deed. They insist the two Plaintiffs are strangers insofar as the trust known as the East African University Registered Trustees is concerned. They aver that the trustees of the East African University are Bandu Dungu Katerega, Evans Kerosi Somoni, Sarah Naiga, Gitonga Wambugu Kariuki, Osoro Kennedy Omwoyo and Peter Clever Matovu. Further, no resolution of the said trustees has been annexed to demonstrate the said trustees have authorized filing of this suit. They reiterate that Dr. Kitambala Marcellin and Prof. Badru Dungu Katerega had no capacity to institute the suit herein and hence the suit is fatally defective. The Plaintiffs in opposing the said application filed a Notice of Preliminary Objection where they contend that this Court does not have jurisdiction to entertain a question in regard to the composition of a Trust hence the application is misplaced. They explain that the Defendant has never been a trustee of the East African University and therefore has no gravitas to raise or direct the affairs of the said university. Further, the retirement of

some of the persons mentioned on the body of the Notice of Motion dated 30th August, 2018 and further by virtue of Registration submitted to the Registrar of Documents including notices issued under Sections 22, 23 as well as 26 of the Registration of Documents Act, the said persons are estopped from claiming or alleging to be board members of the Trust of the East African University. They claim under section 150 of the Land Act, the jurisdiction of the Environment and Land Court is in relation to disputes, actions and proceedings concerning land and not administration of Trust or dealing with disputes arising from composition of Trust.

The two applications and Notice of Preliminary Objection were canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Plaintiffs' Notice of Motion application dated the 11th June, 2018, the Defendant's Notice of Motion application dated the 30th August, 2018 together with the Preliminary Objection dated the 28th July, 2018 and the rivalling submissions, the following are the issues for determination:

- Whether the Plaintiff is entitled to orders of temporary injunction as against the Defendant pending the outcome of the suit.
- Whether the Plaintiffs' suit should be struck out.
- Who should bear the costs of the suit.

The Plaintiffs in their submissions reiterated their averments and insist the Defendant has not demonstrated the extent of encroachment. They insist they have proved that the Defendant has trespassed on the suit land. They contend that they have established a prima facie case and will suffer irreparable injury which cannot be adequately compensated by an award of damages. Further, that balance of convenience tilts in their favour. In the response to the Preliminary Objection, they submitted that the Defendant destroyed the Plaintiffs' fence and claims a portion of its land. In responding to the Defendant's application dated the 30th August, 2018, they submit that there was a spelling mistake on the name of Professor Badru Dungu Katerega to read Bandu Dungu Katerega. Further, Dr. Kitambala Marcellin is the current acting Vice Chancellor of the East African University who was given oral instructions to institute this suit. They deny stating that they were the only trustees of the aforementioned university. To buttress their averments, they have relied on the following decisions which I deem relevant: **Palace Investments Limited V Geoffrey Kariuki Mwenda & Another (2015) eKLR; Gujral Sandeep Singh Ragbir V Minister for Public Works, Road and Transport County Government of Kajiado & Another (2018) eKLR; Elishaphan Omollo Nyasita V John Ojowi Onuko (2019) eKLR; Giella V Cassman Brown & Co Ltd (1973) EA 358; Mrao Ltd First American Bank of Kenya & 2 Others (2003) KLR 125 cited in the case of Moses C Muhia Njoroge V Jane W. Lesaloi & 5 Others (2014) eKLR; Pius Kipchirchir Kogo V Frank Kimeli Tenai (2018) eKLR; Ali Kitsao Katana V Kassim Mohammed Omar & 5 Others (2018) eKLR; George Karanu Ndeithi & Another V Eddy Peter Ndungu Kimemia & 3 Others (2020) eKLR; JKN v HWN (2015) eKLR; Leo Investments and Republic V Registrar General (2014) eKLR and Ali Kitsao Katana V Kassim Mohammed Omar & 5 Others (2018) eKLR.**

The Defendant in its submissions contend that the Plaintiff is fatally defective and should be struck off. It proceeded to highlight the names of the trustees and insists no resolution of the trustees was annexed to demonstrate they authorized the filing of this suit. Further, the Plaintiffs had no capacity to institute this suit. It further submitted that the Plaintiffs should not have instituted this suit since the matter herein had already been referred to the Land Registrar. It reiterated that the Plaintiffs had not established a prima facie case with probability of success at the trial. Further, that the Plaintiffs will not suffer irreparable loss which cannot be adequately compensated in any way by an award of damages. To support its averments, it has relied on the following relevant decisions: **Philomena Ndanga Karanja & 2 Others V Edward Kamau Maina (2015) eKLR; Affordable Homes Africa Limited V Ian Henderson & 2 Others, HCCC No. 524 of 2004; Thome Farmers Company No. 4 Ltd V Farm of Faith Investors Ltd (2019) eKLR; Kenya Airways Ltd V Classical Travel and Tours Ltd (2003) eKLR; Owners of Motor Vessel Lillian 'S' Vs Caltex Oil Kenya Ltd (1989) KLR 1; Giella V Cassman Brown & Co Ltd (1973) EA 358; Mrao Ltd First American Bank of Kenya & 2 Others (2003) KLR 125; Samson Aliton Okello V Barclays Bank of Kenya Limited (2009) eKLR; Ooko V Barclays Bank of Kenya Ltd (2002) eKLR and Sammy Japheth Kavuku V Equity Bank Ltd & Another (2014) eKLR.**

I will proceed to deal with the aforementioned issues jointly.

As to whether the Plaintiffs' suit should be struck out. I will proceed to make reference to Order 2 Rule 15(1) (d) of the Civil Procedure Rules, 2010 which provides that: **"At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that- (d) it is an abuse of the process of the court."**

In this instance, the Defendant seeks to strike out the Plaintiffs' suit and contends that it is a boundary dispute which should have been determined by the Land Registrar first before being filed in court. Further, that the suit was filed without authority of the Trustees. Insofar as I concur with the Defendant that boundary disputes have to be first determined by the Land Registrar, however on perusal of the Plaintiff, I note it raises other issues including trespass to land, declaration on ownership of suit land, orders of injunction as well as compensation for a fence. Section 13 of the Environment and Land Court Act confers jurisdiction to this court and I opine that this court is legally mandated to deal with the issues raised in the Plaintiff, and will decline to strike out the suit on this point. As for the fact that there is no authority from the trustees to institute this suit. Further, that the Plaintiffs are not trustees of the aforementioned University. First, I wish to point out that the issues raised on determination of a Trustee of the East African University is not within the jurisdiction of this court and will decline to deal with this but direct parties to institute proceedings in the High Court to determine the same. However, on the issue of failure of the Plaintiffs' to file an authority from the Trustees, I note the Plaintiffs did not indicate they are the only Trustees to the University. Further, it is my considered view that this is a procedural issue and the Trustees Authority can be filed before the matter is set down for hearing. Further, the Civil Procedure Act has provided oxygen principles to aid the court in determining disputes. While, Article 159 (2) (d) of the Constitution stipulates that **'in exercising judicial authority, the courts and tribunals shall be guided by the following principles(d) justice shall be administered without undue regard to procedural technicalities.'**

In the case of **Republic Vs. District Land Registrar, Uasin Gishu & Anor (2014) eKLR** Justice Ochieng held that .. 'to my mind, Justice is not dependent on Rules of Technical procedures. Justice is about doing the right thing. Pursuant to article 159 (2) (d)in exercising Judicial Authority, the courts 'in exercising judicial authority, the courts and tribunals shall be guided by the following principles(d) justice shall be administered without undue regard to procedural technicalities.'

Further, in the case of **RAMJI MEGJI GUDKA LTD –Vs- ALFRED MORFAT OMUNDI MICHIRA & 2 OTHERS [2005] eKLR** it was held that:

“In our view, the power to strike out pleadings must be sparingly exercised. It can only be exercised in clearest of cases. The issue of summary procedure and striking out of pleadings was given very careful consideration by this Court in DT DOBIE & COMPANY (KENYA) LTD. V. MUCHINA [1982] KLR 1 in which Madan J.A. at p. 9 said:-

“The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits “without discovery, without oral evidence tested by cross-examination in the ordinary way.” (Sellers LJ (supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.”

See also the case of **Leo Investments and Republic V Registrar General (2014) eKLR**.

It is against the foregoing while relying on article 159(2) (d) of the Constitution, the above cited provisions from the Civil Procedure Rules as well as associating myself with the quoted decisions that I decline to strike out this suit

As to whether the Plaintiffs are entitled to orders of temporary injunction pending the outcome of the suit.

In line with the principles established in the case of **Giella Vs Cassman Brown & Company (1973) EA 358** as well as the definition of a prima facie case as stated in the case of **Mrao Ltd Vs First American Bank of Kenya & 2 Others (2003) KLR 125**, I will proceed to decipher whether the Plaintiffs have established a prima facie case with a probability of success at the trial.

The Plaintiffs represent the East African University that is the owner of the suit land which is adjacent to the Defendant's parcel of land. The Plaintiffs claim the Defendant has trespassed on the suit land, claimed a portion of the land and proceeded to cut down a fence. The Defendant did not deny the said university owns the suit land, and did not controvert the Plaintiffs' averments that it destroyed a fence. The Defendant proceeded to insist the Plaintiffs should await the determination of the boundary dispute by the Land Registrar, and that this suit should be struck off, which matter I have already dealt with. The Plaintiffs have annexed various documents in their supporting documents to demonstrate how the university acquired the suit land. Looking at all the materials presented by all the parties including the Land Registrar's Report dated the 9th May, 2019 but filed in Court on 12th September, 2019, I find that there exists an apparent infringement on the Plaintiffs' right by the Defendant. In the circumstance, I find that the Plaintiffs' have indeed demonstrated a prima facie case to warrant the grant of an injunction.

On the second principle as to whether the Plaintiff will suffer irreparable loss which cannot be compensated by way of damages, I wish to refer to the case of **Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012** and from the averments in the respective affidavits including perusal of the materials presented noting that the Defendant did not deny destroying the fence to the suit land, I find that the Plaintiffs' alleged injuries are demonstrable and not speculative. Further, that they stand to suffer irreparable harm which cannot be compensated by damages.

On the question of balance of convenience, from the evidence presented by the parties at this juncture, I am not in doubt that the balance does tilt in favour of the Plaintiffs who represent the owner of the suit land.

It is against the foregoing that I find the Plaintiffs' Notice of Motion application dated the 11th June, 2018 merited and will allow it. I find the Defendant's Notice of Motion application dated the 30th August, 2018 together with the Preliminary Objection dated the 28th July, 2018 unmerited and will disallow them.

Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 18TH DAY OF OCTOBER, 2021.

CHRISTINE OCHIENG

JUDGE