



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 53 OF 2019**

**JACOB PHILLIP NYABURI.....PLAINTIFF**

**VERSUS**

**NICHOLAS MBUGUA MATHERI.....1<sup>ST</sup> DEFENDANT**

**FESTUS ONGARO OKELLO.....2<sup>ND</sup> DEFENDANT**

**JAMES KAGIRI MAINA.....3<sup>RD</sup> DEFENDANT**

**TOM MAINA KABAU.....4<sup>TH</sup> DEFENDANT**

**NAOMI WAIRIMU KAMAU.....5<sup>TH</sup> DEFENDANT**

**ROSALIND WANGUI KIHARA.....6<sup>TH</sup> DEFENDANT**

**GEORGE OKUMU ACHAR.....7<sup>TH</sup> DEFENDANT**

**JOHN OGALO ACHANDO.....8<sup>TH</sup> DEFENDANT**

**AMBROSE OFAFA AGOL.....9<sup>TH</sup> DEFENDANT**

**SAMUEL MWANIKI GAKUO.....10<sup>TH</sup> DEFENDANT**

**FRANCIS MWINGA CHEGE.....11<sup>TH</sup> DEFENDANT**

**CAROLYNE JUDITH ADEMBA.....12<sup>TH</sup> DEFENDANT**

**GEORGE OKUMU ACHAR.....13<sup>TH</sup> DEFENDANT**

**LAND SURVEYOR, KAJIADO.....14<sup>TH</sup> DEFENDANT**

**LAND REGISTRAR, KAJIADO.....15<sup>TH</sup> DEFENDANT**

**HON. ATTORNEY GENERAL.....16<sup>TH</sup> DEFENDANT**

**AND**

**NATIONAL LAND COMMISSION.....1<sup>ST</sup> INTERESTED PARTY**

**KENYA RAILWAYS CORPORATION.....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

What is before Court for determination is the Plaintiff's Notice of Motion application dated the 12<sup>th</sup> June, 2019 where he seeks an order of

temporary injunction restraining the Defendants including their agents or servants from interfering with land reference number Kajiado/Kitengela/114, 115, 116, 117, 119, 120 and any other resultant subdivision being land reference numbers Kajiado/Kitengela/28500 to 28514 as well as 32506 to 32535, hereinafter referred to as the 'suit lands' pending the hearing and determination of this suit. The Plaintiff further seeks for the 14<sup>th</sup> and 15<sup>th</sup> Defendant to produce all the surveying reports including Ruling prepared pertaining to this matter as well as an order to compel them to conduct a cadastral survey for the suit lands. The Plaintiff also seeks for orders of a mandatory injunction against the Defendants including the Interested Parties, their agents or servants restraining them from interfering with the suit lands pending the outcome of the suit.

The application is premised on the grounds on the face of it and the supporting affidavit of JACOB PHILLIP NYABURI where he deposes that he is the registered owner of land parcel number Kajiado/Kitengela/116 which he acquired its title on 31<sup>st</sup> December, 1993. Further, that the suit lands were excised from this parcel. He claims they co-existed peacefully with the Defendants and in 2010 he realized that owners of land reference numbers 117 and 114 and other resultant subdivisions had illegally including unlawfully encroached on his land as well as put up permanent structures thereon. He explains that arising from the unlawful acts of encroachment by the Defendants, on 6<sup>th</sup> December, 2010, he was compelled to formally write a complaint to the Land Registrar, Kajiado requesting him to ascertain the boundaries through a cadastral surveying exercise and fix the beacons on the suit lands. He contends that as a result of his complaint the Land Registrar embarked on issuing periodic summons against all his neighbours who are the 1<sup>st</sup> to 13<sup>th</sup> Defendants herein to appear on the ground and have the surveying exercise finally determined but in vain. He confirms that the Land Registrar and the Land Surveyor, Kajiado actually deliberated on the boundary dispute and delivered a Ruling directing the aggrieved parties to institute legal proceedings before this court. He has reliable information that the Defendants are in the process of negotiating with the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties pursuant to the publication of the notices in the Kenya Gazette special editions of 22<sup>nd</sup> December, 2016 and 2<sup>nd</sup> March, 2018 respectively for payment of compensation in relation to compulsory acquisition of the suit lands for the construction of the Standard Gauge Railways. Further, that the Defendants are in the process of constructing permanent structures on the suit lands to his peril.

The 4<sup>th</sup> Defendant opposed the application by filing a replying affidavit sworn by Dr. Tom Maina Kabau where he avers that this suit is unmaintainable and should be struck out or dismissed with costs. He explains that by the time of filing this suit, the Interested Parties had already acquired a substantive portion of the Applicant's land subsequent to which a Standard Gauge Railway (SGR) track had already been constructed in addition to an expansive reserve for a future station, fenced off. He confirms that half of his parcel of land parcel number Kajiado/Kitengela/28506 has been compulsorily acquired and fenced off as public land being part of the SGR reserve. Further, some entire parcels of the suit lands or substantive parts are either part of the SGR track or its large reserve and thus public land. He insists the Applicant should not benefit from the equitable remedy of an injunction as there has been indolence and laxity on his part as he failed to make any objections to the Interested Parties after the publication of the notices of compulsory acquisition of the Defendants' land including his. He states that the Applicant was granted an Award for the compulsory acquisition of part of his parcel of land which he duly consented to, by signing the said Award and was paid, hence cannot reopen the matter. Further, the alleged claim of encroachment lacks merit. He contends that the Applicant is no longer the owner of land reference number Kajiado/Kitengela/166. He denies the allegations of illegal, unlawful and wrongful encroachment. He reiterates that the Applicant has not exhibited any evidence to show the boundaries since there are numerous subdivisions.

The 2<sup>nd</sup> Interested Party opposed the application by filing Grounds of Objection where it contends that it is a stranger to the Plaintiff's allegations and the said application does not disclose a cause of action against it. Further, that its being enjoined in this suit is unprocedural and without merit. It avers that the descriptive part of the Complaint does not describe it nor why it is enjoined in this suit. It insists the Plaintiff's complaint is about a boundary dispute with his neighbours which has nothing to do with it. It reiterates that no substantive orders can issue against it.

The rest of the Defendants and 1<sup>st</sup> Interested Party failed to enter appearance and file a response to the instant application which was canvassed by way of written submissions. However, I note from the court record, there is no evidence of service upon them despite the Plaintiff's Counsel claiming they were duly served.

The application was canvassed by way of written submissions.

### **Analysis and Determination**

Upon consideration of the Notice of Motion application dated the 12<sup>th</sup> June, 2019 including the respective affidavits, Grounds of Objection and rivaling submissions, the following are the issues for determination:

- Whether the Plaintiff is entitled to orders of temporary injunction restraining the Defendants from interfering with the suit lands pending the outcome of the suit.
- Whether a mandatory injunction should issue against the Defendants including the Interested Parties, their agents or servants restraining them from interfering with the suit lands pending the outcome of the suit.

The Plaintiff in his submissions insists he has established a prima facie case with a probability of success and is hence entitled to the orders of temporary injunction sought. He reiterates that he will suffer irreparable harm not capable of being compensated by damages. Further, that 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; Arthur Kitonga & 2 others Vs Ken Ngondi & Another (2014) eKLR; Mrao Ltd Vs First American Bank of Kenya & 2 Others (2003) KLR 125; Nguruman Limited V Jan Bonde Nielsen & 2 others (2014) eKLR; and Corn Products Kenya Limited V Corn Products Kenya Limited & Another (2014) eKLR.**

The 4<sup>th</sup> Defendant in his submissions insists the Plaintiff has not demonstrated the existence of a prima facie case with a probability of success at the trial and highlighted certain averments in his replying affidavit to reaffirm his position. He denies receipt of any notices for the resolution of the dispute herein. Further, that the alleged summons were served on a party Kenneth Gitonga M, who had no legal nor

equitable rights on the land. He further submits that the Plaintiff has not demonstrated irreparable damage/injury if injunctive orders are not granted as the alleged loss can be ascertained in monetary terms. Further, that the balance of convenience is in favour of not granting an injunction. He reiterates that not all the aforementioned parcels of land could have encroached on the suit lands. To support his arguments, he has relied on the following cases: **Giella Vs Cassman Brown & Company (1973) EA 358**; **Amir Suleiman V Amboseli Resort Limited (2004) eKLR**; **Stars V Garters Restaurant & Another V National Bank of Kenya Limited (2019) eKLR**; **Martha Cherugut Rutoh V Kimibei A Rutoh & 2 others (2018) eKLR**; **Julius Kipyegon Koech V Paul Kipngetich Koech (2017) eKLR** and **Ntima Housing Cooperative Society Ltd V Housing Finance Company of Kenya Ltd (2018) eKLR**.

The 2<sup>nd</sup> Interested Party in its submissions reiterates its averments above and contends that the Plaintiff has not established a prima facie against it and is hence not deserving of the injunctive orders sought. To support its arguments, it has relied on the case of **Giella Vs Cassman Brown & Company (1973) EA 358**.

As to whether the Plaintiff has established a prima facie case with probability of success at the trial, I will rely on the established principles 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**. The Plaintiff claims that in 2010 he realized that owners of land reference numbers 117 and 114 and other resultant subdivisions had illegally encroached on his land as well as put up permanent structures thereon. He contends that on 6<sup>th</sup> December, 2010, he lodged a complaint with the Land Registrar, Kajiado requesting him to ascertain the boundaries through a cadastral surveying exercise and fix the beacons on the suit land. Further, that despite the Land Registrar issuing periodic summons against all his neighbours who are the 1<sup>st</sup> to 13<sup>th</sup> Defendants herein to appear on the ground and have the surveying exercise finally determined, the said Defendants failed to adhere to the summons. He confirms that the Land Registrar and the Land Surveyor, Kajiado actually deliberated on the boundary dispute and delivered a Ruling directing the aggrieved parties to institute legal proceedings before this court. He explains that the Defendants were in the process of negotiating with the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties pursuant to the publication of the notices in the Kenya Gazette special editions of 22<sup>nd</sup> December, 2016 and 2<sup>nd</sup> March, 2018 respectively for payment of compensation in relation to compulsory acquisition of the suit lands for the construction of the Standard Gauge Railways. The 4<sup>th</sup> Defendant disputes the Plaintiff's averments and explains that by the time of filing this suit, the Interested Parties had already acquired a substantive portion of the Plaintiff's land subsequent to which a Standard Gauge Railway (SGR) track had already been constructed and an expansive portion of the said land reserved for a future station which has since been fenced off. Further, that half of his parcel of land parcel number Kajiado/Kitengela/28506 has been compulsorily acquired and fenced off as public land as it is part of the SGR reserve. He avers that the Plaintiff never lodged any objections to the Interested Parties after the publication of the notices of compulsory acquisition of the Defendants' land including his. He states that the Plaintiff was granted an Award for the compulsory acquisition of part of his parcel of land which he duly consented to by signing the said Award and was paid, hence cannot reopen the matter. The 2<sup>nd</sup> Interested Party insists the Plaintiff does not disclose a cause of action against it. Further, that its being enjoined in this suit is unprocedural and without merit.

I note the Plaintiff did not deny that he had been compensated for a portion of the suit lands. Further, that by the time he filed this suit, portions of the 1<sup>st</sup> to 13<sup>th</sup> Defendants parcels of land had been compulsorily acquired and the SGR track constructed. From the annexures in the supporting affidavit, the Plaintiff did not exhibit any evidence to show the boundaries of the numerous subdivisions. Further, it clearly emerged that the impugned boundary dispute has not been fully resolved with the Land Registrar, Kajiado in 2018 directing parties to subject themselves to the process of the court. I further note that the 1<sup>st</sup> to 13<sup>th</sup> Defendants own adjoining parcels of land which the Plaintiff claims have encroached upon his land but he has not indicated specifically which parcels.

In the case of **Martha Cherugut Rutoh v Kimibei A. Rutoh & 2 others [2018] eKLR** the Learned Judge while dealing with an application for injunction observed that: **'A further test for the grant of an injunction has emerged from the approach adopted by Ojwang J (as he then was) in the case of Amir Suleiman V Amboseli Resort Limited (2004) eKLR when in recognizing that "the law has always kept growing to greater levels of refinement to cover new situations not foreseen before" relied on the English case of Films Rover International 1986 3 All ER 772 where the court stated as follows: "A fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been wrong."**

Based on the facts as presented, it is my considered view that the Plaintiff has not demonstrated a prima facie case as against the Interested Parties as this is a case for boundary dispute. Further, from the various annexures in the supporting affidavit, at this juncture I find that the Plaintiff has come too late in the day for an injunction as portions of the 1<sup>st</sup> - 13<sup>th</sup> Defendants parcels of land had been compulsorily acquired, with the said Defendants already compensated and the SGR track constructed. I note the Plaintiff does not deny that the 1<sup>st</sup> - 13<sup>th</sup> Defendants have even constructed permanent structures on the suit land. Further, I opine that it is the Land Registrar who is legally mandated as per the provisions of the Land Registration Act to determine a boundary which is not clear if he did as no report is annexed. In the circumstances while associating myself with the decisions cited above, at this juncture, I find that the Plaintiff has not established a prima facie case to warrant the orders of temporary injunction sought. Further, in relying on the Case of **Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, since the Plaintiff has not established a prima facie case, I will not proceed to decide on the other two limbs on injunction.

On the issue of a mandatory injunction sought by the Plaintiff, I will refer to the case of **Kenya Breweries Limited vs. Washington Okeyo (2002) EA 109** where the Court of Appeal held that, **'a mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally, be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application.'**

In the current scenario, the Plaintiff seeks orders of a mandatory injunction against the Defendants including the Interested Parties, their agents or servants restraining them from interfering with the suit lands pending the outcome of the suit. I note the 1<sup>st</sup> to 13<sup>th</sup> Defendants own their respective parcels of land and the Plaintiff confirms they have put up permanent structures thereon. Further, the 1<sup>st</sup> Interested party has already compensated them for compulsory acquisition of portions of their respective parcels of land for the construction of the SGR track which has since been done. It is my considered view that the Plaintiff has not demonstrated the special circumstances to warrant the orders sought and in relying on the above cited decision, I find that this is not a clear case meeting the threshold set in granting a mandatory injunction and will decline to grant the same at this juncture.

The Plaintiff sought for the 14<sup>th</sup> and 15<sup>th</sup> Defendants to be compelled to produce all the surveying reports including Ruling prepared pertaining to this matter as well as an order to compel them to conduct a cadastral survey for the suit lands. It is trite that there are proper legal processes outlined in the Civil Procedure Rules/Act governing production of documents which I direct the Plaintiff to adhere to.

It is against the foregoing that I find the Notice of Motion application dated the 12<sup>th</sup> June, 2019 unmerited and will proceed to dismiss it.

Costs will be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 12<sup>TH</sup> DAY OF OCTOBER, 2021**

**CHRISTINE OCHIENG**

**JUDGE**