



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC. CASE NO. E005 OF 2020

LEWNANTAI KUSENGE LEI.....PLAINTIFF

VERSUS

JOSHUA LEMAKO.....1ST DEFENDANT

JEREMIAH LEMAKO.....2ND DEFENDANT

GEOFFREY LEMAKO.....3RD DEFENDANT

SOLOMON LEMAKO.....4TH DEFENDANT

(Sued on behalf of the Estate of Lemako Koilol Nkana)

LAND REGISTRAR, KAJIADO....5TH DEFENDANT

LAND SURVEYOR, KAJIADO....6TH DEFENDANT

RULING

What is before Court for determination is the Plaintiff's Notice of Motion application dated the 8th October, 2020 where he seeks an order of temporary injunction restraining the Defendants from interfering with land parcel number Kajiado/Kaputiei South/55 hereinafter referred to as the 'suit land' pending the hearing and determination of this suit. The Plaintiff further seeks for orders of a mandatory injunction against the Defendants, their agents or servants restraining them from interfering with the suit land allegedly to implement a Ruling by the 5th Defendant obtained on 13th November, 2019 pending the outcome of the suit.

The application is premised on the grounds on the face of it and the supporting affidavit of LEWNANTAI KUSENGE LEI where he deposes that he is the registered proprietor of the suit land measuring 311.05 hectares, while the late Lemaiko Ole Nkana was allocated land parcel number Kajiado/Kaputiei South/56 that both emanated from Poka Group Ranch. He explains that they all lived in harmony and each person developed their respective portions of land. Further, that his son Caleb Lewuantai settled on the land 25 years ago and together with the family of the late Lemako Kailol Ole Nkana, agreed on jointly financially contributing to have the boundary between the two parcels of land successfully surveyed. He proceeded to highlight the developments Caleb Lewuantai undertook on the portion of the suit land he occupied. He confirms that Lemako Kailol Ole Nkana died in 2016 but in 2019, the 1st to 4th Defendants being his sons, started raising complaints over the boundary between the suit land and land parcel number Kajiado/Kaputiei South/56. Further, that on 5th August, 2019, he received summons from the office of the 5th Defendant that on 25th August, 2019 the Land Surveyor would undertake a field visit but in his absence. He contends that on 13th November, 2019, the 5th Defendant delivered its Ruling pertaining to the Land Boundary Dispute and Land Claim hereof. Further, on 1st September, 2020 he received another Summon that the 1st to 4th Defendants were to visit the suit land on 1st October, 2020 for purposes of implementing the 5th Defendant's Ruling. He reiterates that the aforementioned proceedings including implementation of the 5th Defendant's Ruling is marred with irregularities, illegalities, unprocedural, afterthought and need to be struck off.

The 1st to 4th Defendants opposed the application and filed a replying affidavit sworn by GEOFFREY LEMAKO where he deposes that the Plaintiff/Applicant is their uncle and together with their father, they were both members of Poka Group Ranch. He confirms that upon dissolution of the Poka Group Ranch, his father was allocated land parcel number Kajiado/Kaputiei South/55 measuring approximately 311.5 hectares while the Plaintiff got the suit land measuring 311.05 hectares. Further, that the two parcels of land are separated by a boundary. He denies that any party has undertaken developments thereon and insists they have not been in peaceful occupation as the Plaintiff has habitually trespassed on their land culminating in physical fights, on several occasions. Further, that the Area Chief including Group Ranch

members have severally attempted to intervene but the Plaintiff failed to heed to the warnings. He claims the Plaintiff attempted to acquire a portion of their land and this led them to request the Land Registrar to come and set the boundary between the parties. He contends that the Plaintiff is old as well as senile and his son Caleb S Lewuantai is the one furthering violations commenced by him. He explains that the Plaintiff having been aware of the summons issued by the Registrar a number of times refused to receive or attend to the said summons. He avers that the Plaintiff's claim that he was not granted an opportunity to be heard is untrue because in the Land Registrar's notes, the Respondent in the complaint they had filed gave statements through William Lewnantai and Caleb Lewuantai, who are both the Plaintiff's sons. Further, the Plaintiff has failed to clearly set out any error on the part of the 5th Defendant. He reiterates that the Land Registrar's decision was clear, rational and did not favour any party but set out clearly the boundaries. Further, the Ruling by the Land Registrar being uncontroverted should prevail. He insists the Court should not be involved in investigating boundary disputes as this is a preserve of the Land Registrar and the Plaintiff should have brought a surveyor's findings to contradict the Government Surveyor who is not accused of any bias.

The Plaintiff filed a further affidavit reiterating his claim and denied the averments in the replying affidavit. He denied being an uncle to the 1st to 4th Defendants and insists they have lived peacefully with them. He claims the 1st to 4th Defendants did not have locus to lodge the complaint with the 5th Defendant. Further, that they have not produced any documents to prove he is a senile old man.

The application was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Notice of Motion application dated the 8th October, 2020 including the respective affidavits and rivalling 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 land pending the outcome of the suit.
- Whether a mandatory injunction should issue against the Defendants, their agents or servants restraining them from interfering with the suit land allegedly to implement a Ruling by the 5th Defendant obtained on 13th November, 2019 pending the outcome of the suit.

The Plaintiff in his submissions insists the 1st to 4th Defendants do not have locus standi to be participating in this suit as the owner of land parcel number Kajiado/Kaputiei South/56 passed on and they are yet to acquire Letters of Administration Intestate. He contends that he has established a prima facie case with a probability of success and is hence entitled to the orders sought. He reiterates that the Land Registrar and District Surveyor should not have proceeded to determine the boundary between the suit land and the deceased land. To buttress his averments, he has relied on the following decisions: **In re estate of Mary Wanja Wairimu (Deceased) (2017) eKLR; Giella Vs Cassman Brown & Company (1973) EA 358; Mrao Ltd Vs First American Bank of Kenya & 2 Others (2003) KLR 125; and Azzuri Limited Vs Pink Properties Limited (2017) eKLR.**

The 1st to 5th Defendants in their submissions contend that the instant application is incurably defective as it offends the provisions of section 16 of the Government Proceedings Act Cap. 40. Further, that an attempt to restrain the 5th and 6th Defendants by way of an injunction is untenable as the work of pointing out the boundaries is in their docket. They insist the Plaintiff has not established a prima facie case to warrant the orders sought as he admits receipt of summons from the 5th Defendant but declined to participate in the exercise of adjudicating the boundaries of the two parcels of land. Further, that a mandatory injunction cannot be granted at this juncture. They reiterate that if he was dissatisfied with the exercise, he should have moved to quash the decision. To support their arguments, they have relied on the following cases: **Giella Vs Cassman Brown & Company (1973) EA 358; and Machakos Nursing Home Vs Officer in Charge of Machakos GK Prison & Attorney General (2008) eKLR.**

As to whether the Plaintiff has established a prima facie case with probability of success at the trial, I will rely on 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**. It is not in dispute that the Plaintiff is the owner of the suit land while the 1st to 4th Defendants' father (now deceased) owned Kajiado/Kaputiei South/56. It is further not in dispute that the two parcels of land border each other. What is in dispute is the Plaintiff's averment that the 5th Defendant with assistance of the 6th Defendant proceeded to demarcate the boundaries between the suit land and land parcel number Kajiado/Kaputiei South/56 and delivered a Ruling dated the 13th November, 2019 which was supposed to be implemented on 1st October, 2020 and the Plaintiff received summons to that effect. I note the Plaintiff claims to have not been served with summons yet at paragraph 10 of his grounds of the application, he confirms receiving the said summons.

From the annexures in the respective affidavits, it is evident that the Plaintiff was invited to participate in the boundary dispute hearing but voluntarily declined to do so. Further in the report dated the 13th November, 2019, the Plaintiff's representatives William Lewnantai and Caleb Lewnantai indeed participated in the boundary dispute hearing and confirmed that they were beneficiaries of the suit land. I note the Land Registrar made his findings on 13th November, 2019 and directed that any aggrieved party to move to the ELC Court for redress within 30 days from the said date. It is this impugned Ruling that the Land Registrar sought to implement on 1st October, 2020 culminating in this suit. Section 18 of the Land Registration Act stipulates that: *'(1) Except where, in accordance with Section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel. (2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section. (3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary: Provided that where all the boundaries are defined under section 19 (3), the determination of the position of any uncertain boundary shall be done as stipulated in the Survey Act, Cap. 299.'*

From these provisions it is clear, the Land Registrar is the only one legally mandated to determine a boundary which he did in this instance. It is my considered view that the Plaintiff had a remedy of seeking to quash the said decision or Appeal to the ELC as the Land Registrar had directed but instead opted to file this suit. 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 injunction sought. Further, in relying on the Case of **Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, where it was held that in instances when a party fails to establish the first limb on injunctions, the court need not proceed to decide on the other two limbs and I will hence decline to do so.

On the issue of a mandatory injunction sought by the Plaintiff, I wish to make reference 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 a mandatory injunction against the Defendants, their agents or servants restraining them from interfering with the suit land allegedly to implement a Ruling by the 5th Defendant obtained on 13th November, 2019. I note the 5th Defendant undertook its mandate to determine the boundary dispute between the suit land and 1st to 4th Defendants land. Further, the Plaintiff was represented in the proceedings, and the 5th Defendant directed any aggrieved party to lodge an appeal with the ELC. It is my considered view that there are no special circumstances to warrant the orders sought as the law outlines the process a party should adhere to, in case they are aggrieved with a decision of the Land Registrar. However, in this instance the Plaintiff declined to adhere to the said procedure but opted to file a fresh suit. From the facts as presented while relying on the above cited judicial authority, I find that this is not a clear case meeting the threshold set in granting a mandatory injunction and I will decline to grant the same at this juncture.

It is against the foregoing that I find the Notice of Motion application dated the 8th October, 2020 unmerited and will proceed to dismiss it.

Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 12TH DAY OF OCTOBER, 2021

CHRISTINE OCHIENG

JUDGE