



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC. PETITION NO. E004 OF 2020

IN THE MATTER OF ARTICLE 22 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27, 40, 47, 48, 50 IN CONJUNCTION WITH ARTICLES 2 (1), 3, 10, 19, 20, 21, 22, 23, 24, 25, 27, 40, 50, 162(2) (B), 165 (3), 209, 210, 232(1), (2), 258, 259, 260

AND

IN THE MATTER OF THE FUNDAMENTAL RIGHT TO PROPERTY

AND IN THE MATTER OF THE LAND ACT

BETWEEN

SHAHIN MADHANI VIEHWEBER.....PETITIONER

AND

KENYA FOREST SERVICE.....1ST RESPONDENT

COUNTY LAND REGISTRAR, KAJIADO.....2ND RESPONDENT

THE MINISTRY OF LANDS.....3RD RESPONDENT

THE MINISTRY OF ENVIRONMENT AND FORESTRY.....4TH RESPONDENT

THE ATTORNEY GENERAL.....5TH RESPONDENT

NCHICHO ENE KIROGET.....6TH RESPONDENT

LIKAM OLE MUSA.....7TH RESPONDENT

TINKAINE OLE LONGO.....8TH RESPONDENT

RULING

What is before Court for determination is the Petitioner's Notice of Motion application dated the 18th December, 2020 where she seeks for orders of interim injunction against the 1st Respondent by itself, its agents, servants, officers, employees or any other person from interfering with her quiet enjoyment including possession of land parcel numbers Kajiado/ Meto/1849 as well as Kajiado/Meto/1850 pending the determination of this application and suit. The application is premised on the grounds on the face of it and the supporting affidavit of SHAHIN MADHANI VIEHWEBER where she confirms being the registered proprietor of land parcel numbers Kajiado/Meto/1849 and Kajiado/Meto/1850 respectively, hereinafter referred to as the 'suit lands'. She confirms having purchased the suit lands for valuable consideration and explains the process she adhered to, in their acquisition. She explains that the two parcels of land are situated in one area

and lie directly adjacent to each other with a road reserve separating them. Further, both parcels of land border Oldonyo Orok Forest Reserve. She contends that in October, 2020 the 1st Respondent unlawfully entered the suit lands and proceeded to place beacons thereon including on the road easement separating the two suit lands. She avers that it was a verbal claim of the 1st Respondent's officers' who were encroaching upon land parcel number Kajiado/Meto/1850 that the boundary of the suit lands and Ol donyo Orok Forest Reserve as drawn in 1974 is wrong and that the said boundary should be in a straight line as opposed to the curve it is, at the moment. Further, the said officers from the 1st Respondent intended to place beacons on Kajiado/Meto/1849 but were prevented by her husband who confronted them. She reiterates that before she purchased the suit lands, she undertook background including survey checks. She insists the action of the 1st Respondent of placing new beacons on parcel number Kajiado/Meto/1850 and on the road easement separating the suit lands as well as the intended action to place new beacons on land title number Kajiado/Meto/1849 under the watch of the 4th Respondent, whether pursuant to any plans, contravenes the express records kept by the 2nd and 3rd Respondents. Further, that the valid documents are those held by the 2nd and 3rd Respondents. She avers that the 2nd Respondent is unaware of alleged plans being relied upon by the 1st Respondent to place their new beacons on her properties and the road easement separating the properties. Further, the actions of the 1st Respondent amounts to trespass and has occasioned her loss of use of the alienated portion of land title number Kajiado/Meto/1850 which she had intention in developing. She reaffirms that the 1st Respondent has to the date of this Petition refused to remove the beacons placed on land title number Kajiado/Meto/1850 and adjacent road easement. She enumerated the costs incurred in developing and maintaining the suit lands.

The 1st Respondent opposed the application and filed a replying affidavit sworn by JIRA CHIMANYI, its Surveyor. He confirms that the suit lands border Oldonyo Orok Forest Reserve also known as Namanga Hill Forest which was declared as a forest area vide Legal Notice No. 304 of 1979. He contends that the portion of the Petitioner's lands encroaches on the aforementioned Forest Reserve. He explains the 1st Respondent's mandate and avers that the action of the 1st Respondent in placing the beacons on the suit lands does not amount to trespass or encroachment. He states that routine checks and fact finding by the public officers on public forest land is a core mandate, function and power of the 1st Respondent and is not peculiar to the Petitioner's parcels of land.

The application was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Notice of Motion application dated the 18th December, 2020 including the respective affidavits and rivaling submissions, the only issue for determination is whether the Petitioner is entitled to orders of interlocutory injunction in respect to the suit lands pending the determination of this Petition.

The Petitioner in her submissions reiterated her claim and contended that she had established a prima facie case as she is the registered proprietor of the suit lands. Further, that there is no indication in the Register held by the 2nd and 3rd Respondents that the 1st Respondent had an interest in the suit lands. She insists the 2nd and 3rd Respondents are not in possession of the alleged plans being relied on by the 1st Respondent, to place new beacons on the suit lands as well as the road easement separating them. She further submits that the claim by the 1st Respondent that a portion of the suit lands encroaches onto the Forest Reserve is unfounded and illegal. She also submits that she stands to suffer irreparable injury and an award of damages would not be sufficient compensation if the orders sought are not granted. Further, that the balance of convenience tilted in her favour. To buttress her averments, she relied on the following decisions: **Giella Vs Cassman Brown & Company (1973) EA 358**; **Nguruman Limited V Jan Bonde Nielsen & 2 others (2014) eKLR**; **Mrao Ltd Vs First American Bank Of Kenya & 2 Others (2003) KLR 125**; **Panari Enterprises Ltd Vs Lijoodo & 2 others (2014) eKLR**; **Mbuthia V Jimba Credit Corporation Ltd (1988) KLR 1 and Amir Suleiman V Amboseli Resort Limited (2004) eKLR**.

The 1st Respondent submitted that it has demonstrated the suit lands were irregularly or illegally acquired by the Petitioner during the existence of Legal Notice No. 304 of 1979 which had already declared Ol donyo Orok Forest reserve also known as Namanga Hill Forest to be a forest area. Further, there does not exist an apparent infringement of any right by the 1st Respondent upon the Petitioner. It insists the Petitioner has failed to show that there is a prima facie case which is the 1st limb before an order of interlocutory injunction may be issued. To support its arguments it relied on the following decisions: **Giella Vs Cassman Brown & Company (1973) EA 358**; **Kenya Commercial Finance C. O Ltd V Afraha Education Society (2001) 1 EA 86**; **Nguruman Limited V Jan Bonde Nielsen & 2 Others (2014) eKLR**; **Mrao Ltd Vs First American Bank Of Kenya & 2 Others (2003) KLR 125**; **Symon Gatutu Kimamo & 587 Others V East Africa Portland Cement Co. Ltd (2011) eKLR**; **Kenya Hotel Properties V Willesden Investment Limited (2013) eKLR** and **Paul Gitonga Wanjau V Gathuthi Tea Factory Company & 2 Others (2016) eKLR**.

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 Petitioner has established a prima case with a probability of success at the trial.

The Petitioner claims to be the registered proprietor of the suit lands which the 1st Respondent has trespassed upon. The Petitioner has annexed various documents in her supporting affidavit to demonstrate how she acquired the suit lands and how she is maintaining the same, and these include: Copies of Certificates of official search; Transfer of Land Forms; Consent of the Land Control Board; Maps as well as receipts etc. The 1st Respondent is the only party that opposed the instant application and annexed a copy of the Legal Notice No. 304 of 1979 which declared Ol donyo Orok Forest reserve also known as Namanga Hill Forest to be a forest area and insists the Petitioner encroached on the forest. I note from the materials presented, the 1st Respondent has not produced a copy of the map to confirm the extent of the forest including the alleged encroachment by the Petitioner and if any measurement was undertaken. Further, it has not produced any proceedings to confirm how the boundary position between the suit lands and the forest was determined as well as the consensus arrived upon in the installation of fresh beacons. The Petitioner on the other hand has furnished court with all the documents that confirm how she acquired the suit lands. Further, the measurements of the suit lands is indicated in the said documents. The Court takes judicial notice of the fact that since the 2nd Respondent who was the Land Registrar that issued the title deeds to the Petitioner did not file any affidavit to controvert the Petitioner's averments, then the said documents emanating from that office confirming the transaction as well as

measurements of the suit lands remain uncontroverted. I find that there exists an apparent infringement of the Petitioner's right by the 1st Respondent. In the circumstance, I find that the Petitioner has indeed demonstrated a prima facie case to warrant the grant of an injunction.

On the second principle as to whether the Petitioner 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**, where it was held that **'...the applicant must establish that he 'might otherwise' suffer irreparable injury which cannot be adequately compensated remedied by damages in the absence of an injunction, this is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot 'adequately' be compensated by an award of damages.'**

From the averments in the respective affidavits, noting that the Petitioner hold titles to the suit lands and developed the same. Further, noting that the 1st Respondent has not furnished this court with a map to confirm position of the forest area, I find that the Petitioner's alleged injuries are demonstrable and not speculative. Further, that she stands to suffer irreparable harm which cannot be compensated by way of 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 Petitioner who is owner of the suit lands.

It is against the foregoing that I find the Notice of Motion application dated the 18th December, 2020 merited and will allow it.

Costs will be in the cause.

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

CHRISTINE OCHIENG

JUDGE