



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 25 OF 2021

PATRICK SIMIYU WAMOTO & ANO.....PLAINTIFFS

VERSUS

COUNTY SURVEYOR, TRANS NZOIA

ANDREW KITUM & 24 OTHERS.....DEFENDANTS

RULING

1. This is a ruling on a Notice of Motion dated **6/4/2021**, brought under Certificate of Urgency. The Notice of Motion seeks Orders, inter-alia:

(1) ...spent

(2) THAT this Honourable Court be pleased to issue an order of temporary injunction restraining the Defendants, their agents, servants, employees and/or undertaking and any kind of activities on those parcels of land known as Land Reference No. Kaisagat/Chepkoilel Block 2/Kipsogon/38 measuring approximately Ten Decimal Five Two (10.52) Hectares or thereabouts and Kaisagat/Chepkoile Block 2/Kipsogon/9 all situated within Trans-Nzoia County pending the hearing and determination of the application *inter partes*.

(3) THAT this Honourable Court be pleased to issue an order of temporary injunction restraining the Defendants, their agents, servants, employees and/or undertaking and any kind of activities on those parcels of land known as Land Reference No. Kaisagat/Chepkoilel Block 2/Kipsogon/38 measuring approximately Ten Decimal Five Two (10.52) Hectares or thereabouts and Kaisagat/Chepkoile Block 2/Kipsogon/9 all situated within Trans-Nzoia County pending the hearing and determination of the suit herein.

(4) THAT costs be provided for.

2. The application is brought under **Order 40 Rule 1** and **51 Rule 1** of the **Civil Procedure Rules, 2010**.

3. The grounds upon which the application is premised are that the Plaintiffs/Applicants are, respectively, the registered owners of those parcels of land known as Land Reference No. **Kaisagat/Chepkoilel Block 2/Kipsogon/38** measuring approximately **Ten Decimal Five Two (10.52) Hectares** or **thereabouts** and **Kaisagat/Chepkoile Block 2/Kipsogon/9**, with the 2nd plaintiff being the administrator of the estate of the later **Paul Ndeto Musyimi Mang'ela** who was the registered owner of the parcel; that the defendants jointly and severally without any justifiable cause and without the plaintiff's consent trespassed onto the plaintiffs' parcels of land aforementioned; that they hived off part of the land with allegations that the said hived off portions belonged to Makunga Farm; that on the **31/3/2021**, the defendants acting on the instructions of the 1st defendant without colour of right trespassed and invaded the plaintiffs parcels of land and hived off portions thereof as aforesaid; that the exercise was carried without notice to the plaintiffs or a court order; that the survey officers acting under the instruction of the 1st defendant placed new beacons that purportedly created new boundary on the plaintiffs' parcels of land; that they allocated the said hived parcels of land to the rest of the defendants herein; that the Kitale-Kapenguria Road is the main boundary which demarcates the boundary between Makunga and Kipsogon farms; that the defendants have trespassed onto their lands by crossing the said road which is the main boundary between the farms and purported to create new parcels of land in the plaintiffs' lands; that the plaintiffs' land is private property and does not in any manner relate to and/or boarder Makunga Farm thus the actions of the Defendants to demarcate the plaintiffs' parcels of land amounts to trespass and contravenes the provisions of **Article 40** of the **Constitution of Kenya 2010**; and that the applicant stands to suffer irreparably if the orders sought are not granted.

4. The application is supported by the supporting affidavits of **Patrick Simiyu Wamoto** and **Caroline Mwikali Musyimi** sworn on the **6/4/2021** which reiterate the grounds on the face of the application and all the annexures thereto. It is further supported by a further affidavit of **Patrick Simiyu Wamoto** sworn and dated **7/5/2021** and a supplementary affidavit dated **7/5/2021** sworn by **Kibirech Arap Chemironi** who is the previous owner of the suit properties.

The Response

5. The Application is opposed. The Defendants/Respondents filed a Replying affidavit sworn jointly by **Lucas Maru, Lucas Terer and Samuel Koech (9th, 12th and 21st** defendants who depone to the fact of swearing also on behalf of the other defendants and on their own behalf) dated **30/4/2021**. The opposition is also premised on a Supplementary Affidavit sworn by them on **31/5/2021**. In their response, the deponents aver that the application is an abuse of the courts process, devoid of merit, tainted with malice and ought to be dismissed; that the defendants were members of Makunga Farmers Society which was dissolved earlier and the land was distributed and titles issued to them; that Makunga Farm borders Siyoi Scheme in the South West, Chematich Farm in the East and Kipsogon Farm in the West; that Kipsogon Farm was originally owned by **Chemiron Kibirech** who was a large scale maize seed farmer for a long time; that for fear of cross pollination, **Mr. Chemiron** approached the members of Makunga Farm to allow him to utilize their land along the boundaries to avoid cross pollination; that when **Chemiron** retired from farming, he subdivided his land to two more portions being the suit properties and sold to the Plaintiffs/Applicants who have shifted the boundaries of the land and occupy part of that land belonging to Makunga Farm; that the action of the Plaintiffs/Applicants prompted the members of Makunga Farm to seek for redress from the Lands Office to ascertain the boundaries of the suit properties and that of Makunga Farm; that the surveyors conducted the survey; that the Surveyors' Report found that the Applicant/Plaintiffs had encroached onto the Defendants parcel of land; that instead of the Plaintiffs/Applicants re-aligning the boundaries they moved to court alleging that the boundary of the land is along the Kitale - Kapenguria road when there are clear boundaries from the original map which are well known.

6. The Respondents/Defendants in their Supplementary Affidavit deny all the contents of the Applicants'/Plaintiffs' further affidavit. It is worth noting that **Kibirech Arap Chemiron** recanted the contents of the Applicants'/Plaintiffs' Supplementary Affidavit that he swore on **7/5/2021** vide an Affidavit he swore on **31/5/2021**. I will therefore, in making my analysis, not rely on the contents of the Supplementary Affidavit sworn by **Kibirech Arap Chemiron** on **7/5/2021** in support of the Applicants'/Plaintiffs' application. This is because in the subsequent affidavit, he swore that he was misled by the 1st Plaintiff's wife to swear the said affidavit. **Mr. Chemiron** being an old and illiterate man may be excused of the trickery and ingenuity of trickster(s). His evidence in the main suit would be crucial in this case. It is advisable for either of the parties who so desires to obtain a detailed statement from him.

7. On the **22/9/2021** this court directed that the application be canvassed by way of written submissions. The Applicants have filed their submissions.

Issues, Analysis and Determination

8. I have considered the application, the affidavits in support, and the responses thereto and all the annexures thereto and the submissions on record. I have also considered the written submissions filed on behalf of the Applicant on 27th September, 2021 and those of the 2nd - 25th Defendants filed on 4th October, 2021. I wish to indicate that the submissions filed on 4th October, 2021 were filed out of the stipulated time but the court took the liberty, in the interest of justice, to enlarge time and deem them properly filed and consider them. I find three issues for determination in this matter. They are:

- (1) Whether the applicants have satisfied the principles for the grant of a temporary order of injunction; and if so,*
- (2) Whether an injunction should issue in terms of Prayer three (3) of the Application.*
- (3) Who should bear the Costs of the Application.*

9. It is trite law that who alleges (a fact) must prove (it). Has this been done in the instant Application? The Plaintiffs/Applicants have attached copies of their title deeds as evidence of ownership of the suit properties to the **31st March, 2021** when the respondents moved to interfere with their quiet possession and put beacons thereon. They aver that they have been utilizing the suit properties without interference from the time they purchased the land parcels from the original owner. Their contention is that the land **has distinct boundaries from the land belonging to the Defendants**; that the boundary separating their land from that of the defendants is the **Kitale-Kapenguria road**. The Plaintiffs'/Applicants' claim is that the defendants have trespassed onto and or encroached on part of their parcels of land without their consent and without any color of right whatsoever.

10. On the other hand, the Defendants'/Respondents' contention is that part of the land was curved out and fenced off by the Plaintiffs/Applicants to form part of the suit properties initially belonged to them. They state that they only allowed the initial owner one **Kibirech Arap Chemiron**, of that land who was engaged in large scale maize seed farming to utilize their land to avoid cross breeding of the maize seed as he requested. The Defendants/Respondents allege that the Plaintiffs/Applicants upon taking up possession of the land shifted the boundaries on the land belonging to Makunga Farm which is also theirs by virtue of being members.

11. From the evidence on record, it appears that there has been long boundary dispute between the Plaintiffs'/Applicants and the Defendants/Respondents over the suit properties and the property belonging to the Defendants/Respondents and it dates back to **2015**. That the letters and correspondences which finally led to the surveyor visiting the suit properties to ascertain the boundaries in regard to the parcels herein is clear evidence that there has been a long standing boundary dispute between the parties herein. This court notes that the surveyors, after visiting the ground to ascertain the boundary of the parcels in question, found that the Plaintiffs had encroached on the defendants' parcel of land thus the need for alignment of boundaries. However, being dissatisfied with the findings, the Plaintiffs/Applicants sought legal redress from the court.

12. It is not lost to the Court the fact that law has been restated over and over again that the remedy for an order of injunction is an equitable remedy which is discretionary to any court. Even then, it is now settled law that the exercise of that discretion by any court of law should be done judiciously as was stated in the case of **Kahoho v Secretary General, EACJ Application No. 5 of 2012** (cited by the Respondents herein in their submissions). Also, refer to the persuasive dictum of Munyao J. in **Daniel Kipkemoi Siele v Kapsasian Primary School & 2 others [2016] eKLR** <http://kenyalaw.org/caselaw/cases/view/118862> where he stated as follows, "... the grant or not of an order of

injunction is upon the discretion of the court. However, like all other discretions, the same must be exercised judiciously.” On the issue of the judicious exercise of discretion, the Court, in making sure that it is so doing, must see to it that its decision is not plainly wrong, that the judge should not take into account matters he or she should not have taken into account or leave out those he ought to consider, and that he or she should properly direct himself or herself to the issues of fact and law before the Court. In essence the Court should be consciously and delicately balance the interests of the parties and justice as it consider all issues before it. This is what this Court proceeds to do below.

13. The test for the grant of temporary injunction was set out in the case of **Giella -vs- Cassman Brown [1973] EA 358**. The three limbs that have to be satisfied for the grant of the orders are:

(a) Whether the applicant has established a prima facie case

(b) Whether the he or she would suffer irreparable loss that may not be compensated by damages and

(c) That if the court is in doubt, it may rule on a balance of convenience.

14. The Plaintiffs/Applicants have proved that they are the registered owners of the suit properties having acquired title after buying it from the initial owner. It is not in dispute that they have been in peaceful occupation of the suit land and have also been utilizing the suit land without any interference until recently when the Defendants/Respondents purportedly encroached on their parcel of land claiming to be theirs. This court notes that the Defendants/Respondents have not been utilizing the disputed portion of land at all. In my view, the Plaintiffs have established a *prima facie* case as against the defendants herein, thereby satisfying the first limb.

15. As to whether the Plaintiffs/Applicants will suffer irreparable loss if the orders are not granted, the Court has to consider an important issue: what loss is irreparable in the present case? Of course this Court is alive to the holding by my brother Judge, Munyao in **Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR <http://kenyalaw.org/caselaw/cases/view/156488/>** and I agree with him. I also agree with the Respondents when they submit so. Judge Munyao stated in that case as follows: **“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”**

16. It is in my considered view that they may suffer irreparable loss if the prayers sought are not granted. This is for the reason that the Plaintiffs have been utilizing the land since they purchased it except for the simmering boundary dispute as stated above. It is their belief that some portions of their land parcels are being hived out by erection of beacons and possible settlement by the defendants and that puts the said portions at the risk of being taken away, resulting to the Plaintiffs being dispossessed of the same yet they are registered as proprietors of the parcels which extend to where it shall later be determined after the suit is concluded; further the interruption of the peaceful occupation alone is likely to cause the Plaintiffs great loss - it may be irreparable especially if the actions of the defendants escalate. One may argue that the interruption may be compensated by way of damages but it is the view of the Court that should the Defendants be not restrained by an order of the Court and they take further steps or actions that may deface the nature of the subject that will not be compensated by damages, particularly should this suit be prolonged. The *status quo* ante the **31/3/2021** would yield lesser harm than that after.

17. Again, the balance of convenience tilts in favour of the plaintiffs. The **Giella Case** gives the Court the third limb which should be applied as the discretion is being exercised. It is to the effect that where the court is in doubt, it proceeds to rule on a balance of convenience. I have weighed the convenience of the parties. I am of the view that since the Defendants have known that there has been a boundary dispute all along since the Plaintiffs bought their parcels of land registered in their names and never moved to remedy the situation immediately, waiting for this court to determine the issues before it with finality would yield a better balance of convenience than otherwise.

18. For the reasons advanced above, it is my considered view that the Plaintiffs have established a *prima facie* against the Defendants. I hereby allow the application in terms of **Prayer three (3)**.

19. Regarding costs of the Application, I would have granted the same to the Respondents. However, for the reasons that they did not comply with the timelines of filing written submissions, I exercise my discretion to order that they (costs) be in the cause. Parties to matters should learn to comply with the timelines set, otherwise they will be met with sanctions as courts will deem fit.

20. In order to fast track this matter, the Plaintiffs are directed to file and serve upon the Defendants their duly bound and paginated bundle of documents (including pleadings) within **21 days** from the date of this order and the Defendants shall file and serve theirs, also bound and paginated, within **21 days** of being served with the Plaintiffs’.

21. Lastly, parties should ensure that the copies of documents filed are clear and legible. Further, any party wishing to object to any documents at the hearing should comply with both the Law of Evidence and the Civil Procedure Rules and the ELC Practice Directions (PRACTICE DIRECTIONS ON PROCEEDINGS IN THE ENVIRONMENT AND LAND COURTS, AND ON PROCEEDINGS RELATING TO THE ENVIRONMENT AND THE USE AND OCCUPATION OF, AND TITLE TO LAND AND PROCEEDINGS IN OTHER COURTS, Gazette Notice No. 5178), especially Rule 28 (g).

22. The suit shall be mentioned on **29/11/2021** by way of teleconference for the purpose of fixing a hearing date and giving of further directions.

DATED, SIGNED AND DELIVERED AT KITALE ON THIS 6TH DAY OF OCTOBER, 2021.

DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE.