



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**LAND CASE NO. E43 OF 2021**

**MOBOKO SHEMBEKHO LIMITED.....PLAINTIFF**

**VERSUS**

**ROBERT KIPTALAM.....1<sup>ST</sup> DEFENDANT**

**BENJAMIN KIPKECH KIPKULEI.....2<sup>ND</sup> DEFENDANT**

**CHIEF LAND REGISTRAR.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. The instant suit was filed on **24/5/2021**. There were initially two related suits in respect of the subject matter herein, that is, this suit and **ELC 44 of 2021** the latter which was withdrawn with no orders as to costs on **7/10/2021**. A notice of motion dated **24/5/2021** was filed with the plaintiff. The motion sought the following orders:

**a. This application be certified urgent and service of the same dispensed with in the first instance.**

**b. Pending the *inter partes* hearing and determination of this application, an order of injunction be issued restraining the Defendants whether by themselves, agents, servants or anyone acting on their authority howsoever from trespassing onto, remaining onto, invading, damaging, developing, cultivating, alienating, transferring any interest and/or in any manner whatsoever dealing with all the suit properties known as Land Reference Numbers 20591/16 and 20591/79 situated at Naivasha within Nakuru County in the Republic of Kenya, which order shall be enforced by the Officer Commanding, Kongoni Police Station.**

**c. Pending the *inter partes* hearing and determination of this application, an order of injunction be issued restraining the Defendants whether by themselves, agents, servants or anyone acting on their authority howsoever from trespassing onto, remaining onto, invading, damaging, developing, transferring any interest and/or in any manner whatsoever dealing with all the suit properties known as Land Reference Numbers 20591/16 and 20591/79 situated at Naivasha within Nakuru County in the Republic of Kenya, which order shall be enforced by the Officer Commanding, Kongoni Police Station.**

**d. Costs of the application be provided.**

2. The motion was scheduled for hearing on **9/6/2021**, but soon after its filing the 2<sup>nd</sup> defendant filed an application dated **3/6/2021** seeking a raft of orders among them being the order that his notice of motion be heard together with the plaintiff's application. I will replicate the orders the 2<sup>nd</sup> defendant sought as herein under:

**1. Spent.**

**2. This application be heard together with the Plaintiff's application on the 9/06/2021**

**3. An interim injunction do issue against the Plaintiff and its agents from entering, taking possession and or interfering with the 2<sup>nd</sup> Defendant's occupation, use and management of LR. No. 20591/16 and LR No. 20591/79 pending the hearing and determination of this application.**

**4. An inhibition do issue forbidding the registration of any dealings in reference to properties LR. N. 20591/79 and LR No. 20591/16 pending the hearing and determination of this suit.**

**5. An injunction do issue against the Plaintiff and its agents from entering, taking possession and or interfering with the 2<sup>nd</sup> Defendant's occupation, use and management of LR. No. 20591/79 and LR. No. 20591/16 pending the hearing and determination of the suit.**

**6. The Naivasha Sub County Commander do assist in enforcement of the orders herein.**

**7. The costs of this application be in the cause.**

3. It is clear that the defendant's application was made in response to the application filed by the plaintiff, and not surprisingly, on **7/10/2021** it was agreed by consent of the parties that the application dated **3/6/2021** be deemed as the response to the application dated **24/5/2021** in **ELC 43/21**. The further affidavit of the plaintiff was deemed the further affidavit in the application dated **24/5/2021**.

4. Separate Responses to the applications were not excluded. Consequently, the 2<sup>nd</sup> defendant filed his replying affidavit in response to the plaintiff's application dated **24<sup>th</sup> May 2021** on **7<sup>th</sup> June 2021**. The plaintiff on his part filed the replying affidavit sworn on **8<sup>th</sup> June 2021** in response to the defendant's application.

5. The 2<sup>nd</sup> defendant filed a supplementary affidavit in further support of his application on **17/9/2021**. On **12/10/2021** this court granted the plaintiff right to respond to that supplementary affidavit and so the plaintiff filed its further affidavit in the matter on **21/10/2021**.

6. The court in the course of the proceedings ordered that the Deputy Registrar do ascertain the developments on the suit properties and that she be accompanied by the District Land Registrar who would point out the various parcels. The Deputy Registrar was to file a report within **7 days** of the site visit and a perusal of the court record shows that the said report was filed on **8/11/2021**.

7. Vide an application dated **17<sup>th</sup> September 2021** the **Agricultural Development Corporation** (herein after "ADC") was joined to the suit as an interested party on **22/9/2021**.

8. The 2<sup>nd</sup> defendant filed submissions on his application on **1/10/2021**. The plaintiff filed its submissions on **6<sup>th</sup> October 2021**.

9. That is the most concise summary that can be given of the progress so far of this highly contentious matter.

10. The application dated **24/5/2021** by the plaintiff seeks to injunct the defendants from dealing with the suit properties while the application dated **3/6/2021** seeks similar orders of injunction against the plaintiff.

11. At the heart of the suit and the two applications before me are the twin issues of ownership and possession of the suit land.

12. However the immediate issues that arise from the two applications before me are as follows:

**a. Is it the plaintiff or the 2<sup>nd</sup> defendant who is in possession of the suit land and who among them should be enjoined from interfering with the suit land?**

**b. Who should bear the costs of the applications?**

13. Regarding the first issue, the claim of the plaintiff as is evident from its affidavits is that it is the registered owner of the suit lands **LR Nos 20591/16** and **LR no 20591/79** (hereinafter "*the suit lands*" or "*the suit property*", having purchased them in **2020** from their previous owners **Wilson Kigutu Macharia** and **David Kimani** respectively for Ksh 22,000,000/= and Kshs 15,000,000/= respectively. The plaintiff claims that it took vacant possession upon purchase and enjoyed quiet possession thereof until **May 2021** when the 1<sup>st</sup> and 2<sup>nd</sup> defendants invaded the suit lands violently and commenced some unsuccessful attempts to evict the plaintiff therefrom thus threatening the safety of the plaintiff's employees hence the suit for an injunction against the alleged acts of the defendants' trespass. In his application, the plaintiff shows apprehension that the defendants would continue with the attempts to evict it. It exhibits official searches dated as late as **24<sup>th</sup> May 2021** to demonstrate that it is the proprietor of the suit land. It avers that it has demonstrated a *prima facie* case against the defendants.

14. The 2<sup>nd</sup> defendant's evidence in support of his application for injunction against the plaintiff is contained in the affidavits he filed. The 2<sup>nd</sup> defendant's claims are that he is the registered proprietor of the suit lands. He states that his titles are first in time and are a direct descendant of the mother title held by the ADC. He alleges that the plaintiff's titles have no root in the mother title owned by ADC and that they are patently illegal as they lack supporting documents. He alleges that by the time the plaintiff was securing the titles to the suit land he was already the registered proprietor and in occupation thereof. He alleged that he was then in the process of preparation for a planting season.

15. Both parties claim that they would suffer loss if the orders sought in their respective applications were not granted.

16. The plaintiff has his plaint and the 2<sup>nd</sup> defendant has his counterclaim. Each therefore has their respective claim regarding the suit land since it is trite law that the counterclaim is a separate suit by itself.

17. I must first consider which of the contestants herein has a *prima facie* case against the other.

18. The plaintiff has annexed copies of its certificates of title to the suit lands registered in its name on **3/2/2020** and **14/12/2020** respectively.

19. The copies he exhibits appear to show that ADC was the original owner of plot number **20591/16** before it transferred to one Davit A Kibiwot; the latter appears to have transferred the same to one *Kigutu Macharia* who later transferred it to the plaintiff. The copies also appear to show that *David Kimani Gicharu* was the original owner of plot number **20591/79** before he transferred to the plaintiff.

20. On his part the 2<sup>nd</sup> defendant claims that he in the year **2000** acquired plot number **20591/16** and **20591/79** from Chemusian Company Ltd and Simba Posho Mills respectively. Simba Posho Mills are said to be the allottees of the suit land, having been so allotted the land by the ADC. However it was not until **2011**, according to the 2<sup>nd</sup> defendant, that the plot number **20591/79** was demarcated and formally transferred to him. He claims that he took possession of the two parcels and secured them with an electric fence, and that he has been carrying on farming activities on the lands until May **2021** when the agents of the plaintiff invaded the said parcels, destroyed the electric fence and purported to subdivide the suit property among themselves. He stated that they have ploughed parts of the properties in readiness for sowing crops thereon. His certificate of title in respect of **LR 20591/16** shows Chemusian Company Ltd as the previous owner and that it was allotted the land by the government on **18/1/99** and who apparently transferred the land to the 2<sup>nd</sup> defendant on **8/8/2014**. However, his copy of the certificate of title to plot no **20591/79** does not evince who the earlier owner thereof was. However copies of various correspondences and a transfer for each plot were attached to the application. Copies of pay in slips to the Commissioner of Domestic Taxes and a Kenya Commercial Bank cash payment receipt are also attached to the application. Photographs of the fence allegedly vandalized by the plaintiff's agents are also exhibited.

21. However in another twist the plaintiff attached to its replying affidavit to the application dated **3/6/2021** copies of certified copies of the searches dated **24<sup>th</sup> May 2021** showing that it was the registered proprietor of the suit lands by then.

22. The Deputy Registrar's report was adopted by this court as part of the record. Its findings are that a Mr. David Kinuthia had cleared **parcel no 20591/16** and maintained his presence on it after fencing it. The report also indicated that the barbed wire fence erected by David Kinuthia had been uprooted. The report also indicated that Mr David Kinuthia had maintained his presence over parcel no **25091/79**. The input of the local administration officials was crucial in the report by the Deputy Registrar. The local administrative officials indicated that the plaintiff is in possession of both parcels through the said David Kinuthia who describes himself in affidavits on record as the plaintiff's farm manager.

23. In a rejoinder by way of a supplementary affidavit filed on **17/9/2021** the 2<sup>nd</sup> defendant claimed that the report filed by the Deputy Registrar ignored his electric fence which had been pulled down. He also drew the attention of the court to an online video and stated that the plaintiff had obtained possession by force. He argues that the deputy registrar's report appears to confer possession to the plaintiff.

24. However, in a further affidavit filed on **21/10/2021** David Kinuthia claimed that he had been in possession of the suit land for a period of **20** years and that the 2<sup>nd</sup> defendant has never visited the suit properties. He scoffs at the allegation that the 2<sup>nd</sup> defendant had erected an electric fence to the properties and avers that there is no power grid in the area. He claimed that he worked for Mr. David Kimani Gicharu whom he knew as the proprietor thereof and that supervised farming activities thereon on his behalf, and that he fenced off the land in **2002**; after the said David sold the land to the plaintiff the plaintiff retained the deponent as its manager on the suit land, that is parcel no **25091/79**. He maintained that goons sent by the 2<sup>nd</sup> defendant destroyed the fence on **18/5/2021** and that he reported the incident to the police, the area senior chief and assistant chief who all visited the land on the same date whereupon the attackers fled the scene. He also stated that he had managed the agricultural activities on the adjacent portion of land that is **25091/16** at the instructions of a former owner, Mr. Achikwa who sold the farm later on to a Mr. Wilson Kigutu who subsequently sold it to the plaintiff. Upon purchase, Mr. Kinuthia states, he took vacant possession of the parcel on behalf of the plaintiff and he continued managing agricultural activities thereon on its behalf until **18<sup>th</sup> May 2021** when the goons allegedly sent by the 2<sup>nd</sup> defendant invaded the property.

25. As stated in the celebrated decision of **Giella vs Cassman 1973 EA 358**, the conditions for the grant of an interim injunction are that the applicant must establish that they have a *prima facie* case with a probability of success and that they would suffer loss that would not be capable of compensation by damages if the orders are not granted; lastly, if the court is in doubt, it may rule on the application on a balance of convenience.

26. Many of the factual allegations in the documents so far filed will have to be established by way of evidence at the main hearing of the suit. The only task facing this court at present with regard to the applications at hand is to establish who has established that they deserve orders of temporary injunction. This court is not expected to hold a mini-trial at this stage in order to determine the issues before it. However it was quite necessary to set out in detail the respective cases of the parties, however lengthy and tedious that appears to be, in order to give a clear perspective of this suit.

27. Having examined the documents filed by the parties in this case and the report filed by the Deputy Registrar, I am persuaded that the plaintiff has some documents of title and is in possession. Thus it has established that it has a *prima facie* case against the defendants.

28. As regards loss, I am not convinced that failure to grant the orders sought may occasion the plaintiff loss that can not be compensated for by way of damages; however it is vital to preserve the land subject matter of this suit.

29. In the interests of justice for all parties, I hereby dispose of both applications dated **24/4/2021** and **3/6/2021** by ordering that the *status quo* prevailing as at the present moment which, is that the plaintiff is in possession, shall be maintained by all parties pending the hearing and determination of the main suit. No party shall however subdivide or charge or waste or dispose of the suit land until the final determination of the instant suit.

30. The parties shall ensure that they have complied with the rules. The plaintiff shall file and serve all the documents necessary for his case within **14 days** and the defendants shall respond within **14 days** of service. The suit shall be mentioned on **7/12/2021** to fix a hearing date.

It is so ordered.

**DATED, SIGNED AND ISSUED AT NAKURU VIA ELECTRONIC MAIL ON THIS 10TH DAY OF NOVEMBER, 2021.**

**MWANGI NJORGE**

**JUDGE, ELC, NAKURU**