



**REPUBLIC OF KENYA**

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

**ELCC NO E42 OF 2021**

**JOASH K. YEGON**

**CHRISTOPHER K.C CHEBIEGON**

**JIMMY KIPROP YEGON**

**(Suing as the administrators of NEHEMIA CHEPYATOR CHEBIEGON).....PLAINTIFFS**

**VERSUS**

**ISAIAH KIPRUTO TANUI.....1<sup>ST</sup> DEFENDANT**

**MOSES ROTICH.....2<sup>ND</sup> DEFENDANT**

**DISTRICT LAND SURVEYOR,**

**ELDAMA RAVINE.....3<sup>RD</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR, KOIBATEK.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. This ruling is in respect to the Notice of Motion application dated **10/05/2021** which seeks the following orders:

1. ...spent

2. ...spent

3. **That pending the hearing and determination of this suit the honorable court be pleased to issue a temporary injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents by themselves, their servants and/or agents and/or employees from trespassing into, from alienating, from fencing, from moving the fence, from interfering, from occupying, from cultivating and planting crops, from selling, from disposing, from sub-dividing, and/or from having any dealings with the parcel of land comprising of 10 acres from effecting the recent survey Map No. Sheet 1 (104/3/20), a registry index map and published by survey of Kenya in September, 1979 to take away the 10 acre parcel of land and making it part of the Ravine Settlement 102/28.**

4. **That the costs of the application be in the cause.**

2. The application is supported by the affidavit sworn on **10/05/2021** by the 1<sup>st</sup> plaintiff/applicant. The grounds on the face of the application and the supporting affidavit are that the plaintiffs are the legal representatives of the estate of **Nehemia Chepyator Chepyegon**; that they were granted letters of administration *ad litem* on **2/03/2021** in the Eldama Ravine Principal Magistrate **Court Succession Cause No. E017 of 2021**; that they have a dispute with the 1<sup>st</sup> and 2<sup>nd</sup> defendants over a **10** acres parcel of land that was illegally hived from land parcel no. **Baringo/Perkerra-101/18** with the intention of it forming part of **Ravine Settlement 102/28**; that the applicants have learnt that a survey that was done recently, that is, the Survey Map No. **Sheet 1(104/3/20)**, an RIM published by the Surveys Department in **1979** had unprocedurally omitted the **10** acres from the plaintiffs' land; that as per the survey map dated **21/05/1958; No. 70302 Folio No. 83** and Register No. **24**, and **Survey Map Office Copy No 79252 Folio No 97 register no 58** dated **12<sup>th</sup> February 1962**, the boundary is in the middle of the river; that the **10** acres are joined to the **Baringo/Perkerra-101/18** by a brace symbol crossing the old Nakuru-Eldama Ravine road and this shows the full extent of **Perkerra 101 Settlement Scheme**, formerly **Mr. Denning's** land known as **L.R 9863** where plot **Baringo/Perkerra-101/18** is situated; that the deceased and the plaintiffs have been in occupation of the suit property since the year **1963**;

that the deceased had bought the parcel of land through the Settlement Fund Trustees; that in **2018** there was a meeting held by elders who confirmed that the ten acres belonged to the deceased; that they realized that the recent survey omitted the **10** acres from forming part of their land parcel No. **Baringo/Perkerra-101/18**; that it also omitted the river that separates their father's ten acre piece of land with the neighboring land owned by the 1<sup>st</sup> and 2<sup>nd</sup> defendants; that there are other survey maps that indicate that the ten acres form part of the deceased's parcel of land while others show that the ten acres does not form part of the land; that as a result of the survey map No. **Sheet 1(104/3/20)** that was erroneously published in **September, 1979**, the 1<sup>st</sup> and 2<sup>nd</sup> defendants have trespassed into the ten acres of land and uprooted the fence; that this was reported to the Eldama Ravine police station and given **OB No. 40/10/3/2021** and **OB 21/22/04/2021**; that this application be allowed in the interest of justice as they stand suffer irreparable loss and damage.

### Response

3. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed their Replying Affidavit dated **16/06/2021** and filed on **21/06/2021**. They deposed that before the late Nehemiah Chepiyegon died, he had subdivided land parcel No. **101/18**; that the subdivision was done on **06/02/2019** and approved by District Surveyor on **26/02/2019** mutation no. **04421080** and that he paid Registry Map Index amendment fees of Kshs **3,190.00** receipt No. **B3788837**; that this meant that the plaintiffs were fully satisfied with the **R.I.M sheet no 3(104/3/20)** of **1972**; that land parcel No. **Baringo/Perkerra Settlement Scheme 101/18** was subdivided into title numbers **1589, 1590, 1591, 1592, 1593, 1594, 1595, 1596** and **1597** and registered in the name of the plaintiffs; that the deceased together with the plaintiffs/applicants occupied the disputed area which forms part of **Baringo/Ravine Settlement Scheme 102/28** since **1965** illegally and failed to respect the boundary of **Baringo Settlement Scheme 101/287** which is now **Baringo/Perkerra Settlement Scheme 101/18**; that the boundary between the two parcels of land is the old road as per the letter dated **20/04/1964**; that there is a suit pending in court over the same subject matter which is **Eldama Ravine CMCC ELC SUIT NO. 6 OF 2021**; that the land Registrar has the power to determine the boundary between the two parcels of land as per the provisions of **Section 2(2)** of the Land Registration Act; that the Registry Index Map will assist in solving the boundary dispute between land parcel numbers **Baringo/Ravine Settlement Scheme 102/28** and **Baringo/Perkerra Settlement Scheme 101/18** and therefore the applicants should not be granted the orders sought.

4. The plaintiffs then filed a supplementary affidavit in response to the replying affidavit sworn on **16/08/2021** and filed on **23/08/2021**. The 2<sup>nd</sup> defendant then filed a further affidavit sworn on **21/09/2021** and filed on **23/09/2021**.

### Submissions

5. Upon perusal of the court record, there are no submissions filed by either of the parties.

### Determination

6. The plaintiffs/applicants are seeking for an order of injunction against the defendants/respondents. For the court to issue an order of injunction, the applicants must meet the conditions set out in the case of **Giella -vs- Cassman Brown 1973 EA 358**. These conditions are that the applicant must establish a *prima facie* case with a probability of success, the applicants must show that damages would not be an adequate remedy if the orders sought are not granted and when in doubt the court will decide on a balance of probability.

7. The court in the case of **Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 Others [2003] KLR** defined what a *prima facie* case is as follows:

**“So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.**

8. In the case of **Habib Bank AG Zurich vs. Eugene Marion Yakub Civil Application Number Nairobi 43 of 1982** (unreported), Madan, Law and Potter JJA. held that:

**“Probability of success means the court is only to gauge the strength of the plaintiffs case and not to adjudge the main suit at the stage since proof is only required at the hearing stage.”**

9. The plaintiffs' case is that they are involved in a dispute with the 1<sup>st</sup> and 2<sup>nd</sup> defendants over a parcel of land measuring **10** acres which they allege was illegally hived from land parcel No. **Baringo/Perkerra-101/18** to form part of land parcel No. **Ravine Settlement 102/28**. They allege further that this omission was done by the survey which is **Map No. Sheet 1(104/3/20)** published by the survey of Kenya in **September 1979** and **sheet No. 3(104/3/20)** and that they have been in occupation of the ten acres since the year **1963**. They allege further that after the said survey was done, the 1<sup>st</sup> and 2<sup>nd</sup> defendants trespassed onto the suit property and moved the fence and begun to till the land.

10. The 1<sup>st</sup> and 2<sup>nd</sup> defendants on the other hand allege that land parcel No. **Baringo/Perkerra Settlement Scheme 101/18** was subdivided by the late Nehemiah Chepiyegon on **28/11/2019** before he died and therefore that parcel of land no longer exists. But then they also admit that the plaintiffs have been in occupation of the disputed **10** acres of land since the year **1965** which they allege forms part of **Baringo/Ravine Settlement Scheme 102/28**.

11. It is my view that in light of the admission by the 1<sup>st</sup> and 2<sup>nd</sup> defendants that the plaintiffs have always been in occupation of the disputed ten acres, the plaintiffs have established a *prima facie* case. What they have not established is that they stand to suffer loss that cannot be compensated by damages if the orders sought are not granted and so this court is bound to apply the balance of convenience test. Since interlocutory injunctions are meant to preserve the suit property pending the hearing and determination of the suit, it is this court's

opinion that the balance of convenience tilts in favour of granting the temporary injunction sought.

12. In the end, I allow the application dated **10/05/2021** in terms of **Prayers Nos (3) and (4)** thereof. The plaintiff shall comply with the rules within **21 days** of this order and the defendant shall comply within **21 days** from the date of the expiry of the period granted to the plaintiff. This suit will be listed for a mention to fix a hearing date on **26<sup>th</sup> January 2022**.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 15TH DAY OF DECEMBER, 2021.**

**MWANGI NJORGE**

**JUDGE, ELC, NAKURU.**