



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 113 OF 2018

FREDRICK KIMANI NGINYA.....PLAINTIFF

VERSUS

FLESTA ACHAYO WARINWA.....1ST DEFENDANT

PAUL NJOROGI NGANGA.....2ND DEFENDANT

WILSON KIMANI WAITITU.....3RD DEFENDANT

ZIPPORAH NYAKIO PATO.....4TH DEFENDANT

FRANCIS MWANGI KIMANI5TH DEFENDANT

DISTRICT SURVEYOR KAJIADO COUNTY.....6TH DEFENDANT

LAND REGISTRAR, KAJIADO NORTH.....7TH DEFENDANT

RULING

What is before Court for determination is the Plaintiff's Notice of Motion application dated the 6th May, 2019 brought pursuant to Order 40 Rule 1 (a), Rule 2 and Order 51 Rule 1 of the Civil Procedure Rules 2010, Section 3A of the Civil Procedure Act and Article 40 of the Constitution. The Applicant seeks for orders that:

1. Pending the hearing and determination of this Application, this Honourable Court be pleased to grant a temporary injunction restraining the Defendants whether by themselves, their servants, agents, employees or any other person working at their behest from trespassing into land parcel NGONG/ NGONG/ 89299 and interfering with the quiet and peaceful possession of the suit property by the Plaintiff.
2. An order directing the 6th and 7th Defendants to restore and or correct the boundaries and the beacons that had been initially interfered with.

The Application is premised on the summarized grounds that the Plaintiff is the registered owner of land parcel number NGONG/ NGONG/ 89299 hereinafter referred to as the 'suit land'. The Plaintiff acquired the suit land following a sub division of the initial parcel of land known as NGONG/ NGONG/ 30039 respectively which was allocated to him after the subdivision of their family land NGONG/ NGONG/ 902. The Defendants have trespassed and wrongfully use a portion of the suit land. The 6th and 7th Defendants in conducting a survey of the suit land demarcated the boundaries out of negligence and in conspiracy with the 1st Defendant to 5th Defendants. Further, they embarked on creating an access road cutting across the suit land which action has defaced as well as devalued the land. The actions of the Defendants to create the access road on the Plaintiff's parcel of land is illegal and amounts to trespass.

The application is supported by the affidavit of the Plaintiff FREDRICK KIMANI NGINYA where he reiterates his claim above and explains that the subdivision of NGONG/ NGONG/ 902 resulted in the creation of land parcel numbers 30040, 30041 and 30042 and 30039. He avers that after the subdivision, land parcel number 30042 which was allocated to his brother was subdivided and sold to the 1st, 2nd, 3rd and 5th Defendants. Further, that an access road was created between the suit land and the Defendants' parcels, to enable them have access to their properties. He contends that on or about August, 2016, the Defendants herein trespassed on the suit land and made across road to their properties culminating in the interference with the beacons showing boundaries of the land. He claims the actions of trespass culminated in a

boundary dispute which was made known to the Land Registrar, Kajiado North by the Chief of Embul – Bul Location. Further, parties engaged the services of a government surveyor to align the boundaries before any dealings or transactions on the said parcels. He further states that on 20th July, 2016 alongside the 1st to 5th Defendants, they were summoned by the Land Registrar who directed that he would visit the disputed boundaries on 4th August, 2016 which he did. He avers that the Land Registrar's report has never been availed to him to date but on 12th February, 2019 he engaged the services of a licensed surveyor who conducted a re – survey of the suit land and established that the new boundaries demarcated by the Land Registrar as well as the District Surveyor's encroached on suit land.

The 1st Defendant FIESTA ACHAYO WARINWA in opposing the instant application filed a replying affidavit where he confirmed being the registered owner of land parcel number NGONG/ NGONG/ 32674.

The 2nd Defendant PAUL NJOROGE NGANGA opposed the application and filed a replying affidavit where he provided the history of the suit land and contended that the Plaintiff misled the Court as the access road that had been used from the time the Plaintiff's mother subdivided the original parcel is the same road still in use to date. He states that it is not true that James Waititu (deceased) created an access road when he subdivided his parcel of land much later on. He was informed by his father and one James Kinga Kungu (Surveyor) that on 4th August, 2016, the Land Registrar Ibrahim Billow conducted a site visit and concluded that the access road was correctly placed. The 3rd, 4th and 5th Defendants opposed the application and filed their respective affidavits where they denied the Plaintiff's averments. The 3rd Defendant confirmed owning land parcel number NGONG/ NGONG/ 30040 but the 4th and 5th Defendants deny owning any land adjacent to the suit land. They deny creating an access road as alleged by the Plaintiff. The 3rd Defendant avers that it is the Plaintiff who brought in 6th and 7th Defendants to demarcate the boundary and he even signed the attendance sheet. Further, that the Plaintiff failed to exhaust the Appeal remedies available to him.

The Plaintiff and the 1st upto 5th Defendants filed their respective submissions.

Analysis and Determination

Upon perusal of the Notice of Motion dated the 6th May, 2019 together with the supporting and replying affidavits including the parties' submissions, the only issue for determination at this juncture is whether the interim injunction sought by the Plaintiff ought to be granted pending the hearing and determination of the main suit

The dispute herein revolves around an access road. It is not in dispute NGONG/ NGONG/ 902 was subdivided by Zipporah Kimani and created land parcel numbers 30040, 30041 and 30042 and 30039 respectively. The Plaintiff claims the 1st to 5th Defendants have trespassed on his land and created a road which fact they deny. The Plaintiff in his submissions relied on section 18 (2) and 19 (2) of the Land Registration Act and the case of **Fredrick Otieno Obonyo C Gilbert Otieno Nyanjom & Another (2018) eKLR** to support his arguments. The 1st and 2nd Defendants in opposing the application submitted that the Plaintiff had not established a prima facie case. They relied on the cases of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** and **Mrao Ltd V First American Bank of Kenya Ltd (2003) eKLR** to buttress their averments.

The principles for consideration in determining whether temporary injunction can be granted or not is well settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358**.

In the first instance as to whether the applicant has demonstrated a prima facie case with probability of success. I note the Land Registrar had already proceeded to determine the boundary dispute herein on 4th August 2016 and directed the parties to maintain the access road as it was. The Plaintiff who is the Registered Proprietor of the suit land demands for a re determination of the road of access claiming the 1st to 5th Defendants have trespassed on his land.

In the case of Mrao Limited Vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125 the court held that: *' In civil cases, a prima facie 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. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.'*

From the facts presented by the parties herein, the original title NGONG/NGONG/902 was subdivided into 30039; 30040 and 30041. The said subdivisions were done by Zipporah Kimani who signed the Mutation form. Looking at annexure 'PNN 2' which is a copy of the Mutation Form for Ngong/ Ngong/ 902 the original parcel number, it is evident there is an access road therein. The Plaintiff seeks for the Land Registrar to undertake a fresh determination of the access road but has not indicated whether he appealed against the first Ruling. Further, the Plaintiff had not controverted the 2nd Respondent's averment that he is the one who invited the Land Registrar to determine the access road. I note the 1st, 2nd and 3rd Respondents are the registered proprietors of their respective portions of land and insist they have always used the access road. The 4th and 5th Defendants deny owning any land adjacent to the Plaintiff. In relying on the two cases cited above and based on the evidence as presented, I find that the Plaintiff has not established a prima facie case to warrant the injunctive orders sought.

On the second principle as to whether the Plaintiff will suffer irreparable loss which cannot be compensated by way of damages. I note the 1st to 3rd Respondents are proprietors of their respective parcels of land. Further, they contend that they have always used the access road. From the Mutation Form, it is evident that the access road was created at the time of the subdivision of Ngong/ Ngong/ 902. In the case of **Case of Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, 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. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy. ‘ In relying on this case and the facts as presented, I find that the Plaintiff’s alleged injuries are speculative.

On the question of balance of convenience, from the evidence presented by the parties, I find that the balance of convenience does not tilt in favour of the Plaintiff.

It is against the foregoing that I find the Notice of Motion dated the 6th May, 2019 unmerited and will proceed to dismiss it with costs.

Dated signed and delivered in open court at Kajjado this 9th day of March, 2020.

CHRISTINE OCHIENG

JUDGE

IN THE PRESENCE OF:

M/S. Oloo holding brief for 3rd, 4th and 5th defendants

Court assistant -Mpoye