

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 179 OF 2018

LOIS K. KESHINGA.....PLAINTIFF

VERSUS

DAVID OLE NKEDIENYE.....DEFENDANT

RULING

What is before Court for determination is the Plaintiff's Notice of Motion Application dated the 21st February, 2019 brought pursuant to section 1A, 1B, 3A and 63 (e) of the Civil Procedure Act and Order 40 rule (1) (c) (b), Rule 2 (1), (2), 3 (1) (3) Rule 4 (1), (2), (3), (4), Rule 10 (a) (b) (c) of the Civil Procedure Rules as well as Section 3(1), (2), (3), Section 13 (1), (7) (a) (c) (f) (g) , Section 18 (v) and 19 (1) (2) of the Environment and Land Court Act. The Plaintiff seeks orders of interim injunction against the Defendant by himself, his servants or agents from trespassing on land parcel number Kajiado/ Kitengela/ 53294; 53295 and 53296 pending the determination of this suit. Further, that the Defendant do remove forthwith the fence, structures, animals or any thing brought onto the land and be restrained from erecting thereon. The Plaintiff further seeks for the Deputy Registrar to make an inspection of the suit properties and present a report.

The application is based on the grounds on the face of it and supported by the affidavit of LOIS K KESHINGA where she deposes that together with her deceased husband KESHINGA OLE OIPUTA, they jointly owned land parcel number Kajiado/ Kitengela/ 1885 that was part of Kitengela Group Ranch, which land was subdivided and they remained with Kajiado/ Kitengela/ 42063 that has since been subdivided into Kajiado/ Kitengela/ 53294; 53295; 53296; 53297; 53298 and 53299 respectively, hereinafter referred to as the 'suit lands'. Further, the suit lands are still registered in their joint names. She confirms that the Defendant who is her younger brother owns land parcel number Kajiado/ Kitengela/ 1883. She claims in the year 2017 the Defendant laid a claim on their land for an unspecified acreage and assembled a group of elder purportedly members of the Kitengela Group Ranch and commenced the exercise of reclaiming the land. She explains that the Defendant assembled various people and together with her son, they attended a meeting held at the house of one Peter Katoru where a decision to visit the disputed site was done. She claims they were not given an opportunity to appoint their own surveyor or have any representation and not informed whether the Land Registrar had issued any summons or indeed if any dispute was registered. She contends that the intruders proceeded to re survey and re draft the boundary. Further, the intruders ignored any attempt to make reference to the title or registered mutation forms, holding that they have powers to alter any errors. She avers that they were ordered to remove their fence. Further, a Surveyor called Mr. Kaesha thereafter came to the site and proceeded to demarcate the land. She states that the Defendant proceeded to cut down trees, removed a barbed wire fence erected by her son, then made paddocks and brought livestock in the fenced area. She reiterates that she is entitled to restitution as together with her sons , they have been deprived of their land and inheritance in a classic case of corruption, intimidation as well as gang land seizure using elders with no legitimate power against registered land.

The Defendant DAVID K. OLE NKEDIANYE opposed the application by filing a replying affidavit where he confirms that the Plaintiff who is his sister together with her late husband, jointly owned land parcel number Kajiado/ Kitengela/ 1885 that they subdivided into Kajiado/ Kitengela/ 53294; 53295; 53296; 53297; 53298 and 53299 respectively. He further confirms owning land parcel number Kajiado/ Kitengela/ 1883. He denies laying a claim on the land of a neighbour called Katoru nor the Plaintiff's land. He further denies ever visiting the Plaintiff's land in the year 2017 to lay a claim on it. He explains that his parcel of land and the Plaintiff's were initially owned by Kitengela Group Ranch and that he invited his surveyor in the presence of some of the elders from the said Ranch, to confirm beacons with the GPS as pointed out by the said elders so as to undertake a re survey. He insists both parties were notified of the meeting and that the beacons were pointed out in the third meeting and not in November, 2017 as claimed. He contends that subsequently to the subdivision, it was discovered that there were boundary issues involving five parcels of land which included the Applicant's and his parcel of land. He denies convening a meeting but states that the same was done by officials of the Group Ranch, Area Chief, Land Surveyor, Registrar and elders, after giving notice to the affected persons. He avers that upon confirmation of the position of the beacons, it was discovered that the Applicant had encroached on his parcel of land, put up a fence therein, and she was advised to put her fence at the correct position. He further contends that during the original subdivision of the land owned by the Group Ranch many errors were found to have occurred, with many members finding themselves with either more land than indicated on the title or less land as stated in the title. He reiterates that he has put livestock and made a paddock in his land and denies ever entering into the Applicant's land. Further, that he has no interest in the Applicant's land.

The Applicant LOIS K KESHINGA filed a further affidavit where she contends that the alleged dispute could not have been determined in the manner described by the Respondent. Further, that the said exercise cannot be taken casually. She reiterates that the exercise resulted in the removal of a fence and drastic changes of loss of approximately 67 acres which he has put livestock and made a paddock.

Only the Plaintiff filed her submissions which I have considered.

Analysis and Determination

Upon consideration of the Notice of Motion Application dated the 21st February, 2019 including the parties' affidavits and Plaintiff's submissions, the only issue for determination at this juncture is whether the interim injunction sought by the Plaintiff is warranted.

It is not in dispute that the Applicant owns land parcel numbers Kajiado/ Kitengela/ 53294; 53295; 53296; 53297; 53298 and 53299 respectively. It is further not in dispute that the Defendant owns land parcel number Kajiado/ Kitengela/ 1883. The Plaintiff claims the

Defendant has trespassed on her land culminating in her loosing 67 acres. She seeks injunctive reliefs as against the Defendant. The Defendant insists there was a mistake in the subdivision and the same was corrected when the surveyor pointed out his beacons to him. From the averments of both parties, it seems to be that this was a boundary dispute. Sections 18 and 19 of the Land Registration Act provides as follows: **'18 (1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel. (2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section. (3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary: Provided that where all the boundaries are defined under section 19(3), the determination of the position of any uncertain boundary shall be done as stipulated in the Survey Act, (Cap. 299).**

Section 19. (1) If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries. (2) The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel. (3) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section.'

I note from the averments of each of the parties, no one has availed a report from the Land Registrar, Kajiado whose mandate is to determine the boundary. However, at this juncture, it is difficult for the court to decipher whether the said dispute has been determined by the Land Registrar or not. The Plaintiff annexed sketches of the said new boundaries and from a perusal of the same, it is not clear if it has been registered with the Director of Survey or are mere drafts sketches. Further, I note each party is occupying their respective portions of land except for the area the Plaintiff claims the Defendant has put a paddock and is rearing livestock, which fact the Defendant disputes. In line with the principles enshrined in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** and based on the facts before me, at this juncture, I find that the Plaintiff has not established a prima facie case as against the Defendant to warrant the injunctive orders sought. Further, in relying in the decision of **Nguruman Ltd v Jan Bonde Nelson & 2 others**, Civil Appeal No.21 of 2014(UR) where the Court held that if a prima facie case is not established, then irreparable injury and balance of convenience need no consideration, I will not consider the remaining two conditions as the Plaintiff has failed to meet the first condition in the threshold set to warrant the grant of an injunction.

I direct that this matter be referred to the District Land Registrar, Kajiado for purposes of determining the boundary in dispute. Since each party is occupying their respective land, I order that the obtaining status quo should be maintained where each party is to remain in the portion where occupy pending the determination of the suit.

Costs will be in the cause.

Dated signed and delivered via email this 23rd day of April, 2020

CHRISTINE OCHIENG

JUDGE