



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC.NO.13 OF 2020

EMILY JERUBET.....PLAINTIFF/APPLICANT

VERSUS

BARNABA KIBWAMBOK KOGO.....1ST DEFENDANT/RESPONDENT

JEREMIAH KIBIWOT KOGO.....2ND DEFENDANT/RESPONDENT

RULING

This ruling is in respect of application dated 28th February 2020 by the plaintiff applicant seeking for the following orders:

- a) Spent
- b) THAT the Defendants by themselves, their servants, agents and/or assigns be and are hereby restrained from evicting the Plaintiff/Applicant, ploughing, leasing, dealing and/or any other manner interfering with all those parcels of land known as L.R NO. NANDI/KIPKAREN SALIENT/787 and 788 pending the hearing and determination of this application inter partes.
- c) THAT in light of the acrimony on the ground, the Officer incharge Kabiyeet Police Station do ensure compliance of order two (2) above pending further orders of this court.
- d) THAT the injunctive orders above do remain in force pending the hearing and determination of the application dated 28th February, 2020 and/or further orders of this honourable court.
- e) THAT costs be provided for.

The plaintiff applicant filed this application under certificate of urgency seeking for orders of injunction against the defendants from interfering with the suit land pending the hearing and determination of the suit. The respondents were served with the application but they neither filed a response nor submissions as directed by the court. The court had granted interim orders during the COVID 19 pandemic to preserve the status of the suit land.

Counsel relied on the grounds on the face of the application together with the supporting affidavit of the plaintiff/applicant. It was counsel's submission that the Plaintiff/Applicant position that she is the legal registered owner of the suit parcels of land known as L.R Nos. L.R NO. NANDVKIPKAREN SALIENT/787 and 788 whereby she annexed a copy of the title of the suit parcels of land.

Ms Isiaho counsel for the plaintiff/applicant further submitted that the applicant currently resides on L.R No. NANDI/KIPKAREN SALIENT/788 having lived thereon with her late grandmother Rema Tapkigen Ng'etich prior to her death. That the suit parcels of land are sub-divisions of L.R NO. NANDI/KIPKAREN SALIENT/537 which belonged to her late maternal grandmother one, REMA TAPKIGEN.

Counsel submitted that it is the plaintiff/applicant's case that the parcel of land known as NANDI/KIPKAREN SALIENT/537 was allocated by the REMA TAPKIGEN(deceased) to three beneficiaries namely herself, JULIA JESANGA SEUREY (who is her mother) and the 1ST Defendant (BARNABA KIBWAMBOK KOGO) hence the resultant being NANDI/KIPKAREN SALIENT/787, 788 and 789 respectively

Ms Isiaho further submitted that it should be noted that the suit parcels of land were transferred to the above stated beneficiaries during the lifetime of the late and that the applicant contends that the sub-divisions were undertaken by the 1ST Defendant who instructed a private surveyor whereby fences were subsequently erected as per the directions of the said private surveyor without her being notified.

Counsel therefore submitted that the survey conducted by the private surveyor on the instructions of the 1st defendant had some discrepancies hence a prayer for a re survey of L.R NO. NANDI/KIPKAREN SALIENT/787 and 788 by the Nandi County Land Surveyor to place beacons in order to prevent future disputes. That the applicant in her supporting affidavit stated that she sought redress from the Land Registrar for rectification of the boundaries of the parcels but she was informed that the same constituted a land dispute hence the only redress would be obtained from the court.

Counsel further submitted that the defendants have threatened to dispose of the suit parcels and this would make the applicant suffer great loss and damage should the defendants make good their threats. Further that since the issue of boundary cannot be resolved by way of oral evidence, there is need for an expert report on the extent of the boundaries to be availed before this honourable court before the main suit is heard in order for the court to properly adjudicate over the issues between the parties herein.

Ms Isiaho submitted that the applicant has established a prima facie case with a probability of success by annexing a copy of the title deeds registered in her name and photographs showing that the 2nd Defendant has demolished the doors and windows to her house and that he had threatened to forcefully evict her from the suit parcel of land as well as uproot the maize crop.

Counsel therefore urged the court to grant the orders as prayed as the applicant has met the threshold for grant of injunctions.

ANALYSIS AND DETERMINATION

The issues for determination in an application for injunctions are well settled as per the Giella Casman Brown case. An applicant must establish that he or she has a prima facie case with a probability of success, that he or she is likely to suffer irreparable harm if an injunction is not granted and finally where the balance of convenience tilts if the court is in doubt.

On the first issue as to whether the applicant has established a prima facie case with a probability of success, the applicant has demonstrated that she is the registered owner of the suit parcels of land known as L.R NO.NANDVKIPKAREN SALIENT/787and L.R NO-NANDI/KIPKAREN SAUENT/788 by attaching copies of the title deeds.

The applicant also alleges that the boundaries of the said parcels of land were identified by the defendant in her absence and has discovered that the acreage thereof as indicated by the title documents do not tally with the measurements on the ground hence rendering resurvey necessary. This makes the case triable to determine the issues raised by the applicant.

On the second limb as to whether the applicant is likely to suffer irreparable harm if an injunction is not granted the applicant has annexed photographs of a house that has been tampered with by demolition. If this is not a threat to the preservation of the substratum of the suit, then what would we consider as such.

Order 40 rules (1) and (2) gives the court powers to grant temporary injunctions to restrain such acts as may waste, alienate, remove and or dispose of the suit parcel as it may deem fit until the disposal of the suit or further orders of the court.

On the issue as to where the balance of convenience tilts in case the court is in doubt, in considering the balance of convenience, it is necessary to assess the harm to the applicant if there is no injunction, and the prejudice or harm to the respondents if an injunction is imposed. As part of the consideration, the Court must also consider whether damages are likely to be an adequate remedy for the applicant if its rights are upheld in the final hearing but if no injunction is granted. Conversely, a counter consideration is whether damages are likely to give adequate compensation to the respondents, and any affected third party, if the interlocutory injunction is subsequently found to be wrongly granted and whether the respondents are likely to suffer irreparable harm.

From the evidence put forth before the court it is clear that the applicant will suffer harm if the injunction is not granted as there is real threat demonstrated by the respondents in terms of the demolition of the plaintiff's house. This would therefore mean that no prejudice will be occasioned to the respondents if an order of injunction is issued against the respondents.

The applicant also urged the court to order that the County Surveyor Nandi to resurvey the suit parcels of land to place beacons to avert future disputes. The applicant averred that they had gone to the Lands office Nandi County who advised them to come to court as this is a land dispute. If parties want their land to be demarcated, then the same must be done by the experts being a surveyor and a Land Registrar who will conduct the survey and give a report to court for adoption.

The Land Registrar has powers under Section 19(1) of the Land Registration Act deals with the role of the Land Registrar in the resolution of boundary disputes as follows:

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.

This section gives the Land Registrar powers to issue notices to the proprietors of land adjoining the boundaries in question of the intention to ascertain the boundaries. Having found that the applicant has met the threshold for grant of injunctions I order that the County Land Registrar together with the County Land Surveyor Nandi County do place beacons on **L.R NO.NANDVKIPKAREN SALIENT/787and L.R NO-NANDI/KIPKAREN SAUENT/788** as per the acreage on the titles. That the report be filed in court within 30 days and the cost of the resurvey be borne by the parties.

DATED and DELIVERED at ELDORET this 30th DAY OF JUNE, 2020

M. A. ODENY

JUDGE