REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 57 OF 2020

MPOYO OLE PARIKEN.....PLAINTIFF

VERSUS

KISIOYA OLE TEEKA.....DEFENDANT

RULING

What is before Court for determination is the Plaintiff's Notice of Motion application dated the 2nd September, 2020 brought pursuant to sections 1A, 1B and 3A of the Civil Procedure Act, Order 40 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules. The Plaintiff seeks for orders of injunction restraining the Defendant by himself, his agents, employees, assigns , Advocates, servants or any other person acting under his instructions from alienating, interfering, trespassing or operating a quarry on his land parcel number Kjd / Ewuaso Kedong / 2828 hereinafter referred to as the ' suit land', pending the outcome of the suit. Further, that the OCS Ewuaso Police Station to ensure compliance with the orders. The application is premised on the grounds on the face of it and the supporting affidavit of MPOYO PARIKEN where he deposes that he is the registered owner of the suit land and had been enjoying peaceful occupation thereon until 2016 when the Defendant trespassed on it by cutting trees, grazing and harvesting stones therefrom. He explains that he asked the Defendant to stop trespassing on the suit land and sought for assistance from the elders including the Deputy County Commissioner and the Defendant would stop periodically but later resume his acts. Further, in the beginning of 2020, the Defendant proceeded to undertake quarrying business on the suit land by harvesting stones, cutting trees and grazing with the current area occupied by the Quarry being seven (7) acres. He claims to have engaged the services of surveyors who confirmed in their report that the quarry dug and operated by the Defendant are in the suit land. He contends that the Defendant has no right whatsoever to trespass on the suit land and as a result of the said actions, he has suffered damages and his land has lost value.

The application is opposed by the Defendant who filed a replying affidavit sworn by KISIOYA OLE TEEKA where he deposes that he is the absolute proprietor of land parcel number Kajiado/ Ewuaso Kedong/ 1443 measuring 28.09 hectares which he was allocated by the Ewuaso Kedong Group Ranch, wherein he resides and undertakes farming. He confirms that he was shown the boundaries of his land by the Land Demarcation Committee during the demarcation of the Group Ranch and he has never had any issues with his immediate neighbours whom he shares a boundary with. He denies trespassing on the suit land nor participating in unlawfulness as alleged by the Plaintiff. He contends that the Plaintiff has never resided on the suit land nor practised animal husbandry thereon. He claims that some people who belong to Ewuaso Kedong Group Ranch Phase 2 in which the Plaintiff belongs have been claiming that they were allocated land within his land. Further, that being aggrieved with the persistent troubles, he approached the District Land Registrar, Kajiado North to resolve the dispute and on 4th June, 2019, after hearing all the affected parties, the said Land Registrar ruled that he was occupying his land and any third parties' claims were misguided. He insists the essence of the Ruling was that the boundary to his land was ascertained and fixed. He denies that the Plaintiff has any legitimate claim over his land as the boundaries were ascertained. He further explains that the Ewuaso Kedong Group Ranch was divided into Phase one and two with each of the Phases having its own Group Representatives. He reiterates that as a registered owner of his land, he is the absolute proprietor together with all rights of ownership and possession and the Plaintiff has no such rights over his land. He confirms disregarding the letter from the Deputy County Commissioner directing him to stop quarrying on his land as it had no legal basis. Further, that the application for injunction has no basis in law as it is only meant to delay the speedy conclusion of this suit when it is clear it has no merit. He reiterates that the Plaintiff has not established a prima facie case with probability of success and the balance of convenience is to allow him continue with possession of his land.

The Counsels for the Plaintiff and the Defendant submitted orally in respect to this application.

Analysis and Determination

Upon consideration of the Notice of Motion dated the 2nd September, 2020 including the rivalling affidavits and oral submissions, the only issue for determination at this juncture is whether the Plaintiff is entitled to orders of injunction pending the outcome of the suit.

It is not in dispute that the Plaintiff and Defendant both own their respective parcels of land. What is in dispute is that the Defendant is running a quarry which has encroached on seven (7) acres of Plaintiff's parcel of land, which fact he denies. The Plaintiff and Defendant in their oral submissions reiterated their claim and each referred to the documents annexed to their rivalling affidavits. The Plaintiff further relied on the principles as established in the case of **Giella Vs Casman Brown (1973) E.A 358** and claimed it had established a prima facie

case to warrant the orders sought. The Defendant insisted the Plaintiff had not established a prima facie case and he should be allowed to continue running his quarry as it is his source of likelihood.

In line with the principles established in the case of **Giella Vs Casman Brown (1973) E.A 358**, I will proceed to analyse whether the Plaintiff has established a prima facie case with a probability of success. The Court of Appeal in the case of **MRAO VS FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS C.A CIVIL APPEAL No. 39 of 2002 (2003) K.L.R 125** described a prima facie case as follows:

> **"….. is a case 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".**

From a perusal of annexure 'KOT 1' which is the Certificate of Title in the name of the Defendant, it shows the land measures 28.09 hectares. In the District Surveyor's report dated the 25th June, 2019 that each of the parties herein presented, which was prepared as a result of a boundary dispute between land parcel numbers Kajiado/ Ewuaso Kedong/ 1442 vs 1443, 1446 and 2827 where the said Surveyor made a finding that both ground occupation and alignment of Ewuaso Kedong/ 1443 which is owned by the Defendant do not tally. It further indicated that the ground acreage for Ewuaso Kedong/1443 is 63.72 hectares which is contrary to the acreage indicated in the title deed which is 28.09 hectares. As per annexure 'MOP 1' which is the Certificate of Title for land parcel number Kajiado/ Ewuaso Kedong/ 2828, it shows the same measures 11.82 hectares. Further in 'MOP 3' which is a Surveyor's report prepared by Geomatics Services Limited concerning re survey of parcels Kajiado/ Ewuaso Kedong/ 1443, 2827, 2828, 2826 and 1882, it indicates at Note 4 that the quarry is in parcel 2826 and 2828. The Defendant however insists that his parcel of land was in Phase one while the Plaintiff's parcel is in Phase Two. Further, that he declined to adhere to the Deputy County Commissioner's directive to stop undertaking quarrying activities as the notice was not legal. Looking at all the documents presented by the Plaintiff, to my mind they are not baseless as they point to an anomaly in respect to the Defendant's parcel of land and findings by both the Government and Private Surveyors. Further, based on the facts as presented, I find that the Plaintiff has indeed established a prima facie case to warrant the grant of the orders sought.

As to whether the Plaintiff will suffer irreparable harm that cannot be compensated by way of damages, I note the Plaintiff is the registered proprietor of the suit land. The Defendant is excavating a quarry which has encroached on seven (7) acres of his land as per the Surveyor's findings . The Plaintiff claims the land is reducing in value as the Defendant has declined to stop the quarrying activities. From the government surveyor's report it revealed that the ground acreage of the Defendant's land is much bigger than the actual size as indicated in his Certificate of Title. In the case of **Case of Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012,** it was held that **' …the Plaintiff 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 Plaintiff 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 Plaintiff. 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.'**

In relying on the cited decision and based on the circumstances at hand, I find that the Plaintiff's alleged injuries are not speculative as he has demonstrated the harm he continues to suffer while the acts of quarrying are ongoing on seven (7) acres of his parcel of land, which injury cannot be compensated by way of damages.

On the question of balance of convenience, from the evidence presented by the parties, I find that the said balance tilts in favour of the Plaintiff whose rights have been infringed upon by the Defendant.

It is against the foregoing that I find the Plaintiff's Notice of Motion application dated the 2nd September, 2020 merited and will allow it.

Costs of the application are awarded to the Plaintiff.

Dated signed and delivered in open court at Kajiado this 29th day of October, 2020

CHRISTINE OCHIENG

JUDGE