



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 74 OF 2019

GABRIEL ONSONGO OKONDO.....1ST PLAINTIFF
ELIZABETH KEMUNTO OGAKI.....2ND PLAINTIFF
AMOS LEMANGEN OLE KATEL.....3RD PLAINTIFF
VERA ODERA OGEMBO.....4TH PLAINTIFF
DAVID L. C MWANIKI.....5TH PLAINTIFF
LILIAN WANJIKU MUCHEMI.....6TH PLAINTIFF
BEATRICE WANJIRA KAMAU.....7TH PLAINTIFF
HUDSON LODENYO.....8TH PLAINTIFF
JOSEPH MENGE.....9TH PLAINTIFF
LILIAN NJERI THUKU.....10TH PLAINTIFF
JOSEPH GICHUHA THUMBI.....11TH PLAINTIFF

VERSUS

SANGIRI OLE KIOK.....1ST DEFENDANT
THE LAND REGISTRAR KAJIADO NORTH.....2ND DEFENDANT
THE HON. ATTORNEY GENERAL.....3RD DEFENDANT

RULING

What is before Court for determination are the 1st Defendant's two Notice of Motion applications dated the 23rd December, 2019 and 14th July, 2020. In the application dated the 23rd December, 2019 which is brought pursuant to Order 40 of the Civil Procedure Rules as well as Sections 1A, 1B & 3A of the Civil Procedure Act, the 1st Defendant seeks for the 3rd Plaintiff to be restrained from trespassing on land parcel number Kajiado/ Loodariak/ 123 pending the outcome of the suit. In the application dated the 14th July, 2020, the 1st Defendant seeks for the 3rd Plaintiff to be detained in Civil jail for a term not exceeding six (6) months for disobeying the orders of the Court made on 2nd March, 2020.

The two applications are premised on the summarized grounds that the 1st Defendant is the registered proprietor of land parcel number Kajiado/ Loodariak/123 which the 3rd Plaintiff has encroached as well as trespassed upon. Further, that despite the existence and service of the Court Order dated the 2nd March, 2020, the 3rd Plaintiff in utter disobedience of the said order, trespassed on the land by grazing his animals thereon. He contends that the 3rd Plaintiff is in contempt of the court and seeks for the preservation of the subject matter pending the determination of the main suit.

The two applications are supported by the affidavit of SANGIRI OLE KIOK where he reiterates his claim above and deposes that the Land

Registrar Kajiado North did indicate in his report dated the 20th November, 2017 that Point DD¹ which is the disputed site belongs to him. He explains that the dispute arose between the 3rd Plaintiff and himself and that vide a meeting held on 17th January, 2017 to resolve it, shepherds were prohibited from trespassing on the disputed area. He confirms that one Kadipo Saidimu has subdivided and transferred part of the disputed area to the 3rd Plaintiff. Further, that because of insecurity, he was advised to put up a notice thereon. He insists to date the 3rd Plaintiff is illegally in occupation of the disputed area. He contends that the Order of the Court issued on 2nd March, 2020 was served upon all the Plaintiffs but the 3rd Plaintiff in disobedience of the said Order has further trespassed on land parcel number Kajiado/ Loodariak/ 123 by way of grazing cattle.

The 3rd Plaintiff AMOS LEMANGEN OLE KAITEI opposed the said applications by filing two replying affidavits where he deposes that he is the registered proprietor of land parcel number Kajiado/ Loodariak/ 2149 and that he has been legally occupying his land as well as developing the same from 2011 without any interruption from any party. He confirms that his land neighbours the 1st Defendant's land and there is no fence or visible boundary line of any kind in between. He explains that one Kadipo Saidimu subdivided his parcel and he now owns his portion and not after 9th July, 2019 as averred by the 1st Defendant. Further, that the 1st Defendant was present during the said subdivision but never raised any objection and the notice he put up was done after he had purchased his land. He contends that he has kept peace despite threats and attacks by the 1st Defendant. Further, the orders sought by the 1st Defendant seek to evict him from his lawfully acquired land and would violate his constitutional legal rights. He reiterates that the Kajiado North Land Registrar should be ordered to undertake a site visit on the disputed boundary and determine the correct position between the 1st Defendant and himself. Further, that the application is frivolous, vexatious and an abuse of the court process. He avers that the issues of trespass and encroachment are before the Court for determination and the 1st Defendant is scheming on how to derail the case. In the second affidavit, the 3rd Plaintiff states that the application seeking to cite him for contempt is replete with falsehoods, contradictions and blatant attempts to mislead this court. Further, that he has fully complied with the Order of Court dated the 2nd March, 2020 and denies that his cattle have ever trespassed on the 1st Defendant's land. He further explains that due to the heavy rain, both his parcel of land and the 1st Defendant's are bushy with thickets. He reaffirms that there are no visible boundary marks between the two parcels and that it is the 1st Defendant who threatens his workers. Further, that the 1st Defendant's prayer that he should be imprisoned is malicious and made in bad faith.

The 1st Defendant and the 3rd Plaintiff filed their respective submissions to canvass the two applications.

Analysis and Determination

Upon consideration of the 1st Defendant's two notice of motion applications including the rivalling affidavits and submissions, the following are the issues for determination:

- Whether the 1st Defendant is entitled to orders of injunction restraining the 3rd Plaintiff from trespassing on land parcel number Kajiado/ Loodariak/ 123 pending the outcome of the suit.
- Whether the 3rd Plaintiff should be cited for contempt for violating the orders of the court granted on 2nd March, 2020.
- Who should bear the costs of the two applications?

As to whether the 1st Defendant is entitled to orders of injunction restraining the 3rd Plaintiff from trespassing on land parcel number Kajiado/ Loodariak/ 123 pending the outcome of the suit. The 1st Defendant claims the 3rd Plaintiff has trespassed on his land and grazed cattle thereon. The 3rd Plaintiff denied the allegations and insists he is the registered owner of his land and there is no visible boundary between his parcel of land and the 1st Defendant's. Further, that due to the rains, both parcels of land have enough pasture. In line with the principles established in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358**, I wish to decipher if the 1st Defendant has established a prima facie case as against the 3rd Plaintiff, with a probability of success. From the evidence presented, both the 1st Defendant and the 3rd Plaintiff are registered proprietors of their respective parcels of land. Further, both parties are in occupation of their respective parcels of land. From the pleadings herein, it is evident the fulcrum of the suit herein revolves around a boundary dispute. The Land Registrar Kajiado North had attempted to resolve the same and prepared reports. However, he is yet to present the said reports in court. The Matter is scheduled for mention on 21st October, 2020 for the said Land Registrar to present his report. The 3rd Plaintiff explained that one Kadipo Saidimu subdivided his parcel and he now owns his portion and not after 9th July, 2019 as averred by the 1st Defendant. Further, that the 1st Defendant was present during the said subdivision but never raised any objection and the notice he put up was done after he had purchased his land. He contends that he has kept peace despite threats and attacks by the 1st Defendant. The 1st Defendant admitted that the said Kadipo Saidimu subdivided and sold the disputed portion to the 3rd Plaintiff. From the facts as presented, it is clearly emerging that there is yet to be a clear demarcation of the boundary in dispute between the 1st Defendant and the Plaintiff. Based on the circumstances at hand and in line with Rule 32 of the **PRACTICE DIRECTIONS ON PROCEEDINGS IN THE ENVIRONMENT AND LAND COURTS, AND ON PROCEEDINGS RELATING TO THE ENVIRONMENT AND THE USE AND OCCUPATION OF, AND TITLE TO LAND AND PROCEEDINGS IN OTHER COURTS** which provides that: ' **During the inter-partes hearing of any interlocutory application, where appropriate, parties are encouraged to agree to maintain status quo. If they cannot agree, after considering the nature of the case or hearing both sides the Judge shall exercise discretion to order for status quo pending the hearing and determination of the suit bearing in mind the overriding interests of justice.**'

I direct that the Obtaining Status Quo be maintained with the 1st Defendant and the 3rd Plaintiff to remain on their respective portions of land pending the determination of the boundary. It is against the foregoing that I find that the 1st Defendant as indeed not established a prima facie case as against the 3rd Plaintiff. Since the first limb of the principles as established in the case of **Giella Vs Cassman Brown** has failed, the court is not at liberty to deal with the remaining two limbs as the same are consequential.

As to whether the 3rd Plaintiff should be cited for contempt for violating the orders of the court granted on 2nd March, 2020. The 1st Defendant has sought for the 3rd Plaintiff to be cited for contempt and committed to civil jail for six (6) months for contravening the orders of this court granted on 2nd March, 2020.

Black's Law Dictionary (Ninth Edition) defines contempt of court as: - **“Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”**

Further, section 29 of the Environment and Land Court Act stipulates thus: **‘ Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both. ’**

In the case of **North Tetu Farmers Co. Ltd v. Joseph Nderitu Wanjohi (2016) eKLR** where Justice Mativo stated that: **‘ writing on proving the elements of civil contempt, learned authors of the book Contempt in Modern New Zealand have authoritatively stated as follows: -**

‘There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases - (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant; (b) the defendant had knowledge of or proper notice of the terms of the order; (c) the defendant has acted in breach of the terms of the order; and (d) the defendant's conduct was deliberate.’

It is not in dispute that the Court made its Order dated the 2nd March, 2020 in the presence of the Plaintiffs' and Defendants' respective Counsel. In order to decipher whether the 3rd Plaintiff is in contempt of an order of this court or not, I wish to refer to make reference to the court records. In the current scenario, I note on the 11th November, 2019, the Court had made an Order that the Land Registrar Kajiado North and District Surveyor were to appear in Court to explain the position of the two reports on the disputed boundaries which forms the fulcrum of the suit herein. Further, they were to proceed afresh to the disputed site. However, on 2nd March, 2020, the Land Registrar, Kajiado North failed to attend Court and it was directed that the Obtaining Status Quo was to be maintained. This Order forms the basis of the 1st Defendant's application to cite the 3rd Plaintiff for contempt. From the averments in the 1st Defendant's supporting affidavit, he has not indicated the period the 3rd Plaintiff trespassed on his land by grazing cattle thereon. I note the 1st Defendant and the 3rd Plaintiff each own their respective portions of land. Further, the dispute on the two boundaries is yet to be determined. The 1st Defendant has not controverted the 3rd Plaintiff's averments, that there is no clear demarcation of the boundary between their two parcels of land and his denial that he never grazed his cattle on the 1st Defendant's parcel of land. Contempt proceedings are criminal in nature and the burden of proof is upon the 1st Defendant to prove the same is ongoing. However, from the averments in the 1st Defendant's affidavit, it is not clear, how the 3rd Plaintiff has violated the Status Quo Order as each party is still occupying their respective portions of land. In relying on the quoted authority as well as the legal provisions cited above, I find that in the current circumstances, the 1st Defendant has not proved his allegations of contempt as against the 3rd Plaintiff. I will hence decline to allow the Notice of Motion application dated the 14th July, 2020.

It is against the foregoing that I find the 1st Defendant's two applications dated 23rd December, 2019 and 14th July, 2020 unmerited and will disallow them.

Costs of the two applications will be in the cause.

Dated, Signed and Delivered at Kajiado this 21st Day of October, 2020

CHRISTINE OCHIENG

JUDGE