



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC CASE NO. 77 OF 2018**

**ISABELLA NJOKI PERE.....PLAINTIFF**

**VERSUS**

**CHINA COMMUNICATION CONSTRUCTION COMPANY LTD.....DEFENDANT**

**AND**

**MRG TRADING COMPANY LIMITED.....INTENDED INTERESTED PARTY**

**RULING**

What is before court for determination is the Plaintiff's Notice of Motion application dated the 30<sup>th</sup> May, 2018 where she seeks a permanent injunction against the Defendant in respect to land parcel number Kajiado/ Kitengela/ 2886 hereinafter referred to as the 'suit land', pending the outcome of this case. The Application is premised on the grounds on the face of it and the supporting affidavit of ISABELLA NJOKI PERE where she avers that she is the owner of the suit land and the Defendant has illegally trespassed on the same and commenced excavating thereon. She denies authorizing access to anyone over the suit land nor allowing any adjustments, additions or developments thereon. She contends that the process of excavating has destroyed plantation and defaced the suit land and as a result caused permanent and irreparable damage. She seeks injunctive orders to secure the suit land.

The application is opposed by the Defendant who filed Grounds of Opposition dated the 27<sup>th</sup> November, 2019, where it stated that granting a permanent interlocutory injunction will amount to granting a final order without a full hearing of the case on merit; the Plaintiff has not demonstrated a prima facie arguable case with probability of success; granting an injunction would amount to an eviction order; and the event intended to be enjoined has been overtaken by events. The Defendant and the Intended Interested Party further filed a replying affidavit sworn by MUCHONI RUIRU GIKONYO, its director and shareholder of the Intended Interested Party where he avers that they are proprietors of land parcel numbers Kajiado/ Kitengela/ 19441, 19442, 19443, 19444, 19445, 19446, 19447, 19448, 19449, 26474, 26475, 26476, 26477, and 26478 which were resultant subdivisions from Kajiado/ Kitengela/ 19118 and 19918. He confirms that the Intended Interested Party as the legitimate owner of the aforementioned parcels of land entered into a Lease Agreement dated 8<sup>th</sup> May, 2018 with the Defendant. Further, this culminated in the Defendant commencing excavation activities on land parcel numbers Kajiado/ Kitengela/ 19441, 19442, 19443 and 19444 which belong to the Interested Party. He contends that the Intended Interested Party appointed and commissioned its own land surveyors to confirm acreage and ownership status of the aforementioned properties. Further, the Intended Interested Party applied for Green Cards for its parcels of land which confirmed it owned the said parcels. He provided the history of acquisition of the said parcels of land by the Intended Interested Party and insists the Plaintiff has not provided a history on how she acquired the suit land. Further, that the Plaintiff's title could not have been issued before the Intended Interested Party's title and the same cannot be used to obtain the orders sought. He avers the Plaintiff has not come court with clean hands and the application is frivolous as well as defective. Further, that the same lacks merit.

The application was canvassed by way of written submissions.

**Analysis and Determination**

Upon consideration of the Notice of Motion application dated the 30<sup>th</sup> May, 2018 including the rivaling affidavits, Grounds of Opposition and submissions, at this juncture, the only issue for determination is whether an order of permanent interlocutory injunction should be issued against the Defendant from interfering with the suit land.

The Plaintiff in her submissions reiterated her claim and insisted the Defendant had trespassed on her land. She contended that the Defendant should be permanently restrained from encroaching on her land. She further sought to be awarded damages for the excavation. To buttress her averments, she relied on various decisions including **John K Koech V Peter Chepkwony (2019) eKLR; Meeker V Grissum 970 SW 2d 345, 347 (Mo. App. 1998); Philip Ayaya Aluchio V Crispinus Ngayo (2014) eKLR; Ochako Obinchi V Zachary Oyoti Nyamongo (2018) eKLR; Ntukusoi Ole Letiria V Ruth Ngonyo Kangethe (2019) eKLR; Lucy Bosire Vs Kehancha Div. Land Dispute Tribunal & 2 Others Savings and Loans Limited V Susan Wanjiru Muritu Nairobi (Milimani) HCCS No. 397 of 2002.**

The Defendant in his submissions reiterated its averments in the replying affidavit and insists parties are bound by their pleadings and a permanent injunction cannot issue at this interlocutory stage. Further, that the Plaintiff had not established a prima facie case with a probability of success. Further, an award of damages will be adequate compensation for the alleged trespass in the event the Plaintiff's claim over the disputed property is established after a full hearing. It relied on the following decisions: **Giella Vs Cassman Brown (1973) EA 358; Pamela Jebichii Koskei Vs Horizon Coach Co. Ltd & 2 others (2018) eKLR; Headmaster, Kiembeni Baptist Primary & Another Vs The Pastor of Kiembeni Baptist Church (2005) eKLR and Marion Wambui Munanu Vs Bernard Mwangi Munanu & Another (2018) eKLR** to buttress its 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 Plaintiff has demonstrated a prima facie case with probability of success, I wish to make reference to the case of **Mrao Ltd Vs First American Bank of Kenya Limited (2003) KLR 125** where the Court of Appeal had defined a prima facie. The fulcrum of this suit revolves around alleged trespass to the Plaintiff's parcel. As per the documents presented in the rivaling affidavits, it is not in dispute that the Plaintiff is the registered proprietor of the suit land. It is further not in dispute that the Interested Party is the owner of land parcel numbers Kajiado/ Kitengela/ 19441, 19442, 19443, 19444, 19445, 19446, 19447, 19448, 19449, 26474, 26475, 26476, 26477, and 26478. What is in dispute is the Plaintiff's claim that the Defendant has trespassed on her land and commenced excavations thereon. From the supporting affidavit, the Plaintiff has annexed photographs of the said excavations. The Defendant in its replying affidavit insists it has a Lease Agreement dated 8<sup>th</sup> May, 2018 with the Interested Party and undertook excavations on land parcel numbers Kajiado/ Kitengela/ 19441, 19442, 19443 and 19444 as per the terms of the Lease. I note this matter was referred to the Land Registrar Kajiado to determine a Boundary dispute between Land Parcel Numbers Kajiado/ Kitengela/ 2886 and 14118, 19441 up to 19484. Based on the report dated the 30<sup>th</sup> January, 2019 which was filed in Court on 11<sup>th</sup> July, 2019, the Land Registrar concluded that this is not a boundary dispute. From the evidence presented I note the Defendant was excavating as per the terms of the Lease and was not the owner of the land. Further, from the annexures in the Plaintiff's affidavit she has not provided the date. She was registered as owner of suit land.

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..... It must also be remembered that it is a serious thing to restrain a registered proprietor of a property over what is undeniably his unless there are justifiable grounds to do so. '**

I note the parties relied on various decisions touching on trespass to land and injunction. However, at this juncture I opine that these authorities are indeed relevant once this suit is set down for hearing on its merits. Based on the facts before me and in relying on the various decisions I have cited above; I find that the Plaintiff has not established a prima facie case to warrant an order of injunction over the Defendant who has a lease over the Interested party's parcels of land. Further, I opine that once the suit is set down for hearing and it is determined that the Defendant excavated on a portion of the Plaintiff's land, then damages will be an adequate remedy.

In the circumstances, I find the Notice of Motion dated 30<sup>th</sup> May, 2018 unmerited and will proceed to dismiss it.

Costs will be in the cause.

**Dated Signed and Delivered at Kajiado this 26<sup>th</sup> Day of November, 2020.**

**CHRISTINE OCHIENG**

**JUDGE**