



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC CASE NO.61 OF 2017

ALBERT BOYO KIRUI.....PLAINTIFF

VERSUS

BENJAMIN KIPROTICH A. KIGEN.....1ST DEFENDANT

KIPKURUI CHERUTICH.....2ND DEFENDANT

ERICK KIPTUM KIMOSOP.....3RD DEFENDANT

THE COUNTY LAND REGISTRAR

TRANS-NZOIA.....4TH DEFENDANT

THE COUNTY SURVEYOR

TRANS-NZOIA.....5TH DEFENDANT

THE ATTORNEY GENERAL.....6TH DEFENDANT

RULING

1. The application dated 20/11/2018 brought by the 3rd defendant seek the followings orders against the plaintiff:-

(1)spent

(2)spent

(3) That there be a temporary order of injunction restraining the plaintiff/respondent, his servants, agents, employees or any other person acting under his direction or authority from trespassing into, fencing, surveying, ploughing, selling, transferring, encumbering, laying any claim thereto or otherwise interfering with the parcel of land No. Kwanza/Namanjalala Block 4/Kapsitwet/131 meaning five (5) acres or thereabouts pending the hearing and determination of the suit.

(4) That the County Surveyor be directed to survey confirm (sic) the acreage and fix the boundaries between parcel No. Kwanza/ Namanjalala/Kapsitwet Block 4/45 and 131.

(5) That costs be paid by the plaintiff/respondent herein.

2. The grounds upon which the application is made are contained at the foot of the application and in the supporting affidavit sworn on 20/11/2018. In brief they are as follows: that the defendant is the registered owner of **parcel No. Kwanza/Namanjalala/Kapsitwet Block 4/ 131**; that the plaintiff has since filing of this suit trespassed on the portion thereof, ploughing the same forcefully and without defendant's consent while threatening time and again to visit violence against the 3rd defendant and therefore the 3rd defendant cannot enjoy user of the land. It is also averred that the plaintiff's acts are likely to result in violence and a breach of the peace.

3. The application is brought under **Section 1A and 1B, 3 and 3A of the Civil Procedure Act, Order 40 rule 1, 2, 3 and 4, Order 51 rule 1 of the Civil Procedure Rules and Section 3 and 13(1) (7) of the Environment and Land Court Act 2011.**

4. The defendant opposed the application through his grounds of opposition dated **3/12/2018** and filed in court on **4/12/2018**. In those grounds the plaintiff avers that interim orders on the application dated **4/4/2017** was allowed pending the hearing and determination of the suit and there is neither an appeal or review of the said orders that allowing the 3rd defendant's application will be a mockery of this court's earlier orders and that the 3rd defendant has not demonstrated any prejudice that he would suffer if the orders sought by him were not granted.

5. None of the parties filed submissions on the application despite orders of this court made on 29/1/2019.

6. Upon perusal of the record I have confirmed that on 4/4/2017 this court certified the application of the same date as urgent and granted an interim order restraining the defendants and their agents from interfering with the suit land. On the **24th august 2017** this court confirmed those interim orders to last till the end of the suit; though the court stated that the plaintiff had not established a prima facie case as against the 3rd defendant in the same ruling, it declined to strike out the suit as against the 3rd defendant as sought by the 3rd defendant. On that basis alone I find the plaintiff's averment that the grant of interim orders on **4/4/2017** would embarrass this court to be unfounded.

7. The current application alleges that the plaintiff has since the commencement of the suit trespassed onto the 3rd defendant's land. Just as well the suit against him was not struck out in the ruling cited above, for he can now ventilate his grievance without filing a fresh suit.

8. I find it strange that the plaintiff has not sworn any affidavit in denial of the 3rd defendant's application. The facts set out by the applicant are therefore not controverted and this court deems the application as not opposed. However, I have not had the advantage of seeing any conclusive report from a competent surveyor showing that there is encroachment of the applicant's land. None is attached to the application. The orders of injunction sought can not therefore be granted on the applicant's word alone while the same has not established a prima facie case against the plaintiff. The instant application is incompetent for this reason as far as **prayer number 3** thereof is concerned.

9. However I find that **prayer number 4** in the same application is merited as, if granted, it will address the issue of encroachment of the 3rd defendant's land by the plaintiff which is the subject of the instant application. The court will upon receipt of the surveyor's report be able to determine that issue of alleged encroachment appropriately.

10. I therefore dismiss **prayer no. 3** of the application dated **20th November 2018**. I also grant **prayer no. 4** of the said application. The county surveyor shall visit **plots nos. Kwanza/ Namanjalala/Kapsitwet Block 4/45 and Kwanza/ Namanjalala/Kapsitwet Block 4/131** and confirm the acreage of each parcel on the ground, ascertain whether, between the plaintiff and the defendant, any party has encroached on the other's land and file a report herein within **60 days** of this order.

11. The costs of the application shall be in the cause. The survey fees shall however be equally shared between the plaintiff and the 3rd defendant and if any of them defaults, the other party may meet his share of the fees provided that that other defaulting party shall refund to the paying party the full sum of those fees within **14 days** of the filing of the surveyor's report.

It is so ordered.

Dated, signed and delivered at Kitale on this 28th day of March, 2019.

MWANGI NJOROGE

JUDGE

28/03/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Wanyonyi for 3rd defendant/applicant

Mr. Kuria for the 4th - 6th respondent

Mr. Buluma absent for the respondent

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

