



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 816 OF 2017

MARIST BROTHERS KENYA

(REGISTERED TRUSTEES).....PLAINTIFF

VERSUS

ANNE R. NYARIARA.....1ST DEFENDANT

NOAH MONERIA OLE KURRARU.....2ND DEFENDANT

RULING

What is before Court for determination is the Plaintiff's Notice of Motion application dated the 18th July, 2017 and filed in Court on 19th July, 2017 brought pursuant to Order 40 Rule 1 of the Civil Procedure Rules, Section 1B and 3A of the Civil Procedure Act and all the other enabling provisions of the law. In the said application the Plaintiff seeks orders of the temporary injunction to restrain the Defendants from interfering with land parcel number KAJIADO/ LOODARIAK/ 2235 hereinafter referred to as the 'suit land', pending the outcome of the suit.

The application is premised on the ground that the suit land belongs to the Plaintiff. The Defendants have trespassed on the suit land by fencing and commenced developing it without the Plaintiff's authority. The Surveyor's report clearly shows that the Defendant has invaded the Plaintiff's land and is doing wanton damage to the vegetation thereon.

The application is supported by the affidavit of JOSEPH UDEAJAH who is a co – trustee to the Plaintiff who reiterates their claim above and deposes that the Plaintiff had purchased the suit land from the previous owner SALETO ENE NAKARINO. He contends that sometime in November, 2016 he established that a stranger had trespassed on the suit land and commenced fencing it. He explains that he thereafter conducted a Search, which revealed that the Plaintiff was still registered as the owner of the suit land. He reiterates that the Plaintiff has a valid title and will suffer irreparable loss if the instant application is not granted.

The application is opposed by the 1st Defendant ANNE NYARIARA who filed a replying affidavit where she avers that she is the registered proprietor of land parcel number KAJIADO/ILKILSUMET/ 738 having purchased the same from the 2nd Defendant on 7th August, 2012. She confirms taking physical possession of the said land and commenced developments thereon including sinking a borehole as well as fencing the entire property with chain link. She denies trespassing on the suit land as claimed by the Plaintiff. She insists she is currently occupying her land and has not threatened the Plaintiff's use and occupation of the suit land. She reiterates that she has a valid title to her land, has not been questioned by the Plaintiff and therefore the question of vacating the said land does not arise.

The Plaintiff through JOSEPH UDEAJAH filed a further affidavit where he reiterated his claim and acknowledged the existence of 1st Defendant's land. He insists the 1st Defendant is undertaking development on the suit land and not her land. He contends that the two parcels of land are situated in separate locations and the 1st Defendant has refused to seek the assistance of the District Surveyor to locate her land and trespassed on the suit land. He claims the 1st Respondent has on several occasions admitted that the suit land does not belong to her and she is pleading with the Plaintiff to exchange the suit land with her land, which is fifteen (15) kilometers apart.

Both parties filed submissions that I have considered.

Analysis and Determination

Upon perusal of the Notice of Motion dated the 18th July, 2017 and filed in Court on 19th July, 2017 together with the supporting and replying affidavits including the parties' submissions, the only issue for determination at this juncture is whether the interim injunction

sought by the Plaintiff ought to be granted pending the outcome of the suit.

Both the Plaintiff and the Defendant are staking claim over the suit land. The Plaintiff insists he is the registered proprietor of the suit land and has been issued with a title deed to that effect, while the 1st Defendant has trespassed on the suit land and commenced developments thereon. The 1st Defendant denies trespassing on the suit land and insists she is occupying her land.

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 line with this principle, the Court will proceed to interrogate whether the applicant has made out a prima facie case with a probability of success at the trial.

In the first instance as to whether the applicant has demonstrated a prima facie case with probability of success, I note the Plaintiff has a title deed to the suit land, which title has not been challenged by the 1st Defendant. The 1st Defendant has confirmed that her land is different from the suit land and that she is not occupying the Plaintiff's land. She however has not controverted the Plaintiff's averments that she commenced developing the suit land and requested for an exchange of the two parcels of land. Looking at the documents of title presented by the Plaintiff, it is evident that its claim over the suit land is not baseless.

Section 25(1) of the Land Registration Act provides as follows:-

'25. (1) The rights of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act and shall be held by the proprietor together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever but subject.'

In the case of **Ahmed Ibrahim Suleiman and another v Noor Khamisi Surur [2013] eKLR**, which states as follows: *'The Plaintiffs having been registered as proprietors and having been issued with a certificate of lease over title No. Nairobi/Block 61/69 are in terms of section 26 (1) of the Registration of Lands Act entitled to the protection of the law.'*

In relying on the facts as presented including the legal provision cited above and being persuaded by the aforementioned judicial authority, I find that the Plaintiff has established a prima facie case with a probability of success at the trial.

On the second principle as to whether the Plaintiff stands to suffer irreparable loss, which cannot be compensated by way of damages. Since the Defendants are not disputing that the Plaintiff is the registered proprietor of the suit land but deny trespassing on it. I wish to refer to the **Case of Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, where the Court of Appeal held that in an application seeking injunctive relief, speculative injury cannot suffice and there must be more than unfounded fear and the injury should be actual as well demonstrable that cannot be compensated by damages. In the current scenario, it is my considered view that the Plaintiff's injuries are not speculative as it has demonstrated the harm it stands to suffer if the defendants continue to trespass on its land and undertake activities of wanton destruction.

On the question of balance of convenience, from the evidence presented by the parties, I am not in doubt that at this juncture, the balance indeed tilts in favour of the Plaintiff that is the registered proprietor of the suit land.

In the circumstances, I find the Notice of Motion dated the 18th July, 2017 and filed in Court on 19th July, 2017 merited and will allow it.

Dated signed and delivered in open court at Kajiado this 26th March, 2019

CHRISTINE OCHIENG

JUDGE