



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 54 OF 2018

STEPHEN TRUFIMO OYENDE.....PLAINTIFF

VERSUS

MOHAMMED ABDILLAJI SHAIYA.....DEFENDANT

RULING

What is before court for determination is the Plaintiff's Notice of Motion dated the 17th April, 2018 brought pursuant to Order 40 Rules 1, 2, 3 & 9 and Order 51 Rule 1 of the Civil Procedure Rules; Sections 3, 3A and 63E of the Civil Procedure Act. The Plaintiff seeks for restraining orders against the Defendant in respect to land parcel number KAJIADO / KAPUTIEI NORTH / 17352 hereinafter referred to as the 'suit land', pending the outcome of the suit. The application is premised on the summarized grounds that the Plaintiff is the registered proprietor of the suit land and the Defendant has on numerous occasions attempted to encroach on the same. The Plaintiff reported the matter to Isinya Police Station and unless the orders sought are granted, he will suffer irreparable loss and damage.

The application is supported by the affidavit of STEPHEN TRUFIMO OYENDE the Plaintiff herein where he denies personal knowledge of the Defendant and explains that he has been spotted severally on the suit land claiming ownership. He is apprehensive that the Defendant might commence construction on the suit land. He explains that he reported matter to Isinya Police Station and handed over his ownership documents to them but the Defendant failed to do, despite the Police request. He contends that the continued interference by the Defendant on the suit land is unlawful and the same constitutes illegal trespass as well as an affront to his constitutional right to enjoy peaceful including quiet possession of his property. He is apprehensive there might be breach of peace if the Defendant makes good his threat to use force while encroaching on his property.

The Defendant MOHAMMED ABDILLAJI SHAIYA opposed the application and filed a replying affidavit where he deposes that the application is totally unmerited, hopelessly frivolous, vexatious, spurious and blatant abuse of the court process. He insists the Plaintiff has not demonstrated a prima facie case against him. He claims to be a stranger to the suit land and denies ever being thereon. Further, that he is unaware of the location of the suit land and denies meeting the Plaintiff's agent nor talking to him. He avers that he has no intention of encroaching or constructing on the suit land and claims he is the registered proprietor of land parcel number KAJIADO/ KAPUTIEI NORTH/ 5932 which he purchased from one Mercy Wangari Muiruri in 2011. Further, that his land is a resultant subdivision of Kajiado/ Kaputiei North/ 1129 together with land parcel number Kajiado/ Kaputiei North/ 5931. He disputes the mutation form which the Plaintiff has annexed to his affidavit and marked ' STO' indicating that the suit land was also subdivided from Kajiado/ Kaputiei North/ 1129 and insists it is inauthentic, a fabrication, a forgery as well as a fraud. He explains that the suit land's number is totally dissimilar sequentially and unrelated to the other two subdivisions on the said mutation. He claims that in September, 2017 he engaged the services of messrs Marik Development Company Ltd to mark out boundaries on his land and place beacons in accordance with the maps available at the office of the Director of Surveys, Kajiado, which exercise was carried out. He states that towards the end of 2017, his caretaker informed him that the Plaintiff had entered into his land and removed beacons as well as destroyed part of the fence, which he had erected thereon pursuant to the survey exercise, claiming he had encroached on the suit land. Further, he managed to speak to the Plaintiff through his caretaker's phone and realized he was disputing the boundary between the suit land and his land. He claims despite reporting the boundary dispute to the relevant authority, the Plaintiff proceeded to file the instant suit, obtained temporary injunctive orders and proceeded to destroy his fence. Further, that in August 2018, there was mediation between the Plaintiff and himself organized by third parties where it resolved that the Plaintiff was to withdraw this suit and call upon the government surveyor to demarcate the boundary of the suit land but he never did so. He reiterates that the suit land does not border his land and the Plaintiff seeks to fall back on a fabricated mutation.

The Plaintiff filed his submissions but the Defendant did not do so.

Analysis and Determination

Upon consideration of the materials filed in respect of the Notice of Motion dated 17th April, 2018 including the affidavits, annexures and submissions, the only issue for determination is whether the Plaintiff is entitled to orders of temporary injunction pending the outcome of the suit.

The principles for consideration in determining whether temporary injunction can be granted or not is well established in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358**.

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, while the Defendant also holds a title deed to his land. From the documents presented, it emerges that the two parcels of land are adjacent to each other. Further, that they all emanated from one mutation which fact is disputed by the Defendant. The Plaintiff submitted that he has established a prima facie to warrant the grant of temporary injunction and relied on sections 24, 25 including 26(1) of the Land Registration Act as well as the cases of **Eldoret ELC Case No. 361 of 2014: Kibusia Arap Konga Vs Evans Obonyo & Anor; Nairobi HCCA No. 44 of 2014: Naftali Ruth Kinyua V Patrick Thuita Gachure & Anor; Nairobi HCCC No. 568 of 2012: Lawrence Mwebi V Margaret & 2 Others; and Giella Vs Cassman Brown & Co. Ltd** to support his arguments.

The Defendant in his replying affidavit has challenged the validity of the Plaintiff's title and claims it is the Plaintiff who has actually trespassed on his land and destroyed a fence. It also emerged that the parties had realized there was a boundary dispute between them, which they attempted to resolve out of court but in vain. The issues being raised by both the parties cannot be determined at this interlocutory stage but once viva voce evidence is adduced. In the circumstances, I find it would be pertinent if the prevailing status quo was maintained where each party remained on their respective parcels of land, until the matter is determined.

On the second principle as to whether the Applicant suffers irreparable loss, which cannot be compensated by way of damages. Both the Plaintiff and Defendant claim ownership of their respective parcels of land. The Plaintiff insists the Defendant intends to commence construction thereon while the Defendant contends that the Plaintiff obtained ex parte orders of injunction and destroyed his fence. In reference to the case of **Nguruman Limited Vs Jan Bonde Nielsen**, I opine that both Plaintiff and Defendant's injuries are not speculative and they all stand to suffer irreparable loss and damage.

On the question of balance of convenience, from the evidence presented by the parties, I am not in doubt that the substratum of the suit would be interfered with, if the obtaining status quo is not maintained pending the outcome of the case herein.

Since both the Plaintiff and the Defendant are each claiming their respective parcels of land as evidenced by the documents presented. I will decline to grant the orders of injunction as sought but will proceed to make the following order:

1. Obtaining Status Quo be maintained where each party remains in their respective parcels of the land pending the outcome of the Suit.
2. The costs will be in the cause.

The parties are urged to comply with Order 11 and set the suit down for hearing as soon as possible.

Dated signed and delivered in open court at Kajiado this 20th day of May, 2019

CHRISTINE OCHIENG

JUDGE