



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 59 OF 2018

GIDIEL MWITI M'ARIMI.....PLAINTIFF

VERSUS

LUTHERAN WORLD FEDERATION.....DEFENDANT

RULING

1. The defendant filed an application dated **10/1/2019** on **23/1/2019** seeking an order of temporary injunction to restrain the plaintiff and his agents from further trespassing, constructing any boundary wall or structure, developing, alienating to third parties or otherwise dealing with all that parcel of land known as **Plot No. 186** situate within the agency compound located at Kakuma in Turkana County pending the hearing and determination of this suit and costs.
2. The application is brought under the provisions of **Order 40 Rule 1, Order 50 Rules 1 and 3 of the Civil Procedure Rules [2010] Sections 1A, 1B and 3A** of the **Civil Procedure Act Cap 21**.
3. The applicant has advanced the following grounds for his application: That the plaintiff is not the owner but a mere occupier of the suit property and there is pending before this court a dispute over the ownership of the property; that the plaintiff has commenced construction of a permanent boundary wall "*along the suit property*" (sic) which is located within the defendant's compound; that the plaintiff's boundary wall encroaches on the neighbouring plots and causes a security risk to the compound as well the nearby Kakuma airstrip; and that the suit property is in danger of being wasted damaged or alienated and it is therefore in the interest of justice that an order of injunction be issued.
4. The plaintiff filed his sworn replying affidavit dated **28/2/2019** on **1/3/2019**. He depones that the boundaries between Plot No. 186 and the defendant's land is clearly demarcated and defined by relatively old beacons fixed by the County Government of Turkana and there is no boundary dispute before this court; that the plaintiff's plot is separated from the defendant's land by wooden posts erected long ago which mark the boundary but many of them had been eaten by ants hence causing the fence to fall; that all the plaintiff has done is to replace the damaged posts along the boundary line that exists and he has not exceeded that boundary line or encroached into the defendant's compound at all. He avers that he does not need permission from the defendant to repair the fence and that there is no ownership dispute as alleged by the defendant.
5. Interestingly enough, this suit was filed by the plaintiff on **21/6/2018** whereby he sought an injunction to restrain the defendant from stopping the construction work being undertaken by the plaintiff or in any way interfering with the plaintiff's use of plot No.186. In the body of the plaint the plaintiff has averred that he is the lawful allottee of plot No. 189; that he prepared building plans with a view to developing the plot and obtained the necessary approvals from the Central and County Government departments; that he obtained project funds from a local bank and commenced foundation excavation works but the defendant whose land neighbours his plot illegally fenced off the plot and denied the plaintiff and his workers access to the site and thereby illegally halted the development work. The plaintiff avers that he is suffering hardship on account of servicing the development loan and principal amount and interest yet the project has stalled due to the defendant actions, and that his building materials lying idle at the site are being wasted and that he may suffer irreparable loss.
6. In their statement of defence the defendant has denied that the plaintiff is the lawful allottee of the said plot. After giving a narrative of how their compound came into being through donation by the local community during what it refers to as the **1992** Sudanese refugee crisis, the applicant states that the plaintiff merely bought a business called **Catherine's Pub** which had been run by one **Consolata Wanjiru Schnellinger** who had been allocated a plot in the compound in the year **2000** to enable her set up the business. The plaintiff had only paid **Kshs.700,000/=** as goodwill for the business but the plot was not transferred to him since the said Consolata Wanjiru Schnellinger had no capacity to sell the land as she never owned it in the first place. It is alleged the plaintiff began construction work in June, **2017** without seeking clearance from the Compound Management Committee as required in a memorandum of understanding between the plaintiff and the committee which runs the compound which is chaired by the defendant. It is said that the compound hosts numerous humanitarian agencies who include the defendant and that the land the compound is located on including the suit land still belongs to the local community in the Kakuma area todate.

7. In the reply to defence filed by the plaintiff on **13/9/2018** he reiterates that he is the lawful allottee of the suit land vide letter of allotment **Serial No. 0280** issued to him on the basis of the planning and markets committee meeting held on **1/3/1992** and that the defendant has no *locus standi* to question the validity of his ownership of the suit premises. He avers that the County Government of Turkana and the former County Council of Turkana were the trustees of the community/trust land within the county and had the ultimate authority to allocate plots to deserving applicants and that there is no merit in the defendant's claim that the land is still community land.

8. The defendant filed written submissions on **18/3/2019**. It would appear that the plaintiff did not file any submissions as none appear in the record.

9. I have examined the documents filed by the plaintiff and they include what he refers to as a copy of a letter of allotment, a letter acknowledging receipt of an environmental impact assessment project report dated **7/7/2017**, an environmental impact assessment licence from the National environment management authority dated **2/8/2017** (with conditions), a purported letter of transfer of the plot to the plaintiff, a valuation report, and some building plans.

10. Neither the plaintiff nor the defendant has involved the County Government of Turkana in this litigation for reasons unsaid; the true custodian of community land in Turkana has therefore not been heard in this application, which is rather unfortunate because the court has no evidence, even by way of an affidavit from the County Government of Turkana, to demonstrate that the land falls under the category of community land.

11. The plaintiff's objection to the defendant's challenge raised against his planned developments on the suit land is partially merited in that this is litigation between private parties and the defendant is, just like the plaintiff, a mere beneficiary of the land.

12. The facts set out in the defendant's defence need be proved by way of a substantive hearing before they can be relied on. That has not occurred yet and this court has no evidence to go by in issuing the orders sought by the defendant in the application.

13. In the circumstances of the instant application, I do not think that the conditions set out in the case of **Giella vs Cassman Brown 1973 EA 358** regarding the grant of an order of temporary injunction has been satisfied by the defendant.

14. I therefore find that the application dated **10/1/2019** has no merits and the same is struck out with costs.

15. This court is also alive to the statements regarding the classification of land as alleged by the defendant herein, as well as the copies of allotment letter relating to the suit land exhibited by the plaintiff. It would not be proper to leave out the County Government of Turkana in any substantive determination of the instant suit. This court therefore orders that the County Government of Turkana shall be enjoined in this suit as an Interested Party hereto. The plaintiff shall amend the plaint accordingly and serve it upon the Interested Party within **14 days** hereof and the said Interested Party shall file its defence within **21 days** of that service.

Dated, signed and delivered at Kitale on this 6th day of May, 2019.

MWANGI NJOROGE

JUDGE

6/5/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Ndarwa holding brie for Nderitu for Applicant

N/A for the Plaintiff/Respondent

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

6/5/2019