



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 112 OF 2018

BENSON LONGOR EBEL.....PLAINTIFF

VERSUS

COUNTY EXECUTIVE COMMITTEE

MINISTRY OF LAND, HOUSING &

URBEN DEVELOPMENT,

TURKANA COUNTY.....1ST DEFENDANT

COUNTY GOVERNMENT OF TURKANA...2ND DEFENDANT

RULING

1. The application dated **14/12/2018** which was filed in court on the same date has been brought by the plaintiff. It seeks the following orders:-

- (1) That this application be certified as urgent and the same be heard ex-parte in the first instance.**
- (2) That pending the hearing interpartes of this application, the court do issue a temporary injunction restraining the defendants/respondents by themselves, their agents or servants from evicting, demolishing, trespassing, constructing and/or in any other manner from interfering with the plaintiff's/applicant's occupation, access to, use or quiet enjoyment of all that land parcel situated along Lodwar-Kitale Highway, adjacent to Kenya Power and Lighting Company Ltd, Lodwar Offices.**
- (3) That upon the hearing and final determination of this suit the court do issue: a permanent injunction restraining the defendants/respondents by themselves, their agents or servants from evicting, demolishing, trespassing, constructing and/or in any other manner from interfering with the plaintiff's/applicant's occupation, access to, use or quiet enjoyment of all that land parcel situated along Lodwar-Kitale Highway, adjacent to Kenya Power and Lighting Company Ltd, Lodwar Offices.**
- (4) That upon grant of prayers 1, 2, and 3 hereinabove, the court be pleased to issue an order directing the Officer commanding Lodwar Police Station, Deputy Officer Commanding Lodwar Police Station, and/or Officer in Charge of Lodwar Police Station to be served with this order and to ensure compliance thereof.**

(4) That upon grant of the prayers 1, 2 and 3 hereinabove, the court be pleased to issue an order directing the Officer Commanding Lodwar Police Station, Deputy Officer Commanding Lodwar Police station, and/or Officer in Charge of Lodwar Police Station to be served with this order and to ensure compliance thereof.

(5) That the defendants/respondents do bear the costs of this application

2. The applicant has brought the application under **Article 40(5) and (6) Constitution of Kenya, 2010, Section 1A, 1B, 3, 3A** of the **Civil Procedure Act, Order 40 Rule 1 and 2, 51 Rule 1 of the Civil Procedure Rules.**

3. The grounds upon which the application is made are contained at the foot of the application. Briefly those grounds are that the applicant owns the suit land which he has extensively developed; that he was issued with a two (2) week notice by the 1st respondent to vacate on the ground that his property is on a road reserve, an allegation that he disputes, and that he risks being evicted with resultant loss and damage and violation of his constitutional rights to owning property; that in any event the 1st respondent has acted ultra vires as issuance of such a notice, if any is deserved, should be by Kenya National Highways Authority, (KeNHA) and that he has a *prima facie* case with high chances of success.

4. The application is supported by an affidavit of the applicant dated **14/12/2018** which lays emphasis on the above grounds.

5. In reply to the application the respondents filed a replying affidavit sworn on **18/3/2019** by **Esther Lokwee** the CEC of the 1st defendant. In that affidavit the deponent depones that the plaintiff lacks any registered or other proprietary interest in the suit land and has failed to provide any proof of such and his claim is not therefore supported by any formal records; that the land is not described or identified; that that the suit land has never been allocated and can not be allocated as it is a buffer between the main road and a government installation and so it is a reserve and public land; that there have arisen conflicts between him and the KPLC over the suit property; that the claim of allocation to him by the deputy mayor, whose power to allocate government land is doubted by the deponent, is false; that in any event the applicant should have applied for a plot at the municipal offices as is the usual procedure; that the developments on the suit land are illegal for want of development permission; that notice was issued to all persons in occupation of the land around the applicant's claimed area and not just the applicant; that the applicant and the 1st respondent have had consultations over the notice whereupon he merely pleaded for time to vacate but it is evident that he was bent on delaying his removal from the land and that under **Article 62(2)** the respondents have responsibility over public land in counties.

6. The plaintiff filed submissions on **15/4/2019** while the defendant filed submissions on **26/4/2019**.

7. I have considered those submissions.

8. This is an application seeking a temporary injunction. In the case of **Giella -vs- Cassman Brown 1973 EA 358** the conditions for the grant of an order of temporary injunction were laid down as follows: the applicant must demonstrate the existence of a *prima facie* case and secondly, the applicant must demonstrate that he stands to suffer loss that can not be compensated by way of damages; thirdly, if the court is in doubt then it should rule on a balance of probabilities.

9. Has the applicant established that he has a *prima facie* case?

10. In the **Mrao Ltd -vs- First American Bank of Kenya & 2 others 2003 KLR 125**, the court observed as follows while dealing with the definition of a *prima facie* case:

“In civil cases, a prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A

prima facie case is more than an arguable case”.

11. He claims to be the rightful owner of the suit land. What is the evidence to that effect? He submits that land in Turkana is communally held and that he was allocated the suit land by the Deputy Mayor of the defunct Municipal Council of Turkana in the year **2011**. The evidence of allocation that he relies on is a letter dated **2/2/2011** from the Assistant Chief, Nawoitorong Sub-location.

12. In my view and without even having to consider the fact that there is another letter exhibited by the respondents said to denying the veracity of the letter attached to the plaintiff’s application, that letter dated 2/2/2011 emanating from the plaintiff is not proper evidence of allocation by the Municipal Council of Turkana the predecessor to the 2nd defendant or by any other allocating authority.

13. Having failed to establish ownership by way of formal title documents, can the applicant be said to have failed to establish a prima facie case?

14. It is noteworthy that both sides to this litigation agree that the land in Turkana is community land. It is alleged in the chief’s letter that the applicant and others have been resident on the suit land for about **20** years though for now there is no independent evidence to corroborate this allegation.

15. At first the response by the respondents gives the impression that the suit land is a road reserve but upon a closer examination of the text it becomes clear that they are saying is that the land is unallocated and is a “*buffer zone*” between the Kenya Power & Lighting Company premises and the main road. No evidence is however attached of the allegation that the land consists of a designated “*buffer zone*”.

16. The status of the suit land is therefore yet to be ascertained. If the land is communally owed and the applicant has been in possession thereof as claimed, does the applicant have any right or interest in the land by mere virtue of occupation in the absence of any documents in proof of ownership? If eviction issues, what will be the fate of the applicant’s claim to the effect that the respondents are frustrating his pursuit of title documents to the suit land to which he claims to have legitimate expectation? There is need to examine the rights of a person in occupation of the subject land before final orders are made in the suit. An eviction that would totally remove the applicant from the suit land would not leave room for this court’s inquiry geared toward that purpose. In my view these are matters in which the court is in doubt and which the court has to investigate upon a full hearing of the matter.

17. Would the applicant suffer any loss that may not be compensated for by way of damages? The applicant has demonstrated by way of a report that there is a permanent development on the suit land. The photographs in the survey report attached to the application demonstrate the existence of structures built on the land.

18. Despite the structures having been built under their watch, the respondents now aver that the developments are illegal.

19. This court is of the view that if there was prior authorization by the respondents or their predecessor to the developments any eviction before full trial, which would occasion the applicant untold loss, improper. In my view there is need for a full hearing of the case. They can not be ascertained now.

20. It would be necessary in my view to avail the applicant the protection of the law by way of an injunction in the light of the above uncertainties.

21. In view of the foregoing this court finds it necessary to decide the application on a balance of convenience and that convenience lies in issuing an order of temporary injunction as sought. I therefore grant the application in terms of **Prayers No. 3** of the application dated **14/12/2018**.

22. The costs of the application shall be in the cause.

Dated, signed and delivered at Kitale on this 15th day of July, 2019.

MWANGI NJOROGE

JUDGE

15/7/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

N/A for the Applicant

N/A for the Respondent

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

15/7/2019