



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 139 OF 2018

SAMUEL KINTALELEL KIPAREN.....1ST PLAINTIFF

ROTIKEN OLE KIPAREN.....2ND PLAINTIFF

MOKINYO OLE KIPAREN.....3RD PLAINTIFF

JOB MALOVA ABOKI.....4TH PLAINTIFF

ABRAHAM CHOTI ARATI.....5TH PLAINTIFF

JOSIAH MACHUKI MANDIEKA.....6TH PLAINTIFF

PHELLIS MANDIEKA.....7TH PLAINTIFF

MERUKANA INVESTMENTS LIMITED.....8TH PLAINTIFF

VERSUS

LAND REGISTRAR – NGONG.....1ST DEFENDANT

ATTORNEY GENERAL.....2ND DEFENDANT

AND

DAVID KARUIRU & 25 OTHERS.....INTERESTED PARTIES

RULING

What is before Court for determination are Plaintiffs' two Notice of Motion applications dated 3rd September, 2018 and 15th February, 2019 respectively. The Plaintiffs' have brought the said applications pursuant to Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules including Section 3A of the Civil Procedure Act and Article 159 of the Constitution. The Plaintiffs' seek injunctive orders against the Defendants in respect of Land Parcel Numbers Kajiado/ Ntashart/ 13190; 2494; 2496; 1594 and 8185 respectively. They further seek orders to restrain Geomatics Services Limited from entering the said parcels of land and for status quo to be maintained. The said applications are premised on the summarized grounds that the Applicants' are the registered proprietors of the said parcels of land, which the Respondents have encroached upon. Further, that the Land Registrar made an arbitrary and unjustifiable decision without summoning the Plaintiffs and they are apprehensive he may proceed to gazette the said decision, which will cause them irreparable damage.

The applications are supported with the affidavits of SAMUEL KINTALELEL KIPAREN and JOSIAH MACHUKI MANDIEKA where they reiterate their claim above. In the affidavit of SAMUEL KINTALELEL KIPAREN, he avers that he is the registered proprietor of Kajiado/ Ntashart/ 13190 which he has been occupation of. He is aware his late father sold Kajiado/ Ntashart/ 2494; 2496; 1594 and 8185 respectively to the 2nd to 8th Plaintiffs. He claims on or about 30th August, the Land Registrar together with the Defendants herein evicted them from their land in an effort to determine the boundary dispute in relation to Kajiado/ Ntashart/ 50 and 51 respectively. He contends that despite their insistence that the parcels of land in Kajiado/ Ntashart/ 50 had been sold and transferred to other parties who were not present, the Land Registrar and the Defendants proceeded with the hearing of the land dispute. He insists he was not afforded a fair hearing but the Land Registrar proceeded to shift the boundary of Kajiado/ Ntashart/ 51 to encroach on Kajiado/ Ntashart/ 50. In the affidavit of JOSIAH MACHUKI MANDIEKA he confirms being the registered proprietor of Kajiado/ Ntashart/ 9156 and 8185 respectively which he has been in occupation of. He contends that on or about 30th August, the Land Registrar together with the Defendants herein evicted them from their land in an effort to determine the boundary dispute in relation to Kajiado/ Ntashart/ 50 and 51 respectively. Further, that despite their

insistence that the parcels of land in Kajiado/ Ntashart/ 50 had been sold and transferred to other parties not present, the Land Registrar and the Defendants proceeded with the hearing of the land dispute. He insists he was not afforded a fair hearing. He reiterates that the issues concerning boundaries were deliberated through minutes dated 9th March, 2018 which made a determination of the genuine owners of the properties. Further, that the boundaries and the beacons were very clear. He states that they have received a letter dated 1st February, 2019 from Geomatics Services Ltd notifying them of the eminent entry upon parcel Nos Kajiado/ Ntashart/ 1654 – 1679 (Originally 281).

The Interested Parties opposed the application and filed a replying affidavit sworn by DAVID KARUIRI on their behalf where he deposes that they are registered proprietors of parcel Nos Kajiado/ Ntashart/ 1654 – 1679 having purchased the same jointly in 1980 and have their various title deeds. He avers that the application dated 15th February 2019 is fatally defective and an abuse of the Court process as fixing of the external beacons had already been undertaken by the District Surveyor and Land Registrar as covered by the Report of the Land Registrar dated 6th December, 2018 which is annexed to the Supporting Affidavit. He contends that Geomatic Services Limited has been appointed in accordance with the Survey Act and its appointment can only be challenged through judicial review. He states that the application is a ploy to delay and deny the Interested Parties' from exercising their full proprietary rights. He reiterates that the Applicants were given proper notice of entry for purposes of survey, which does not interfere or threaten any interest. He reiterates that the Application has been driven by the expected compensation of the Standard Gauge Railway Line.

The Plaintiffs and the Interested Parties filed their respective submissions that I have considered.

Analysis and Determination

Upon perusal of the two Notice of Motion applications dated 3rd September, 2018 and 15th February, 2019 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 Plaintiffs ought to be granted pending the hearing and determination of the main suit.

Both the Plaintiffs and the Interested Parties are staking claim over their respective parcels of land. The Plaintiff insists the Land Registrar proceeded to determine boundary disputes without giving them a hearing culminating into land parcel number Kajiado/ Ntashart/ 51 encroaching into Kajiado/ Ntashart/ 50. The Plaintiffs seek to stop Geomatics Services Limited who are surveyors from entering the dispute parcels. The Plaintiffs have submitted that they have established a prima facie case to warrant the orders sought and have relied on the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358; Terry C Maina Vs District Land Registrar, Kajiado (2015) eKLR; David Murai V District Land Registrar Nyandarua & Another (2019) eKLR; Waithaka Vs Industrial and Commercial Development Corporation (2001) eKLR; Mrao Vs First American Bank Of Kenya Ltd & Two Others C.A Civil Appeal No. 39 Of 2002 (2003) K.L.R 125; Charter House Investment Ltd Vs Simon K Sang & Others Civil Appeal No. 315 of 2004 and Nadejda Kisseleva Murage V Kajiado North District Land Registrar & 5 Others (2015) eKLR** to buttress their claim above.

The Interested Parties opposed the applications and submitted that the Plaintiffs had not established a prima facie case to warrant the orders sought. They have relied on various cases including **Mrao Vs First American Bank Of Kenya Ltd & Two Others C.A Civil Appeal No. 39 Of 2002 (2003) K.L.R 125; Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358; Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012; Secretary, County Public Service Board & Another V Hulbhai Gedi Abdille (2017) eKLR; Rich Productions Limited Vs Kenya Pipeline Company & Another (2014) eKLR; Narendra Chaganlal Solanki V Neepu Auto Spaces Ltd Kisumu High Court Civil Case No. 90 of 2003; Kenya Commercial Finance Company Limited Vs Afraha Education Society (2001) 1 EA and Joseph Wambua Mulusya Vs David Kitu & Another (2014) eKLR** to oppose the application for injunction.

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 the first instance as to whether the Applicants have established a prima facie case with probability of success. It is not in dispute that the Plaintiffs own their respective parcels of land. Further, the Plaintiffs are not disputing the Interested Parties' titles to land. From the evidence herein, it emerges that there has been a boundary dispute culminating in the Land Registrar's report. The Plaintiffs' claim they were not given audience, which fact is disputed by the Interested Parties'. The Plaintiffs further claim that one Geomatics Surveyors Limited notified them of their intention to enter their land. The Interested Parties insist the boundaries had already been fixed vide the Land Registrar's report dated 6th December, 2018. In the case of **MRAO VS FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS C.A CIVIL APPEAL No. 39 of 2002 (2003) K.L.R 125** the Court described a prima facie case as follows:

“.... is a case 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 as to call for an explanation or rebuttal from the latter”.

Further, in the case of **Case of Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, 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.

I note the Land Registration Act gives the Land Registrar mandate to determine a boundary dispute. Further, an aggrieved party has recourse to Appeal or to institute judicial review proceedings to quash the said proceedings. In the current case, the Plaintiffs never informed Court on whether they appealed against the Land Registrar's Ruling or sought to quash it through judicial review. Since the Plaintiffs never sought to quash the decision of the Land Registrar nor Appeal against it, but are seeking to stop the Surveyors' from entering suit lands, at this juncture, I am unable to restrain the said surveyors from entering the said parcels of land. In the circumstances, I find that the Plaintiff has not established a prima facie case to warrant the orders sought.

It is against the foregoing that I find the two Notice of Motion applications dated 3rd September, 2018 and 15th February, 2019 respectively unmerited and will proceed to disallow them.

Costs will be in the cause.

Dated signed and delivered in open court at Kajiado this 30th day of September, 2019.

CHRISTINE OCHIENG

JUDGE