



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MIGORI**

**ELC CASE NO. 97 OF 2017**

**(Formerly Kisii ELCC No. 318 of 2012)**

**MOSES OWINO ODONGO.....PLAINTIFF/APPLICANT**

**VERSUS**

**ALBERT ONYANGO.....DEFENDANT/RESPONDENT**

**RULING**

1. This ruling is in respect of an application by way of Notice of motion dated 18<sup>th</sup> January 2019 and filed on 24<sup>th</sup> January 2019 brought pursuant to section 1A and 3A of the Civil Procedure Act (Cap 21), and Order 51 Rule 1 of the Civil Procedure Rules, 2010. The plaintiff (applicant) namely Moses Owino Odongo who appears in person, is seeking the following orders against the defendant (respondent), Albert Onyango,

***i. Spent***

***ii. That the Honourable court be pleased to issue an ORDER of injunction restraining the defendant from further interfering with the established beacons separating land parcel number Kanyamwa/Kayambo/Kwamo/389 and Kanyamwa/Kayambo/Kwamo/390 (the suit land) established boundary and further cutting down of trees on parcel number Kanyamwa/Kayambo/Kwamo/389 of which are fenced/enclosed in the defendant's compound/homestead pending hearing and determination of the suit.***

***iii. That the cost of application be provided for in favour of the plaintiff/applicant.***

2. The application is premised on the applicant's supporting affidavit of 15 paragraphs sworn on 18<sup>th</sup> January 2019 together with a copy of a letter reference number 011/20/2018 dated 18<sup>th</sup> October 2018 by the respondent's counsel attached thereto. The applicant averred, among other things, that no settlement of the matter has been reached further to order of the court made on 26<sup>th</sup> July, 2018 and that neither the applicant's father, David Odongo Akech (deceased) nor the plaintiff, sold any land to the respondent as alleged in this matter. The application is also based on grounds (a) to (g) on its face and they essentially relate to order (a) sought therein which was spent on 24<sup>th</sup> January, 2019.

3. The respondent through M/s Odhiambo Kyangi and Company Advocates opposed the application by way of his replying affidavit sworn on 22<sup>nd</sup> March 2019 and filed on even date. The respondent averred, among other things, that there is a portion of the boundary marked by sisal plants between the suit land, LR NO. Kanyamwa/Kayambo/Kwamo/389 and LR NO. Kanyamwa/Kayambo/Kwamo/390 and has curved in semi-circle into the latter parcel of land which belongs to the respondent. That the applicant has trespassed into the said semicircular portion of the respondent's land.

4. Pursuant to the court order of 11<sup>th</sup> March 2019, the application was argued by written submissions. The applicant filed his submissions dated 19<sup>th</sup> June 2019 while learned counsel for the respondent filed submissions dated 29<sup>th</sup> July, 2019 for and against the application respectively. I note the submissions including **section 3 (3) of the Law of Contract Act (Cap 23)** cited in the applicant's submissions.

5. I have carefully, considered the entire application, the replying affidavit and submissions herein. The point for determination at this stage is whether the application has satisfied the triple requirements for grant of an interlocutory injunction as laid down in the case of **Giella -vs- Cassman Brown Company Ltd (1973) E.A 358**. Thus, the applicant has to:-

***a) Establish his case at a prima facie level only.***

**b) Demonstrate irreparable injury if a temporary injunction is not granted and;**

**c) Ally any doubts as to (b) hereinabove by showing that the balance of convenience tilts in his or her favour.**

6. The meaning of “**Prima facie case** “ in Civil cases is to be found in **Mrao Ltd –vs- First American Bank of Kenya Ltd and 2 others (2003) KLR 125 and the case of Nguruman Ltd –vs- Jan Bonde Nielsen and 2 others (2014) eKLR**, among other authorities, by which I am guided. Thus, it is trite law that a “**Prima facie case**” is more than an arguable case. That the evidence in a prima facie case must show an infringement of a right, and the probability of success of the applicant’s case upon trial.

7. The standard of proof of a prima facie case is on a balance or, preponderance of probabilities; see **Nguruman Ltd case (Ibid)**. On the face of it, is the application more likely than not to ultimately succeed?

8. The plaintiff contended that he is the owner of the suit land unto which the defendant has trespassed. That the defendant occupies a portion of land measuring 0.27 hectares of the suit land and that he has cut down trees thereon. The respondent asserted that the portion does belong to him and not the applicant. Quite clearly, there is an apparent infringement of right to property which calls for protection under **Article 40 (1) of the Constitution of Kenya 2010** in the circumstances.

9. On irreparable injury, the applicant submitted that the respondent destroyed the boundary between the suit land and LR No. Kanyamwa/Kayambo/Kwamo/390 belonging to respondent who also cut down trees on the suit land. The respondent asserted that there is no evidence in support of the applicant’s allegations.

10. In seeking an injunctive relief against the respondent, is the applicant calling upon the respondent to do that which he is lawfully competent to do? Apparently, the applicant is likely to be adversely affected by the acts of the respondent. The likely damage may hardly be quantifiable.

11. This court is mandated under **section 13(7) (a) of the Environment and Land Court Act, 2015 (2012)** to grant interim preservation orders including injunctions. The remedy of an injunction is equitable and discretionary as observed in the case of **National Bank of Kenya Limited –vs- Shimmers Plaza Ltd (2009) KLR 278** where the Court of Appeal held that :-

**“the duration of an order of injunction is at the sole discretion of the trial Judge and depends on the circumstances of each case.....”**

12. In the light of the nature of the application and the circumstances of the case, I am of the considered view that the balance of convenience tilts in favour of the applicant. The appropriate interim preservation order merited is the maintenance of status quo over the suit land in lieu of the orders of the injunction sought in the application, see **Musa Angira Angira –vs- ICDC (2015) eKLR**.

13. Accordingly, the application dated 18<sup>th</sup> January 2019, be and is hereby determined in the following terms :-

**a) The respondent as well as the applicant shall maintain the obtaining status quo on the suit land pending the hearing and determination of the suit. In particular, neither party shall sell, charge and or further interfere with the established boundaries of the suit land until this suit is heard and determined.**

**b) Costs of the application be in the cause.**

**DELIVERED, DATED and SIGNED at MIGORI this 16<sup>th</sup> day of September 2019.**

**G.M.A. ONGONDO**

**JUDGE**

**In the presence of: -**

The plaintiff in person.

Mr. D. Adawo learned counsel holding brief for Mr. Odhiambo Kanyangi for the defendant.

Tom Maurice – Court Assistant.