



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAROK**

**ELC CAUSE NO. 466 OF 2017**

**FORMERLY KISII ELC NO. 930 OF 2016**

**MICHAEL LINKATO OLOLABURA.....1<sup>ST</sup> PLAINTIFF**

**OLE UNUA TOMKEI.....2<sup>ND</sup> PLAINTIFF**

**SAMUEL LEKAKENY KINANTA.....3<sup>RD</sup> PLAINTIFF**

**-VERSUS-**

**DAVID LEBOO KILISU.....1<sup>ST</sup> DEFENDANT**

**SKYSHIP LIMITED.....2<sup>ND</sup> DEFENDANT**

**ENDANKE CO. LTD.....3<sup>RD</sup> DEFENDANT**

**OLOOLOLO GAME RANCH LTD.....INTERESTED PARTY**

**RULING**

By a Notice of Motion dated 30<sup>th</sup> September, 2019 the Applicant sought for orders that: -

1. **THAT** an order that this application be heard and determined on priority basis.
2. **THAT** pending the hearing and determination of the application herein an order of temporary injunction be issued restraining the respondents/Defendants, by themselves, their employees, successors in title, agents and/or servants from constructing, disposing off, developing, transfer and/or interfering in any manner whatsoever with the suit property being LR NO. TRANS MARA/KIMINTET/'D'/480.
3. **THAT** pending the hearing and determination of the main suit herein, an order of temporary injunction restraining the respondents/defendants, by themselves, their employees, successors in title, agents and/or servants form constructing, disposing off, developing, transferring and/or interfering in any manner whatsoever with the suit property being LR NO. TRANS MARA/KIMINTET 'D'/480.
4. **THAT** directions relating to the hearing and determination of this suit be given
5. **THAT** such further and/or other orders that the court may deem fit to grant
6. Costs of this application be in the cause.

The Application was based on the grounds that the Plaintiff is the registered owner of land parcel No. Trans Mara/Kimintet 'D'/480 and holding the same on their own behalf and on behalf of Inkoirero Self Help Group. The Applicant contends that in 2012 the Applicant commenced proceedings against the Defendants for fraud, unlawful encroachment and trespass against the Defendant. However, on or about May, 2019 the Defendants commenced construction on the suit land. The Application was further supported by the affidavit of the 3<sup>rd</sup> Plaintiff/applicant who deponed that he was the secretary of the Applicant Group and averred that the Respondent or agents have commenced construction on the suit land which could lead to the same being wasted and should the same not be protected.

The Application was opposed by both the 1<sup>st</sup> Defendant and the interested party. The 1<sup>st</sup> Defendant in his replying affidavit filed in court on

15<sup>th</sup> October, 2019 averred that their exists Application that was filed by the Plaintiff in 2012 under a certificate of urgency (Kisii HCC No. 274 of 2012) which application remained undetermined for 7 years later and thus it removes the urgency claimed in the instant matter and consequently the same is sub judice.

The 1<sup>st</sup> Defendant/Respondent contends that the substantive dispute before the court is one which is a boundary dispute that the court lacks the requisite jurisdiction to hear and despite the above the respondent states that he is the registered owner of the suit land and was issued with a title to the land in the year 2008. He finds the plaintiff's title to the land as a forgery and as the same was obtained by fraud and unlawful means.

The 1<sup>st</sup> Respondent also stated that he is enjoying both occupation and possession of the suit land where he has a homestead and has maasai cottages used by his tourist clients and that the purported construction is only renovations that he is carrying out on the land.

The Interested Party also opposed the Application by way of Replying Affidavit sworn by Kuya Kijabe a Director of the interested party where he deponed that the Interested party is the registered proprietor of land parcel No. Narok/Trans Mara/Oloulolo/1 which measures 954.9 Hectares which parcel borders the suit land Trans Mara/Kimintet 'D'/480 in which the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants operate a Balloon Camp and that the present suit may affect the Interested Party's rights over its land.

I have read the Application before me and the submissions filed by the parties. This is an application which the Applicants are seeking the grant of equitable remedy of injunction against the Defendants. The Principles which guide the grant of injunction is now well settled in **GIELLA -VERSUS- CASSMAN BROWN & COMPANY LIMITED (1973)EA 358**. First an applicant must show he has established a prima facie case with a probability of success, secondly damages will not be adequate compensation and thirdly on whose favour does the balance of convenience tilts.

What constitutes a prima facie case was defined in the case of **MRAO LIMITED –VERSUS-FIRST AMERICAN BANK OF KENYA LIMITED AND 2 OTHERS(2003)KLR** where the court of appeal held:-

**“In civil case a prima facie is a case in which the material placed before it a tribunal directing itself to the fact will conclude that there exists a right that was infringed on”**

In the instant matter, the Plaintiff Applicant contends that he is the owner of land parcel Narok Trans Mara/Kimintet 'D'/480 in which the Defendants have unlawfully encroached and commenced constructions. The 1<sup>st</sup> Defendant also in his replying affidavit contends that he is the owner of the suit parcel of land and he has a title to the said land as does the Applicant.

The Applicant avers that he is improving his homestead and a tourist facility on the land.

From the above it is apparent that there are two competing interests where each party claims to own the land and the Defendants have annexed a copy of the titles in such a scenario, it is apparent that the only manner to ascertain who owns the suit land is by way of conducting a full hearing in which evidence is taken and the authenticity of the titles subjected to examinations. It is therefore my finding that the Applicants have not proved the first test for the grant of injunction. A party cannot be said he has prima facie case where the respondent equally has and produces title to the land.

From the above I find that the applicant has not met the ingredients for the grant of orders of injunction and I thus dismiss the case with costs.

**DATED, SIGNED and DELIVERED in open court at NAROK on this 19<sup>th</sup> day of December, 2019**

**Mohammed Kullow**

**Judge**

**19/12/19**

In the presence of:

CA:Kimiriny

Clapton for the Plaintiff

Ms Adala holding brief for Kemboy for the interested party