



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC CASE NO. 182 OF 2018**

**SHEILA WANJIRU MBUTHI.....PLAINTIFF**

**VERSUS**

**ABDALLA ABDUL JALIL.....1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR, KAJIADO.....2<sup>ND</sup> DEFENDANT**

**RULING**

What is before Court for determination are the Plaintiff's Notice of Motion applications dated the 26<sup>th</sup> November, 2018; 30<sup>th</sup> November, 2018 and 14<sup>th</sup> January, 2019 respectively brought pursuant to Section 18 (2), 19 and 86 (1) of the Land Registration Act; Order 51 and Order 40 of the Civil Procedure Rules. The Plaintiff is seeking injunctive reliefs as against the Defendants in respect to land parcel number Kajiado/ Mailua/ 555 and for the 2<sup>nd</sup> Defendant to be directed to give an access road between Kajiado/ Mailua/ 352 and Kajiado/ Mailua 353 respectively. The applications are premised on the summarized grounds that the Plaintiff is one of the registered owners of land parcel number Kajiado/ Mailua/ 555 hereinafter referred to as the 'suit land' where they hold it in trust for the beneficiaries to the estate of George Mbuthi Njoroge. The 1<sup>st</sup> Defendant's father rightfully sold the suit land on consideration to the Plaintiff's late husband. There has existed a long standing dispute between the Plaintiff and the 1<sup>st</sup> Defendant.

The applications are supported with the affidavits of SHEILA WANJIRU MBUTHI where she reiterates her claim above and avers that together with Salome Mwihaki Mbuthi they hold the suit land in trust for the beneficiaries of the late George Mbuthi Njoroge. She confirms being in possession of the suit land from 1993 and built a hotel thereon. Further, that her late husband purchased the suit land from Abdul Jalil Abdul Khan and was issued with a title deed on 19<sup>th</sup> January, 1993. She explains that there existed a dispute between her late husband and the 1<sup>st</sup> Defendant's father in 2002 and the same was referred to the District Officer Namanga who recommended that the two should open an access road at the boundary of Kajiado/ Mailua/ 556 and Kajiado/ Mailua 555. She contends that in 2008, the 1<sup>st</sup> Defendant impersonated his deceased father and lodged a complaint with the Land Disputes Tribunal against her together with her late husband who had already passed away in 2007. Further, that she objected to the adoption of the Tribunal's Award and the 1<sup>st</sup> Defendant's application was dismissed. She states that on 22<sup>nd</sup> September, 2016 the District Land Registrar and Surveyor attempted to resolve the boundary dispute herein. She does not dispute if the access road to parcel Kajiado/ Mailua/ 352 and Kajiado/ Mailua 353 is excised at the boundary of the suit land and Kajiado/ Mailua/ 556. She insists the 1<sup>st</sup> Defendant is taking advantage of the fact that the Registry Index Map was never amended when her late husband purchased suit land though there is a registered mutation. She avers that the 2<sup>nd</sup> Defendant failed to take into consideration that Kajiado/ Mailua/ 351 was subdivided into Kajiado/ Mailua/ 555 and Kajiado/ Mailua/ 556 respectively. Further, that 1<sup>st</sup> Defendant being registered owner of Kajiado/ Mailua/ 556 can still change the position of the access road to Kajiado/ Mailua/ 352 and Kajiado/ Mailua 353 as they do not need their approval. She reiterates that the Court should direct the 1<sup>st</sup> Defendant to give the access road to Kajiado/ Mailua/ 352 and Kajiado/ Mailua 353. Further the 2<sup>nd</sup> Defendant should advise the District Surveyor to amend the Registry Index Map accordingly. She further states that due to the destruction of the live fence on the suit land, she has incurred losses in her hotel.

The 1<sup>st</sup> Defendant opposed the application by filing a replying affidavit sworn by ABDALLA ABDUL JALIL where he confirms being the son and heir to the 1<sup>st</sup> Defendant's estate. He contends that there is an inability to differentiate between the 1<sup>st</sup> Defendant herein and himself. He insists the Applicant was well aware his father passed away on 28<sup>th</sup> November, 2015 and his estate has been shared out to his beneficiaries. He contends that the dispute herein has been there for a long time and centered around purchase of a portion of Kajiado/ Mailua/ 351 which was later fraudulently subdivided into Kajiado/ Mailua/ 555 and Kajiado/ Mailua 556 respectively. Further, that the said purchase was for 80x100plot but before his father died the Plaintiff's husband commenced fencing off close to one acre of the land. He claims that the Plaintiff's husband thereafter obtained title documents. Further, the Plaintiff proceeded to unlawfully and unprocedurally block off an access road that had been demarcated by the surveyors and alleged this had been done upon the families entering into an agreement. He further insists that on 20<sup>th</sup> May, 2002, the District Officer Namanga together with the Chief, AP Inspector and CID Namanga recommended that the access road should be opened up at the boundary of the improperly hived off parcel number Kajiado/ Mailua 555 and

Kajiado/ Mailua 556 since both parties incidentally allegedly interfered with the original road put up by the surveyor. He explains that since the dispute persisted, on 16<sup>th</sup> October, 2018 the District Land Registrar, Kajiado delivered a ruling in respect to the boundary herein which is yet to be appealed from. He reiterates that it is the Applicant through the office of the Assistant County Commissioner stalling the implementation of the District Land Registrar, Kajiado's report.

Both the Plaintiff and the 1<sup>st</sup> Defendant filed their respective submissions.

### **Analysis and Determination**

Upon consideration of the three Notice of Motion applications herein including the Supporting and Replying affidavits, as well as parties' submissions the only issue for determination at this juncture is whether the Plaintiff is entitled to orders of temporary injunction pending the outcome of the suit.

The Plaintiff in her submissions to buttress her argument for a temporary injunction relied on the cases of **Kenya Hotels Vs Kenya Commercial Bank Limited & 2 Others HCCC No. 8 of 2004 (unreported) and Mrao V First American Bank of Kenya Limited & 2 others (2003) KLR 125.**

The 1<sup>st</sup> Defendant in his submissions reiterated his claim above.

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 Applicant has demonstrated a prima facie case with probability of success, I wish to refer to the case of **Mrao V First American Bank of Kenya Ltd & 2 others (2003)KLR 125** where the Court defined a prima facie case to mean a case where based on the facts as presented a Tribunal can conclude there exists a right that has been infringed upon. It is not in dispute that the Plaintiff and 1<sup>st</sup> Defendant are owners of their respective parcels of land. The fulcrum of the suit herein revolves around a boundary dispute and location of an access road. The Plaintiff contends that it should be at a particular spot while the 1<sup>st</sup> Defendant insists it is at another spot. The Plaintiff admitted that the 2<sup>nd</sup> Defendant has actually proceeded to determine the issue of the access road between the two parcels of land and produced a report to that effect. From the Plaintiff's averments she seems dissatisfied with the said decision of the Land Registrar in respect to the location of the access road. The 1<sup>st</sup> Defendant claims the dispute has persisted over a long period of time because his father sold the Plaintiff's husband land measuring 80x100 but he fenced off almost one acre. Further, that the Registry Index Map (RIM) was never amended and the road should be as per it. I note the Land Registrar in his report dated the 28<sup>th</sup> November, 2018 concluded that the existing road measuring 9 metres as reflected in the Registry Index Map (RIM) which serves Kajiado/ Mailua/ 352 and 353 at the upper part and touching Nairobi Arusha Highway (Namanga Road) is the official government road. The Plaintiff in her affidavits has not indicated whether the Defendants have interfered with Land Parcel number Kajiado/ Mailua/ 555. Her main contention is that the Land Registrar proceeded to rely on the RIM to demarcate the access road by failing to appreciate that parcel number Kajiado/ Mailua 351 does not exist. She has submitted that the ELC has jurisdiction to handle this matter. The Plaintiff has claimed the 1<sup>st</sup> Defendant has proceeded to pave a way on land reference no. Kajiado/ Mailua 555 and blocked access to the Plaintiff's hotel culminating in her getting losses of Kshs. 8,000 daily. The 1<sup>st</sup> Defendant insists that the Ruling by the Land Registrar was delivered in 2018 after all parties had been heard. Further, that the Ruling was never appealed from.

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. In an annexure 'SM7' in the application dated 26<sup>th</sup> November, 2018, is a map that indicates the existence of a road next to parcel 105 which belongs to the Plaintiff with the said road shown as serving parcel Kajiado/ Mailua 352 and Kajiado/ Mailua 353 respectively, I opine that the Plaintiff's claim on the Land Registrar failing to appreciate the circumstance on the ground can only be determined one viva voce evidence is adduced and not at this interlocutory stage. Further, I find that the Plaintiff has not established a prima facie case as against the Defendants for interfering with her land parcel number Kajiado/ Mailua 555 to warrant the granting of the orders of injunction sought.

It is against the foregoing and based on the evidence before me that I direct that the ascertained access road by the Land Registrar in his report dated 28<sup>th</sup>, November 2018 which is currently in use should be maintained pending the outcome of the suit. I further direct that this matter be set down for hearing on a priority basis.

Costs will be in the cause.

**Dated signed and delivered in open court at Kajiado this 5<sup>th</sup> December, 2019.**

**CHRISTINE OCHIENG**

**JUDGE**