REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 27 OF 2017

(Formerly Machakos HCCC No. 18 of 2010

VINCENT MBOROGO WAINAINA.....1ST PLAINTIFF

MARY NYOKABI MBOGORO.....2ND PLAINTIFF

VERSUS

OL KEJUADO COUNTY COUNCIL.....1ST DEFENDANT

LAND SURVEYOR OL KEJUADO COUNTY COUNCIL.....2ND DEFENDANT

RULING

The application before Court is the Plaintiff's Chamber Summons dated the 2nd February, 2010 brought pursuant to Order XXXIX Rules 1, 2 and 9 of the Civil Procedure Rules, Registered Land Act Cap 300 and Section 3A of the Civil Procedure Act and all other enabling provisions of the law. It is based on the following grounds which in summary is that the Applicants are the registered owners of Land Reference Numbers KAJIADO/KITENGELA/19543, 19544, 19545, 19546 and 19547 hereinafter referred to as the 'suit properties'. The Respondents and or their agents through the 2nd Defendant have illegally cut a barbed wire fence, uprooted some trees on the suit properties and has been holding meetings thereon with an intention of illegally subdividing them. The Respondents and or their agents, servants or assigns are planning to illegally usurp Plaintiffs' ownership of the suit properties, with meaningful threats being issued to that effect.

The application is supported by the affidavit of VINCENT MBOROGO WAINAINA, the 1st Plaintiff herein where he deposes that together with the 2nd Plaintiff who is his wife, they are registered owners of the suit properties. He claims that in November, 2009 he visited the suit properties, found that a barbed wire fence that they had erected on it had been cut and some trees that they had planted, uprooted. Further that the 1st Defendant through its servants and/or employee who is the 2nd Defendant herein had been laying claims of ownership over the suit properties which rightfully belongs to them. He contends that he lodged a complaint with the area Chief and that on 26th January, 2010 , the 2nd Defendant in the company of about fifty (50) people came to the suit properties, claimed the same belonged to the 1st Defendant and he would assist in issuing the Certificates of Ownership to them. He avers that there has been threats from the Defendants against attempts to develop the suit properties including to owners of plots on what was originally L.R No. KAJIADO/KITENGELA/110, the head title, claiming the whole parcel of land belongs to the 1st Defendant. He insists they have title which is proof of ownership as per the law and that the Defendants do not have documentation to support their claim. Further that in a meeting convened by the area Chief including the Councilor, they produced all their documents of title but the Defendants insisted the suit properties form part of Kajiado County Council and persist in their acts of trespass. He insists the 2nd Defendant perpetuated the acts of the 1st Defendant that claim the suit land is theirs, which acts are only meant to create confusion and entice would be purchasers in an attempt to purport to sell property that is legally as well as rightfully theirs.

The 1st Defendant opposed the application and filed a replying affidavit sworn by FREDRICK ODHIAMBO NDEDE the Town Clerk, where he deposed that the suit property formally LR No. KAJIADO/KITENGELA/110 the Head title originally belonged to a Group Ranch by the name KAJIADO/OLOOLOITIKOSHI/KITENGELA Group Ranch. He avers that the suit property was subsequently subdivided among individual member of the Group Ranch while the County Council of OL Kejuado retained three plots under title number KAJIADO/OLOOLOITIKOSHI/KITENGELA/ 13, 14 and 15 respectively. He claims the said plots were reserved for putting up Loisirikon Trading Centre, Loisirikon Health Centre and Loisirikon School respectively for the betterment of lives of the citizens around. He avers that the 2nd Defendant is an employee of the 1st Defendant who is its Land Surveyor and was involved in the survey including subdivision of the said parcel of land that originally belonged to KAJIADO/OLOOLOITIKOSHI/KITENGELA Group Ranch. He denies the existence of the suit properties and that the 1st Defendant has never laid claim on the said properties. Further that the 1st Defendant and or its agents have never trespassed on the suit properties and insists it is the only owner of land parcel numbers KAJIADO/OLOOLOITIKOSHI/KITENGELA/ 13, 14 and 15 respectively. He reiterates that the 1st Defendant has not interfered with the Plaintiffs' quiet possession of their suit properties but has only been on its parcel of land which it retained after subdivision of the head title. He contends that the application herein is brought in bad faith in an attempt to disparage the good names of the Defendants.

The 2nd Defendant also opposed the application and filed a Notice of Preliminary Objection dated the 23rd July, 2010 and a supporting affidavit sworn by WESLEY KASUKU where he deposed that he is a land surveyor employed by the 1st Defendant and that at the time the cause of action arose, he was not acting in his personal capacity but was on official duties on behalf of the 1st Defendant. He insists the Council is a legal entity capable of suing and being sued. Further, that the Plaintiffs erroneously misjoined the 2nd Defendant as a party to this suit as any action by himself was on behalf of the 1st Defendant.

The Plaintiffs filed a further affidavit sworn by VINCENT MBOROGO WAINAINA the 1st Plaintiff herein where he reiterated their claim and stated that they undertook due diligence before purchasing the suit lands. He contended that the suit properties originated from land title number KAJIADO/KITENGELA/ 82 that was freehold property in the name of Mutarakwa. He explained that in 1980 the freehold property was sold to Kamucii Investment group which subdivided the property to 41 portions, among the portions were LR No. KAJIADO/KITENGELA/110. Further that in 2003, Real Cria Estate Limited bought KAJIADO/KITENGELA/110 among other portions on free hold tenure from Kamucii Investment Group. He insists Real Cria Estate subdivided LR No. KAJIADO/KITENGELA/110 into freehold portions which included KAJIADO/KITENGELA/19543; 19544; 19545; and 19547 respectively. He further insists that the 1st Defendant has provided wrong information with an intention of misleading the court as they bought the suit properties and obtained title deeds and the 1st Defendant could not have retained freehold land as claimed, since there is no accompanying documentation.

All parties filed their respective submissions that I have considered.

Analysis and Determination

Upon perusal of the application including the affidavits filed herein, the only issue for determination at this juncture is whether the Plaintiffs are entitled to the injunctive orders pending the outcome of the suit.

The Plaintiffs contend they are owners of the suit properties and have annexed copied of the title deeds to prove their claim. The 1st Defendant contends it is the owner of land parcel numbers KAJIADO/OLOOLOITIKOSHI/KITENGELA/ 13, 14 and 15 respectively which plots were reserved for putting up Loisirikon Trading Centre, Loisirikon Health Centre and Loisirikon School respectively for the betterment of lives of the citizens around. It has furnished court with a Certificate of Official Search to prove its claim. The 2nd Defendant insists it was wrongly sued as it was an employee of the 1st Defendant, that is capable of suing and being sued. The Plaintiffs claim the Defendants have trespassed on their land, brought down the fence and harassed them using a group of about fifty people.

On the issue as to whether the Plaintiff is entitled to the temporary injunction pending the outcome of the suit, the principles for consideration in determining whether temporary injunction can be granted or now well settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** as follows:

> **"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."**

In relying on the case above, I note the Plaintiffs claim is not baseless as they are the registered proprietors of the suit properties. Further Section 26(1) of the Land Registration Act, provides that:

'**The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except -**

> **(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or**
>
> **(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. '**

Even though the 1st Defendant is claiming ownership of the suit land, it has not furnished court with a Certificate of title.

In the the case of **Ahmed Ibrahim Suleiman and Another vs. Noor Khamisi Surur (2013) eKLR** where Justice J.M. Mutungi stated that **' the Plaintiff having been registered as proprietor and having been issued with a certificate of lease over title No.` Nairobi/Block 61/69 are in terms of section 26(1) of the Land Registration Act entitled to the protection of the law'**.

It is against the foregoing that I find that the Plaintiffs have established a prima facie case with a probability of success.

As to whether the Plaintiffs will suffer irreparable harm that cannot be compensated by way of damages, I note the instant application has been pending for about eight (8) years. I note the Plaintiffs furnished court with their respective title deeds to the suit land. Further, they claim the Defendants have trespassed on the suit properties and harassed them with a group of people. They have further threatened them with eviction. In the case of **Case of Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012,** it was held that **' …the applicant must establish that he 'might otherwise' suffer irreparable injury which cannot be adequately compensated remedied by damages in the absence of an injunction, this is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot 'adequately' be compensated by an award of damages. An injury is**

irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy. '

In relying on the case above and based on the circumstances at hand, I find that the Plaintiffs' alleged injuries are not speculative as they have demonstrated the harm they will suffer if the injunctive orders are denied.

On the question of balance of convenience, I note both the Plaintiffs and 1st Defendant are claiming the suit properties. In the case of **Andrew M. Wanjohi – Vs- Equity Building Society & 2 other [2006] eKLR** it was expressed that **'In my considered view if the 1st and 2nd Defendants are restrained from selling off until the suit was heard and determined, there is a very real risk that the debt may outstrip the value of the suit property, as the borrower has never made any repayments for more than three years. That fact, coupled with the status of the 1st Defendant and 2nd Defendants, persuades me that the balance of convenience is in favour of the said defendants. If the property was sold, the Plaintiff can find other accommodation. And if it were finally held that the property should not have been sold, the 1st and 2nd Defendants would be able to compensate the Plaintiff. ……..'**

In relying on the above authorities and facts above, at this juncture I find that it is pertinent if the titles to the suit properties were preserved, pending the hearing and determination of the suit.

Since both the Applicants and 1st Defendant are staking claim over the suit properties, and the 2nd Defendant insisting that land parcels numbers were reserved for the betterment of the lives of the local community, I find that these are issues best determined at a full trial, I will decline to grant the orders as sought in the Chamber Summons dated the 2nd February, 2010 which I find merited, but proceed to make the following order:

1. That status quo as appertains to the suit properties be maintained pending the hearing and determination of this suit.

The costs will be in the cause.

The parties are urged to comply with Order 11 and set the suit down for hearing as soon as possible.

Dated signed and delivered in open court at Kajiado this 26th day of February, 2018.

CHRISTINE OCHIENG

JUDGE

Present:

Cc Mpoye

Rabene holding brief for Nyandoro for Defendant

Ms Moshene holding brief for Keya for Plaintiff