



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 929 OF 2017

ANNE WAMBUI GATHERU.....1ST PLAINTIFF

DAVID NDIRANGU WAMBUGU.....2ND PLAINTIFF

VERSUS

KENYA RAILWAYS CORPORATION.....1ST DEFENDANT

CHINA COMMUNICATIONS

CONSTRUCTION COMPANY LIMITED....2ND DEFENDANT

RULING

The application before Court for determination is the Plaintiffs' Notice of Motion dated the 14th November, 2017 brought pursuant to Article 40 of the Constitution, Section 13(1) & (2) (b) of the Environment and Land Court Act, 2011, Section 3A of the Civil Procedure Act, Order 19 of the Civil Procedure Rules and all the other enabling provisions of the law. It is based on the following grounds which in summary is that the Plaintiffs are the legal owners of land parcels numbers KAJIADO/NTASHART/263 & 265 respectively, hereinafter referred to as the 'suit lands'. The Defendants have interfered with the suit lands by entering and trespassing thereupon and damaging the boundary perimeter and commencing construction works. Unless restrained, the Defendants will continue to interfere and continue with the construction work on the suit lands thereby causing the Plaintiffs irreparable loss and damage with the likelihood of a breach of peace.

The application is supported by the affidavit of ANNE WAMBUI GATHERU the 1st Plaintiff herein where she deposes that she is the proprietor of land parcel number KAJIADO/NTASHART/263 and that in June 2017, the Defendants through their agents invaded the said land and purportedly constructed a road. She avers that the Defendants have ignored all her protests to vacate her land and have also interfered with the perimeter wall as well constructed a road on the said land. She claims despite notice of intention to sue being issued and complaints to the Ngong Police Station being lodged, the Defendants have ignored and or refused to vacate her property. She insists she is the owner of one of the suit lands and the Defendants have no right to interfere with it.

The application is further supported by the affidavit of DAVID NDIRANGU WAMBUGU the 2nd Plaintiff herein where he deposes that he is the proprietor of land parcel number KAJIADO/NTASHART/265 and sometime in June 2017, the Defendants through their agents interfered with his land without his permission or authority and purportedly constructed a public road therein. He contends that the Defendants have ignored all his protests to vacate his land, interfered with his perimeter wall and constructed a road on the said land. Further despite notice of intention to sue being issued and

complaints to the Ngong Police Station lodged, the Defendants have ignored and or refused to vacate his land. He claims in October, 2017 he was approached by the 2nd Defendant who issued him with a leasehold offer for his land after they had already entered into it without adhering to the legal procedures. He seeks the court's intervention to restrain the Defendants from interfering with the suit land and insists as the owner of one of the suit lands, the Defendants have no right to interfere with it.

The 1st Defendant opposed the application and filed a replying affidavit sworn by SALOME SARU KAMAU its Assistant Land Surveyor in its Survey Department where she deposes that according to the Registry Index Map from the Survey of Kenya authenticated by the Director of Surveys, which map is NTASHART SHEET II, the shapes, acreage and boundaries of the two suit properties are different and infact the purported boundaries shown on map annexed to the Plaintiffs' affidavit are overlapping other parcels number 274 and 282 respectively. She claims land parcel number KAJIADO/NTASHART/263 from the title shows the acreage as 4.6 hectares while the map shows 2.4777 hectares whereas title number KAJIADO/NTASHART/265 indicates an acreage of 2.0 hectares on the title while the map shows 2.6999 hectares. She insists it is difficult to ascertain the boundaries and the acreage to determine if indeed the Plaintiffs claim has merit. She contends that the 1st Defendant had not undertaken the process of acquisition and are yet to hand over the site to the contractor, hence it is upon the Contractor to negotiate with a land owner if it wishes to make a road. She reiterates that the map showing the boundaries as per RIM vis a vis the boundaries as per the Map provided by the Plaintiffs are not the same. She contends that since the contractor could not agree with the land owners, it abandoned the road and at the time of filing this instant suit, there were no ongoing acts of trespass as complained by the Plaintiffs. She reaffirms that the Plaintiffs have not established a case against the 1st Defendant and as such cannot be entitled to any orders of injunction against it, because the same would be totally misplaced. She insists the Plaintiffs in both their plaint, application and supporting affidavit have not demonstrated how the 1st Defendant acted or has continued to act in violation of the Plaintiffs' property rights over the suit lands and hence they are not entitled to the orders sought.

The 2nd Defendant did not file any response to oppose the application.

The Counsel for the Plaintiffs and the 1st Defendant submitted on the application on the 20th December, 2017. The Counsel for the Plaintiffs' reiterated their claim and stated that they had invited the Defendants vide a letter dated the 4th August, 2017 to resolve the matter out of court but they have not responded. He referred to the purported lease agreement marked as annexure 'AMG 4' between the 2nd Plaintiff and 2nd Respondent and insisted the government did not adhere to the laid down procedures. He submitted that the 2nd Respondent interfered with the structure of the suit lands that were side by side by constructing a road. He contended that there is bad faith on the part of the Respondents. He relied on the case of **Giella Vs Casman Brown** to support his arguments and stated that the balance of convenience was in favour of the Plaintiffs and no prejudice will be suffered if the orders sought are granted.

The Counsel for the 1st Defendant opposed the application, relied on their replying affidavit and submitted that the 1st Defendant is not the principal of the 2nd Defendant and that no such relationship has been established vide the application and supporting affidavit. He insisted the Plaintiffs are on a wild goose chase in the purported case against the 1st Defendant. It has not been demonstrated what omission or commission is attributable to the 1st Defendant. Further that there is no connection between 1st Defendant and 2nd Defendant. He contends that there is no indication of who took the photographs annexed to the supporting affidavit as required by law. Further there is no attempt to connect the photographs with the suit premises as photographs can be taken anywhere. He referred to the Letters written to the 2nd Defendant and submitted that there is absolutely no cause of action against the 1st Defendant. Further that there is no attempt to connect the purported lease agreement marked as annexure 'DW4' with the 1st Defendant. He reiterated that it was through a report by the District Land Surveyor and District Physical Planning Officer that anybody could establish proper extent of the boundaries of the suit land. He reaffirmed that Plaintiffs have not established a prima facie case against the 1st Defendant. Further that through the Plaint, application and supporting affidavit, there is no demonstration howsoever

that the loss the Plaintiffs are going to suffer cannot be compensated by way of damages, with the balance of convenience tilting in favour of the 1st Defendant. He further contended that the application should be dismissed with costs.

In rejoinder, the Plaintiffs' counsel submitted that it is the principle of law that the 1st Defendant is the owner of the project and that is the reason it was sued. Further that the 1st Defendant wanted to cling to technicalities. He submitted that they do not have any objection for the court to grant orders against the 2nd Defendant and insisted the balance of convenience tilts in favour of the Plaintiffs. He said they were aware the Plaintiffs could be compensated by way of damages and that is why they sought for an out of court settlement first.

Analysis and Determination

Upon perusing the Notice of Motion dated the 10th May, 2017 including the supporting, replying and further affidavits as well as the annexures thereon, the main issue for determination is:

- Whether the Plaintiff is entitled to the orders of temporary injunction pending the outcome of the suit.

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** 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 line with this principle, the Court will proceed to interrogate whether the applicants have made out a prima facie case with a probability of success at the trial.

It is not in dispute that the Applicants are the proprietors of the suit land. What is in dispute is the acreage and boundary of the suit land. The Applicants aver that the Respondents have trespassed on the suit land, made a road and damaged their fences. They have annexed photographs of the constructed road to their respective affidavits. The 1st Defendant controverted this claim and stated that according to the Registry Index Map, the shapes, acreage and boundaries of the two suit properties are different with the purported boundaries shown on map annexed to the Plaintiffs' affidavit overlapping other parcels number 274 and 282 respectively. It contended that it is difficult to ascertain the boundaries and the acreage to determine if indeed the Plaintiffs claim has merit. The 1st Defendant further denies being the principal of the 2nd Defendant hence not responsible for the 2nd Defendant's actions. All these allegations by the 1st Defendant have not been controverted by the Plaintiffs. The Plaintiffs further do not explain where they obtained their respective maps from. I find that all these are issues best determined at a full trial and not at this juncture.

In the case of **Mrao Limited Vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125** the court held that: **' In civil cases, a prima facie is a case in 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. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.'**

In so far as the 1st Defendant has claimed that there is need to ascertain the boundaries and acreage of the Plaintiffs' suit land. I note that the Plaintiffs annexed the title deeds to the two suit lands, which indicate

an acreage different from the 1st Defendant's averments. Since the Plaintiffs are alleging that the 2nd Defendant commenced construction of a road through the suit lands without consulting them, which fact has not been denied by any of the Defendants. Further, the 2nd Plaintiff has even annexed a copy of the purported agreement for lease which was prepared by the 2nd Defendant that is yet to be executed. In relying on the facts as stated and two authorities above, I find that the Plaintiffs have established a prima facie case with a probability of success.

As to whether the Plaintiffs will suffer irreparable loss which cannot be compensated by way of damages. The Plaintiffs are registered proprietors of the suit land, which fact is not denied by the Defendants. The Plaintiffs' allege the 2nd Defendant has constructed a road and interfered with the structure of the suit land without the Plaintiffs' authority. Further, the 2nd Defendant has even destroyed a perimeter wall thereon. 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 and they have demonstrated the harm they will suffer if the injunctive orders are denied.

As to the balance of convenience, I find that the balance tilts in favour of the Plaintiffs who have proven ownership of the suit land and the alleged trespass by the 2nd Defendant that failed to file a response to controvert their allegations.

It is against the foregoing that I find the Plaintiff's Notice of Motion dated the 14th November, 2017 is merited but noting that there is an issue of determining exact acreage and boundary of the suit land, I will allow it in the following terms:

1. The parties will observe and maintain the obtaining status quo pending the hearing and determination of the suit'.
2. The costs of the application is awarded to the Plaintiffs

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 Ngong this 19th day of February, 2018

CHRISTINE OCHIENG

JUDGE

Present:

Cc Mpoye

Mutei for 1st Defendant

Wamae holding brief for Wangare for 1st and 2nd plaintiff