



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO.124 OF 2017

MWASHIGHADI KICHAKURI.....PLAINTIFF

-VS-

KIMBURI HARRISON

JONAH MWASI

CHRISPIN MJOMBA.....DEFENDANTS

RULING

1. The Application under consideration is the Notice of Motion dated 23rd June 2017 in which the Plaintiff/Applicant is seeking the following orders:

1. Spent

2. Spent

3. THAT a temporary order do issue restraining the Defendants, their agents, their legal representatives or anybody authorized by them from interfering with the Plaintiff's possession of land situated at Wumari/Senju Sub-Location at Mwachabo Location in Taita Taveta County pending the hearing and determination of this Suit.

4. THAT the costs be provided for.

2. The Application is based on the grounds in the face of the motion and supported by the Affidavit of the Plaintiff, Mwashighadi Kichakuri sworn on 23rd July 2017. The Plaintiff avers that he owns the Suit Property and the Defendant who are his neighbours are fond of causing embarrassment to the Plaintiff and his family by continuously trespassing into the suit land and cutting trees and also demolishing the graves of the Plaintiff's late parents and relatives. The Plaintiff depones that the area is under Land Adjudication Taita, Mwatate and Voi Sub Counties. The Plaintiff states that in the early 1970's he lodged a complaint with the Land Adjudication office Mwatate against the Defendants who were encroaching on his land and surveyors came and surveyed the land, but the Defendants refused to recognize the boundaries fixed and since then have been encroaching into his land. The Plaintiff has annexed copies of photographs showing the alleged trespass.

3. The Plaintiff further depones that he filed a suit **SRMCC No.15 of 2014** in Wundanyi Law Courts which was dismissed for non-compliance with the law on adjudication and has annexed copies of the proceedings in that case. That immediately the said suit was dismissed, the Defendants entered the land and cut down trees without Plaintiff's consent or authority. He adds that the Defendants have fenced off part of the Plaintiff's land, and despite numerous visits to the Land Adjudication Office, the Plaintiff has not gotten any help. The Plaintiff avers that on 16th August 2016, he was issued with a consent to proceed with his case in Court and has annexed a copy of the consent marked "MK 4". It is the Plaintiff's contention that the Defendants are not allowing him to have peaceful enjoyment of his land hence this Suit and Application.

4. The Application is opposed by the Defendants through a Replying Affidavit sworn by Harrison Kimburi, the 1st Defendant on 27th October 2017. He denies that they have encroached or trespassed on the Plaintiff's land and that their activities are only restricted on the areas they have been occupying prior to the commencement of these proceedings. He states that the areas they occupy and work on are the areas that were demarcated for them and which areas have been the subject of proceedings before the local Adjudication/Consolidation Committee, hence the reason the Plaintiff had to seek for consent of the Land Adjudication and Settlement Officer of the area. It is the Defendants contention that the Application is without merit and urged the Court to order that the status quo prevailing be maintained pending

hearing and determination of the Suit.

5. Both parties filed Written Submissions which I have read and I need not reproduce their contents herein. I have considered the Application, Affidavits in support and against and the rival Submissions made. The principles to be applied when considering an application for Temporary Injunction are well settled. In the case of **Giella –v- Cassman Brown & Co (1973) EA 358**, the Plaintiff must show that he has a *prima facie* case with a probability of success; that he stands to suffer irreparable damage,; and if the Court is in doubt, it will decide the matter on balance of convenience.

6. Both the Plaintiff and the Defendants are in agreement that the Suit Property is under adjudication. The Plaintiff avers that the Defendants have encroached on his parcel of land. The Defendants on the other hand maintain that the area is theirs. From the evidence on record, it is clear that the land in question is still under adjudication. This means that the issues of entitlement to any portion of the land are yet to be determined. Such determination is governed by an elaborate dispute settlement mechanism that provides for appellate process as is contained in **Section 26 and 29 of the Land Adjudication Act Cap 284** and **Section 26** of the Land Consolidation Act Cap 283. I also note that the dispute has been in existence since the 1970s. From the evidence on record both parties have lived in the Suit Land for several years. If the Court were inclined to grant orders sought, it would mean that the Defendants are restrained from what they also regard as their land. This may result in hardship on the part of the Defendants. This may also mean the Court will have made a decision on the issue of ownership which is yet to be determined under the two Acts referred to hereinabove. In my view, it is only after completion of the adjudication process has been carried out and each person shown his rightful portion that individual rights will clearly be ascertained. The Defendants have suggested that the status quo currently prevailing be maintained pending hearing and determination of the suit. In my view, that would be an appropriate order to be made considering the circumstances of the case.

7. Having considered the Plaintiff's Application, I am not satisfied on the material before me that the Plaintiff has established a *prima facie* case against the Defendants with a probability of success. In any event, the Plaintiff has not shown that damages will not adequately compensate him in the event of his case succeeding in the end. I am also of the view that the balance of convenience tilts in favour of the Defendants who are and have been in occupation of the Suit Property and utilizing it with the Plaintiff for several years. I will however order that the status quo currently prevailing be maintained pending the hearing and determination of the suit.

8. The upshot of the foregoing is that the Plaintiff has failed to satisfy the conditions for granting the orders sought. In the circumstance I find no merit in the Notice of Motion dated 23rd June 2017 and the same is hereby dismissed. Considering the circumstances of this case, I order that each party bear their own costs.

Dated, signed and delivered at Mombasa this 30th day of May 2018.

C. YANO

JUDGE