



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 776 OF 2017**

**TUTAYO ENE LEEYIO LENKOLO.....PLAINTIFF**

**VERSUS**

**STEPHEN NAKUO.....1<sup>ST</sup> DEFENDANT**

**DANIEL PARKION.....2<sup>ND</sup> DEFENDANT**

**GIDEON NAKUO.....3<sup>RD</sup> DEFENDANT**

**PAUL NAKUO.....4<sup>TH</sup> DEFENDANT**

**THE DISTRICT LAND REGISTRAR KAJIADO**

**KAJIADO COUNTY LAND REGISTRAR.....5<sup>TH</sup> DEFENDANT**

**THE DISTRICT LAND SURVEYOR KAJIADO**

**KAJIADO COUNTY LAND SURVEYOR.....6<sup>TH</sup> DEFENDANT**

**RULING**

The application before me for determination is the Plaintiff’s Notice of Motion dated the 19<sup>th</sup> June, 2017 brought pursuant to Section 3, 3A and 63 (c) & (e) of the Civil Procedure Act, and Order 36 rule 1, Order 40 rules 1, 2 & 8; and Order 51 rule 1& 3 of the Civil Procedure Rules and all the other enabling provisions of the law. In the said application, the Plaintiff seeks injunctive orders against the Defendants and it is premised on the various grounds including the fact that the Plaintiff is the registered proprietor of land parcel number KAJIADO/ KAPUTIEI NORTH/ 23550 hereinafter referred to as the ‘suit land’. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants and other strangers have encroached on the suit land and now putting up structures thereon. The 1<sup>st</sup> to 4<sup>th</sup> Defendants allege that they have title deeds to their parcels, which the Plaintiff verily believes were acquired illegally and fraudulently. The Plaintiff is apprehensive that the titles digitization program which is starting in Kajiado if done may capture the fraudulent titles excised from her parcel to her utter prejudice and loss. There is urgent need to correct the boundaries of the suit land which measures approximately 136.55 hectares so as to fence off the same.

The application is supported by the affidavit of TUTAYO ENE LEEYIO LENKOLO the Plaintiff herein where she deposes that on 17<sup>th</sup> May, 2006, she subdivided her land title number KAJIADO/ KAPUTIEI NORTH/ 4322 into various portions among them the suit land herein, where she resides. She avers that on or about 2007 and 2008 some unknown persons invaded her land and started putting up structures thereon but with the help of the local chief, they were evicted. She states that squatters have entered the suit land on several occasions purporting to look for pasture but with the assistance of the local administration, they were rebuffed. Further, in 2009 the District Commissioner wrote a letter to the Land Registrar, Kajiado to put a restriction on the suit land prohibiting dealings in the suit land. She claims in 2015, the 1<sup>st</sup> to 4<sup>th</sup> Defendants commenced erecting structures on the suit land and claimed they had bought the same and had title deeds to that effect which they refused to show her. Further, they continued building as well as removed beacons on the suit land and kept inviting other squatters to it but despite the local chief’s intervention, they have persisted in their acts stating that the portion they occupy does not belong to the Plaintiff. She is fully aware of her boundaries as one side touches the Railway line. She reiterates that the 1<sup>st</sup> to 4<sup>th</sup> Defendants have declined to vacate the suit land and are taking advantage of her old age. She contends that she sought intervention from the National Land Commission who advised her to file a suit for eviction. She intends to fence off her land and hence wants the beacons including the boundaries restored. She is apprehensive that several other persons have kept coming into the suit land and put up structures thereon and she may lose her entire properties to fraudsters as well as squatters. She prays that the OCS Isinya Police Station does assist in enforcing any orders issued herein as the 1<sup>st</sup> to 4<sup>th</sup> Defendants as well as other squatters will ultimately disobey any of the said orders.

The 1<sup>st</sup> to 4<sup>th</sup> Defendants opposed the application and filed a replying affidavit sworn by STEPHEN NAKUO the 1<sup>st</sup> Defendant herein who deposes that in 1995 at different times many people including himself applied to the Government for allocation of land along the Kenya Railway Line that was vacant. He claims that many people including the 1<sup>st</sup> to 4<sup>th</sup> Defendants obtained allotments to the respective parcels of government land along the Kenya Railway Line. He insists the said parcel of land is government land which stood separately, but is identical to the suit land. He explains that the mutation form exhibited as 'TELL 1' demonstrates that there is a parcel of land designated as a Railway Reserve between the suit land and the Railway Line. He contends that the Plaintiff's parcel of land known as KAJIADO/ KAPUTIEI NORTH/120 did not stretch to the actual Railway line and there is a high likelihood that the parcel of land the 1<sup>st</sup> to 4<sup>th</sup> Defendants occupy is separate from the suit land. He confirms that the 1<sup>st</sup> to 4<sup>th</sup> Defendants have settled on the land for many years to wit close to 22 years where they have had quiet enjoyment and as neighbours of the Plaintiff without complaint and even shared grazing fields. He reiterates that having occupied the land for 22 years with the full knowledge and acquiescence of the Plaintiff, she is estopped from bringing any action against the 1<sup>st</sup> to 4<sup>th</sup> Defendants and others in occupation of the land purportedly in dispute. He reaffirms that the 1<sup>st</sup> to 4<sup>th</sup> Defendants have since developed their parcels of land and made their homes thereon without any complaint from the Plaintiff or from anybody else whatsoever. Further, that it is strange that out of the many allottees of the said Government parcel of land, the Plaintiff has selected to sue only the 1<sup>st</sup> to 4<sup>th</sup> Defendants. He states that the attempt by the Plaintiff to evict the 1<sup>st</sup> to 4<sup>th</sup> Defendants have no legal backing and that the Honourable Court do order the Government Surveyor and/or Surveyors to ascertain the true position of the land in dispute and also to dismiss the Plaintiff's application with costs.

The Plaintiff filed a supplementary affidavit where she reiterated her claim and insists the suit land borders the Railway line. She denies being aware of the Letters of Allotment that the 1<sup>st</sup> to 4<sup>th</sup> Defendants obtained from the government and insists this cannot supersede her indefeasible title. She contends that the 1<sup>st</sup> to 4<sup>th</sup> Defendants have only attached Mutation Form and a Survey map but this does not show any form of ownership. She insists the Defendants built structures on the suit land recently and denies they have stayed thereon for 22 years. She contends that she has filed the suit herein against the 1<sup>st</sup> to 4<sup>th</sup> Defendants because they are the ones who initially encroached on the suit land and later leased as well as purported to sell some portions to unknown third parties.

Both the Plaintiff and the 1<sup>st</sup> to 4<sup>th</sup> Defendants filed their respective submissions.

In her submission, the Plaintiff reiterated her claim and relied on the cases of **JANE WANJIRA MUCHIRA vs WILSON TUMBO THAMBO (2016) eKLR; GIELLA Vs CASSMAN BROWN & CO. LTD (1973) EA 358; and MRAO Vs FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS C.A CIVIL APPEAL No. 39 OF 2002** to support her claim. The 1<sup>st</sup> to 4<sup>th</sup> Defendants submitted that they are bona fide purchasers for value without notice and have not encroached on the suit land. They relied on section 7 of the Limitation of Actions Act intimating the Plaintiff's claim against them is statute barred. They relied on the case of **BENSON MUKUWA WACHIRA Vs ASSUMPTION SISTERS NAIROBI REGISTERED TRUSTEES CIVIL APPEAL No. 121 OF 2006** to oppose the application.

#### **ANALYSIS AND DETERMINATION**

Upon perusal of the Notice of Motion application dated the 19<sup>th</sup> June, 2017 including the supporting, replying and supplementary affidavits as well as the submissions filed herein, the only issue for determination is whether the Plaintiff should be granted injunctive orders pending the outcome of the suit.

The Plaintiff claims she is the registered proprietor of the suit land and the 1<sup>st</sup> to 4<sup>th</sup> Defendants have encroached thereon. She has severally sought the intervention of the Provincial Administration to ask them to vacate but in vain. The 1<sup>st</sup> to 4<sup>th</sup> Defendants insist they have been residing on their land which they were allotted by the government for over 22 years and that the said land is separate from the one claimed by the Plaintiff. They insist the Plaintiff's claim is statute barred.

The principles for granting an injunction are well established in the case of **Giella Vs Casman Brown (1973) E.A 358** where the Court held 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."**

As to whether the Plaintiff has established a prima facie case with a probability of success, I note it is not disputed that that she is the registered proprietor of the suit land as per her title deed issued on 17<sup>th</sup> May, 2006. The Defendants insist they were allotted their land by the Government of Kenya and have annexed mutation forms and a map but not the Letter of Allotments. What is in dispute is the fact that the Plaintiff alleges the Defendants have encroached on her land and have also brought in squatters and she is apprehensive their presence therein, will interfere with the rights over the suit land.

In the case of **MRAO VS FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS C.A CIVIL APPEAL No. 39 of 2002 (2003) K.L.R 125** the Court described a prima facie case as follows:

**"..... is a case 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".**

**Section 26 of the Land Registration Act** provides as follows:

**‘(1) 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.’**

Section 24 (a) of the Land Registration Act stipulates that **‘Subject this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;**

In relying on the above legal provisions, the facts as presented and the above cited judicial authorities, I find that the Plaintiff by being the registered proprietor of the suit land has established a prima facie case.

As to whether the Plaintiff will suffer irreparable harm that cannot be compensated by way of damages, I note the Plaintiff claims the Defendants have encroached on the suit land. The Defendants on the other hand insist they were allocated land by the Government and have been thereon for the last 22 years but have not produced the letters of allotment. 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.’**

In relying on the case above and based on the circumstances at hand, I find that the Plaintiff’s alleged injuries are not speculative as the defendant have encroached on her land, and she has demonstrated the harm she will suffer if the injunctive orders are denied.

On the question of balance of convenience, from the evidence presented by the parties, I find that the balance tilts in favour of the Plaintiff whose rights have been infringed upon by the Defendants’.

From the above, it is clear that Plaintiff has established a prima facie case to meet the threshold for the grant of orders of injunction.

I find that the Notice of Motion application dated the 19<sup>th</sup> June, 2017 is merited and will proceed to allow it in the following terms:

The Land registrar Kajiado do register an inhibition Order restraining the Defendants from interfering with land parcel number KAJIADO/KAPUTIEI NORTH/23550.

The prevailing status quo be maintained pending the hearing and determination of the suit.

Costs of the application is awarded to the Plaintiff

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 June, 2018**

**CHRISTINE OCHIENG**

**JUDGE**