



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 3 OF 2018**

**SABAYA OLE ITOSI NKAISERRI.....PLAINTIFF**

**VERSUS**

**KISANCHO OLE LESELEON.....DEFENDANT**

**RULING**

The application before Court for determination is the Plaintiff's Notice of Motion dated the 18<sup>th</sup> January, 2018 brought pursuant to Section 1A and 63 of the Civil Procedure Act, Order 40 Rule 1, 2 and 4 and Order 51 of the Civil Procedure Rules 2010, and all the other enabling provisions of the Law. The application seeks temporary injunctive orders against the Defendant over land parcel number KAJIADO/OSILALEI/ 241 hereinafter referred to as the suit land. It is premised on the grounds that the Plaintiff is the registered and sole proprietor of the suit land and will suffer damage as a result of the Defendant's action. Further, that the Defendant has no claim over the Plaintiff's/Applicant parcel of land and has no right to encroach over the same. The Defendant will not suffer any harm if he vacates the said parcel since he already owns another parcel of land.

The application is supported by the affidavit of SABAYA OLE ITOSI NKAISERRI the Plaintiff herein where he deposes that he is the proprietor of the suit land which he acquired through first registration from Osilalei Group Ranch where he is still member number 301. He denies allowing the Defendant to occupy the suit land and despite numerous efforts to make him to vacate it, he has declined to do so and threatened him on several occasions. He claims he was forced to flee from the suit land and reduced to live as a squatter on his brother's property.

The application is opposed by the Defendant who filed a replying affidavit where he deposed that he has never trespassed on the Applicant's land as alleged. He avers that the Applicant's allegations that he served him with notices to vacate are not supported by any attached copies. He insists the Applicant's affidavit contains mere allegations and if he indeed threatened him, he should have reported to the Police. He contends that the Applicant has previously filed a suit in the Chief Magistrate's Court Kajiado vide Kajiado Cause No. 274 of 2015 over the same subject matter that has not been concluded. He sought for the application to be dismissed.

The Plaintiff filed his submissions but the Defendant did not despite being granted leave to do so.

**Analysis and Determination**

Upon perusal of materials presented in respect of the Notice of Motion dated the 18<sup>th</sup> January, 2018 including the supporting and replying affidavit as well as the Plaintiff's submissions, the only issue for determination at this juncture is whether the Plaintiff should be granted temporary injunction pending the outcome of the suit.

The Plaintiff claims the Defendant has trespassed on his land and interfered with his peaceful occupation of the suit land culminating in his moving to reside as a squatter on his brother's land. The Plaintiff has annexed copies of the title deed, Certificate of Official Search and the Membership Register from Osilalei Group Ranch where he is a member. The Defendant opposed the application by only denying the Plaintiff's allegations.

The principles for granting an injunction are well established in the case of **Giella Vs Casman Brown (1973) E.A 358**. As to whether the Plaintiff has established a prima facie case with a probability of success, I note the Plaintiff is the registered owner of the suit land and has produced his title deed to prove it. The Plaintiff further produced the membership register which confirmed he is a registered member of the Osilalei Group Ranch and was allocated the suit land on first registration. In his submission the Plaintiff relied on the provisions of section 24(1) of the Land (Group Representatives) Cap 287 that provides as follows: 'in any legal proceedings, a paper purporting to be a copy of or an extract from the register or document kept by the registrar and purporting to be certified by the registrar as a true copy or an extract, shall be admissible as 'prima facie' evidence of the contents of the register or documents.'

**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.’**

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”.**

In relying on the facts as presented and the above cited judicial authorities, I find that the Plaintiff has indeed established a prima facie case with a probability of success as there is apparently his right that has been infringed upon by the Defendant.

As to whether the Plaintiff will suffer irreparable harm that cannot be compensated by way of damages, the Plaintiff alleges that as a result of the threat to his person and property, by the Defendant, he was compelled to move from the suit land and reside as a squatter in his brother’s land. 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 he has demonstrated the harm he is already suffering as he is unable to peacefully enjoy the suit land and resides elsewhere as a squatter.

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 Defendant who only made mere denials in his supporting affidavit.

It is against the foregoing that I find the Notice of Motion application dated the 18<sup>th</sup> January, 2018 merited and allow it as prayed.

**Dated signed and delivered in open court at Ngong this 21st day of June, 2018**

**CHRISTINE OCHIENG**

**JUDGE**