



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 868 OF 2017

MICHAEL KIARIE.....PLAINTIFF

VERSUS

SOIKAN PELIAI.....DEFENDANT

RULING

The application before Court for determination is the Plaintiff's Notice of Motion dated the 20th September, 2017 brought pursuant to sections 3, 3A and 63 (c) and (e) of the Civil Procedure Act and Order 40 rules 1, 2, and 8 as well Order 51 of the Civil Procedure Rules.

The Applicant seeks injunctive orders against the Defendant for closing the existing road between land parcels numbers Kajiado/ Kaputiei North/ 1168 and Kajiado/ Kaputiei North/ 53904 - 53908 as well as peaceful usage including access by the Plaintiff and other members of the public, of the said road, pending the outcome of the application including this suit.

The Application is premised on the grounds that the Defendant has completely fenced off and blocked the existing public and permanent road between his parcel of land title number Kajiado/ Kaputiei North/ 1168 and the Plaintiff's parcels of land being Kajiado / Kaputiei North / 53904 - 53908 among several others. The Plaintiff and several other neighbors' as well as members of the public are grievously suffering, as they cannot access their parcels of land or homes. Further, that there has been no determination of any boundaries to warrant the change of boundaries or the fencing off or closure of the said road.

The application is supported by the affidavit of MICHAEL KIARIE the Plaintiff herein where he reiterated his claim and averred that he purchased land parcel number Kajiado/ Kaputiei North / 5696 and Kajiado/ Kaputiei North/ 5035. Further, that at the time of the purchase the land was surveyed and boundaries clearly marked. He claims that one of the parcels of land being title number Kajiado/ Kaputiei North/ 5035 bordered Kajiado/ Kaputiei North/ 1168 which belongs to the Defendant. He confirms subdividing Kajiado/ Kaputiei North/ 5035 into various portion Kajiado/ Kaputiei North/ 53764 – 53913 which he sold to various persons but retained Kajiado / Kaputiei North / 53904 - 53908 in his name. He explains that Kajiado / Kaputiei North / 53904 - 53908 and several others are accessed using the common and existing nine (9) meters road bordering the Defendant's land. He contends that on or about the 30th August, 2017, the Defendant fenced off and totally closed the existing road claiming that the same was passing on his land making it impossible to access his parcels of land. He states that together with other purchasers, they are grossly affected by the closure of the road as they are unable to access their respective properties. Further, that despite several pleas to the Defendant, he has failed to open up the access road.

The Defendant SOIKAN PELIAI opposed the application and filed a replying affidavit where he confirmed being the absolute proprietor of land parcel number Kajiado/ Kaputiei North/ 4260 which he was allocated by the Olkinos Group Ranch. He denies fencing off and blocking the existing road separating his parcel of land and Kajiado / Kaputiei North / 53904 - 53908 belonging to the Plaintiff. He insists it is the Plaintiff who has encroached on the road reserve and seeks to illegally create a road on his land. He further denies trespassing on the Plaintiff's land and claims the Plaintiff has converted the road reserve into plots. He confirms that on 2nd June, 2015 the Land Registrar Kajiado issued summons to him and two other persons for determination of a boundary dispute touching on parcels Kajiado/ Kaputiei North/ 1168; 1034; 1707; 452 and 458, which dispute was deliberated upon but the report is yet to be issued. He reiterates that the application has no basis in law and is not merited.

The Plaintiff filed a further affidavit where he reiterated his claim and denied the allegations raised by the Defendant in the replying affidavit.

Both the Plaintiff and Defendant filed submissions that I have considered.

Analysis and Determination

Upon consideration of the Notice of Motion dated the 20th September, 2017 including the affidavits and submissions, the only issue for determination is whether the Plaintiff is entitled to temporary injunction pending the outcome of the suit.

As to whether the Plaintiff has established a prima facie case with a probability of success, I wish to rely on the case of **Mrao Vs First American Bank Limited**. I note the Plaintiff is the registered proprietor of the aforementioned parcels of land. The Defendant is also the registered proprietor of his land. It is the Plaintiff's contention that the Defendant blocked the access road in August 2017, thus interfering with his access as well as those of the persons in neighbouring parcels of land, who have also filed affidavits herein. The Defendant disputes these averments and claims the Plaintiff has converted a road reserve into plots and intends to use his land as a road. At this juncture, I find that the issues raised by the Defendant can only be determined once this suit is set down for hearing. I have considered the evidence presented in the Plaintiff's supporting affidavit including the annexures thereon, and find that the Plaintiff has indeed established a prima facie case to warrant the grant of a temporary injunction pending the outcome of the suit.

On the second principle as to whether the Applicant stands to suffer irreparable loss which cannot be compensated by way of damages. Both the Plaintiff and Defendant own adjoining parcels of land that border each other. The Plaintiff alleges the Defendant has blocked the access road which has interfered with his accessing the suit land together with some of the neighbours who have developed their land. In the **Case of Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, the Court of Appeal provided that in seeking injunctive relief, speculative injury cannot suffice and there must be more than unfounded fear and the injury should be actual as well demonstrable that cannot be compensated by damages. In the current scenario, it is my considered view that the Plaintiff's injuries are not speculative as he has demonstrated the harm he will suffer if the injunctive orders he is seeking are denied.

On the question of balance of convenience, from the evidence presented by the parties, I am not in doubt that at this juncture the balance indeed tilts in favour of the Plaintiff.

It is against the foregoing that I find the instant application merited and will allow it in the following terms:

1. The Prevailing Status Quo be maintained wherein the Defendant be and is hereby directed to leave the access road open pending the outcome of the Suit.
2. The costs will be in the cause.

Dated signed and delivered in open court at Kajiado this 10th day of December, 2018.

CHRISTINE OCHIENG

JUDGE