



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

LAND CASE NO. 175 OF 2015

JOHN LEKODKI OLE TELEU

Suing on behalf of Transmara Community Development Project PLAINTIFF

VERSUS

JONATHAN PAAPAI 1ST DEFENDANT

GRACE NAIGURAI 2ND DEFENDANT

JOSHUA KIPNGETICH 3RD DEFENDANT

KIRUI (SURVER TRANSMARA)..... 4TH DEFENDANT

HON. ATTORNEY GENERAL 5TH DEFENDANT

R U L I N G

1. In their application dated 20th May 2016 the 1st and 2nd defendants/ applicants inter alia seek the following orders:-

1. That a temporary injunction do issue against the plaintiff either by himself, his agents, servants, employees, proxies and/or any person from entering into, trespassing onto, building onto, interfering with and/or in any other manner dealing with the property known as Transmara/Poroko/39 (hereinafter referred to as “the suit property”) pending the hearing and determination of the suit.

2. That the order of inhibition issued by this court on 23rd July 2015 be set aside.

3. That the plaintiff’s suit be hereby struck out with costs to the defendants.

The application is supported on the grounds set out on the body of the application and on the supporting affidavit sworn by the 1st defendant dated 20th May 2016. The application is made under Order 40 Rule 1, Order 2 Rule 15 and Order 51 Rule 15 of the Civil Procedure Rules and Sections 1A, 1B, 3A of the Civil Procedure Act.

2. The applicants predicate the application inter alia on the grounds that Trans Mara Community Development (hereinafter referred to as TMD) is a community based project comprising of local leaders, pastors, teachers and elders of the Masai community and was founded with the objective of addressing the

various challenges faced by the community including education, healthcare and economic development of the community at large. That TMD acquired the suit property, **LR No. Transmara/Poroko/39** on or about 25th January 2011 and through donor support constructed a children's home and a school on the property. That the defendants/ applicants aver that the plaintiff, together with his children have on several occasions entered on the suit property and have harassed staff and the children at the school with the objective of having them to vacate the suit property. The applicant further state that the plaintiff is a past official of TMD who voluntarily resigned from office and has no authority or justification to interfere with the operations of TMD and/or its assets. The applicants contend that the plaintiff had no locus standi to bring the instant suit and avers that the plaintiff's persistent interference with the suit property is a threat to the continuance of the children's home which caters for over 100 destitute children.

3. The plaintiff swore a replying affidavit dated 21st June 2016 in opposition to the 1st and 2nd defendants' application. Through the replying affidavit the plaintiff denied the 1st defendant is a chairman of TMD averring that the 1st defendant used his position as a former officer of National Intelligence Security to forcefully install himself as such. The plaintiff asserts TMD is not a community based organization but an organization founded by himself as a NGO as per the certificate of registration annexed as "**JLTI**". The plaintiff states the defendants have never been members of the NGO now known as TMD and claims they are intruders who have no interest in TMD. The plaintiff further states he is the founder of TMD and that through donor funding from the USA notably through Rev. Richard Leigh Smith and Mrs. Anne Smith who have since relocated to Kisii and Migori, he was able to establish and acquire assets for TMD. The plaintiff states that he is the sole owner of the suit property **LR No. Transmara/Poroko/39** which he acquired on 25th January 2011 for the benefit of TMD and avers that the defendants have no basis to seek to injunct him from running his projects.

4. The plaintiff asserts that he has never resigned as an official of TMD and neither has the same been dissolved. The plaintiff states that owing to the defendants acts of interference with his project, he filed the instant suit seeking orders of injunction to restrain the defendants activities and an order of inhibition to prevent any dealings with the suit property. The court on 17th July 2015 granted the order of inhibition ex parte but the prayers seeking injunctive orders were left to be argued interpartes.

5. Apparently before the plaintiff's application dated 15th July 2015 could be heard interpartes on 7th December 2015 as scheduled the plaintiff on 3rd August 2015 filed an application dated 31st July 2015 seeking to have the defendants cited and punished for contempt of court for breaching and/or disobeying the ex parte court order granted on 17th July 2015. The court heard this application and delivered a ruling on 6th May 2016 dismissing the application for lacking any merit. The main application by the plaintiff dated 15th July 2015 remains pending hearing interpartes. The 1st and 2nd defendants rather than have the application by the plaintiff fixed for hearing on merits opted to file a fresh application being the application dated 20th May 2016 basically reversing roles in the sense that the 1st and 2nd defendants seek an injunction against the plaintiff to restrain him from interfering with the activities of TMD on land parcel **Transmara/Poroko/39** or in any manner dealing with the property. The plaintiff more or less seeks a similar order against the defendants in his application.

6. The parties argued the application by the 1st and 2nd defendants by way of written submissions. The applicants submissions dated 2nd August 2016 were filed on 3rd August 2016 and the plaintiffs submissions dated 6th December 2016 were filed on 8th December 2016. I have perused and considered the pleadings and the submissions by the parties and the issue for determination is whether the applicants have satisfied the conditions for grant of a temporary injunction as established in the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E. A 358**. The facts and circumstances in this case cannot in my view fit in the straight jacket of the factors to be considered as established in the **Giella** Case, notably; whether a prima facie case has been established or whether irreparable damage may result if the injunction is not granted and/or whether the application is one to be considered on a balance of convenience.

7. In the matter before me the facts are contested and that has culminated with both the plaintiff on one

part and the 1st and 2nd defendants on the other part each filing an application seeking injunctive orders against the other. The plaintiff claims he is the owner of the TMD project and the parcel of land on which the project is running. He claims to be the person behind the NGO which apparently is the one running the project for the benefit of the community. It is on that basis he filed the application for injunction dated 15th July 2015 where he claims the defendants are collectively interfering with the activities of his NGO. On their part the 1st and 2nd defendants claim the plaintiff resigned from being an official of what they claim is a community based project. They accused the plaintiff of interfering with the running of the project which presently is catering for vulnerable children. Clearly there is a dispute as to the status of TMD and the management of the same. Is it an NGO and/or a community based project and who is entitled to manage the same? Are the defendants' intruders or are they officials of the project? Did the plaintiff resign as an official of TMD and if so does he continue to have an interest in the suit property? These are contested issues which cannot be resolved at this interlocutory stage. Parties shall require to adduce evidence at the trial.

8. The court in a situation such as obtains in the present matter where issues are highly contested will be slow to grant any injunction. The court will instead seek to have the subject matter preserved until the suit is heard and determined on merits. Therefore in the circumstances of this matter the order that commends itself is to require that the parties maintain and observe the prevailing status quo where the TMD project catering for the children's home shall continue without any interference from the plaintiff. The defendants who are presently in-charge of operating and running the children's home shall continue doing so until the suit is heard and determined. It is so ordered.

9. The Environment and Land Courts Practice Directions issued vide Gazette Notice No. 5178 of 28th July 2014 under paragraph 32 gives the court discretion, in appropriate cases during the hearing of interlocutory applications, to order the parties to maintain status quo. Paragraph 32 of the direction is in the following terms:-

“32. During the interpartes hearing of any interlocutory application, where appropriate, parties are encouraged to agree to maintain status quo. If they cannot agree, after considering the nature of the case or hearing both sides the judge shall exercise discretion to order for status quo pending the hearing and determination of the suit bearing in mind the overriding interests of justice.”

10. As I have indicated above, I am persuaded that the ends of justice in the instant matter will best be served if the parties maintain and observe the status quo. To facilitate the hearing of the case, I direct the parties to comply with Order 11 Civil Procedure Rules within the next forty five days of the date of the ruling hereof and thereafter to fix the matter for pre trial directions. Accordingly, the application by the plaintiff dated 15th July 2015 and the instant application by the 1st and 2nd defendants are hereby dispensed with on the aforesaid terms. For the avoidance of doubt the inhibition ordered to be registered against the suit property shall remain in force until the suit is heard and determined on merit. Parties shall bear their own costs for the interlocutory applications.

11. Orders accordingly.

Ruling dated, signed and delivered at Kisii this 24th day of February, 2017.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the plaintiff

..... for the 1st and 2nd defendants

..... for the 3rd defendant

..... for the 4th and 5th defendants

..... Court assistant

J. M. MUTUNGI

JUDGE