



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT KERICHO

ELC NO.36 OF 2016

JOSEPH KIPNGENO KIRUIPLAINTIFF

VERSUS

RICHARD BARNGASDEFENDANT

RULING

(Application for injunction; principles to be applied; plaintiff claiming that the defendant has wrongfully fenced his land thus closing a road of access leading to a water point on the plaintiff's land; plaintiff claiming that this act has inconvenienced the public; no demonstration that there is any road of access as claimed by the plaintiff; no case filed by the public complaining of the action of the defendant; plaintiff can access the water point thus no demonstration of any irreparable loss on his part; application dismissed)

1. This suit was commenced by way of plaint filed on 16 June 2016. In the suit, the plaintiff has pleaded that he wants the defendant and his family members restrained by an order of injunction from trespassing into the **land parcel Kericho/Merigi/693**. The plaintiff has also pleaded that he wants an order to compel the defendant to remove a fence blocking the entry to "the water point". It is his case that on 13 November 2015, the defendant blocked the water point which has denied the plaintiff and the members of the family of the late Meshack K. Rono and the community at large from accessing the same despite demand from the Bomet Land Registrar and Bomet County Water Services Company. It is claimed that the water point was offered by the late Meshack Rono to the public and they have been accessing it for many years.

2. Together with the suit, the plaintiff filed an application seeking orders that pending the hearing and determination of this suit, there be issued an order of injunction restraining the defendant from blocking and/or interfering with the use of the Chepkirib Water Spring by members of Magenji Community. It is this application which is the subject of this ruling.

3. In the application, it is averred that the plaintiff is the registered owner of the **land parcel Kericho/Merigi/693** where the water spring is found. It is said that this spring has been a source of water for the community at large and that the act of the defendant closing the access road to it has resulted into untold suffering for the members of the community.

4. In the supporting affidavit, the plaintiff has stated that the defendant is his neighbor and a son of the proprietor of the **land parcel Kericho/Merigi/160** which borders the plaintiff's land parcel **Kericho/Merigi/693**. He has averred that the Chepkirib Spring though emanating from his land has been earmarked as a public utility and he has allowed the public free access to it and that this was the norm when his father was alive. He was thus surprised when he was called in November 2015 with information that the defendant has closed the spring. In the month of January 2016, he went to the Bomet District

Lands Office to complain about the closure by the defendant and the office wrote a letter dated 7 January 2016 directing all parties to ensure that the natural water source is open to the public. He also got a letter from the County Government of Bomet, office of the Chief Executive Officer, Conservation and Management identifying Chepkirib Spring as a natural water resource. He has stated that he has beseeched the defendant to pull down his fence but he has declined. He has averred that the defendant has no right over the water resource as the same is entirely situated in the **parcel Kericho/Merigi/693**.

5. The defendant entered appearance and filed a brief defence whereby he stated that the dispute is on the boundary between the **land parcels Kericho/Merigi/693** and **Kericho/Merigi/160** and not on the water point as alleged by the plaintiff. He has also pleaded that the plaintiff has not demonstrated that he has any authority to sue on behalf of those he purports to represent. In his replying affidavit, the defendant has contended that the water point in issue is in the plaintiff's land and not his. He has deposed that there is no registered road of access from his land to the water point and that what the plaintiff wants to do is to create a non-existent road of access from his (the defendant's) land to the water point which he is against. He has deposed that the plaintiff has the option of creating a road of access from his land to the water point.

6. I have considered the above pleadings and depositions together with the submissions of both counsel for the applicant and the respondent.

7. To succeed in an application for injunction, one needs to demonstrate a prima facie case with a probability of success and that he stands to suffer irreparable loss if the injunction is not allowed. If in doubt the court will determine the application on a balance of convenience. These principles were set out in the case of *Giella vs Cassman Brown (1973) EA 358* and I stand guided by them.

8. The issue in contention seems to me to be access to a water point known as Chepkirib Spring. The plaintiff claims that this spring is in his **land parcel Kericho/Merigi/163** which the defendant seems to acknowledge. It does appear that the plaintiff is aggrieved by the action of the defendant of fencing his **land parcel Kericho/Merigi/160** which act the plaintiff claims has closed access to the public to the water point. I have not been given any concrete evidence in terms of a survey report or a map to demonstrate that there exists a road through the defendant's land to the water point in dispute. 9. I have no evidence whatsoever that the road claimed to exist by the plaintiff actually exists. I am not therefore of the view that the plaintiff has demonstrated any prima facie case with a probability of success.

9. But even assuming that there does indeed exist a road which ought to be accessible to the public, the plaintiff has not demonstrated to me what loss he is suffering by the defendant closing the access road. The spring is in the plaintiff's land which means that the plaintiff can access it. The fencing that has been done by the defendant cannot be said to be impeding the plaintiff from accessing the water. The application will still fail for failure to demonstrate irreparable loss. It could be that the persons who stand to suffer loss are the general public. But I have no case filed by them. What I can see is that the plaintiff has filed this case on his own behalf, which indeed was acknowledged by his counsel, Mr. J.K Koech, in his submissions. If the public wish to file a case, they are free to do so, but there is none filed by them in this matter. The plaintiff therefore fails the irreparable loss test.

10. The plaintiff having failed both the prima facie case test and the irreparable loss test, I have little option but to dismiss this application with costs.

11. It is so ordered.

Dated, signed and delivered in open court at Kericho this 3rd day of February 2017

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

KERICHO

PRESENT:

Mr. Nyadimo holding brief for Mr. Mitey for Respondent

No appearance on part of M/s Koech J.K. & Co. Advocates for the Applicant.

Court Assistant; Wambany