



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC CASE NO.61 OF 2017

ALBERT BOYO KIRUI.....PLAINTIFF

VERSUS

BENJAMIN KIPROTICH A. KIGEN.....1ST DEFENDANT

KIPKURUI CHERUTICH.....2ND DEFENDANT

ERICK KIPTUM KIMOSOP.....3RD DEFENDANT

THE COUNTY LAND REGISTRAR TRANS-NZOIA....4TH DEFENDANT

THE COUNTY SURVEYOR TRANS-NZOIA.....5TH DEFENDANT

THE ATTORNEY GENERAL..... 6TH DEFENDANT

R U L I N G

1. The application dated 4/4/2017 filed by the plaintiff seeks the following:-

- (a) That service of this application be and is hereby dispensed with in the first instance and the same be certified urgent.
- (b) That a temporary injunction be and is hereby issued restraining the defendants, their servants and agents from trespassing into, fencing, surveying, constructing upon, selling, transferring, encumbering and or otherwise interfering with the parcel of land known as Kwanza/Namanjalala Block 4/Kapsitwet/45 measuring approximately 5 acres pending the hearing and determination of this application interpartes.
- (c) That a temporary injunction be and is hereby issued restraining the defendants, their servants and agents from trespassing into, fencing, surveying, constructing upon, selling, transferring, encumbering and or otherwise interfering with the parcel of land known as Kwanza/Namanjalala Block 4/Kapsitwet/45 measuring approximately 5 acres pending the hearing and determination of the main suit.
- (d) Costs be in the cause.

2. It is supported by the replying Affidavit of Albert Boyo Kivai sworn on **4th April 2017**.
3. The 3rd defendant/respondent filed a Notice of Preliminary Objection dated **7th April 2017**. Objecting to the application and the entire suit on the basis that:-
 - (1) **That the plaintiff/applicant has no cause of action against the 3rd defendant/respondent.**
 - (2) **That the entire suit as filed therein against the 3rd defendant/respondent is totally defective.**
4. He also filed a replying affidavit sworn on **7/4/2017**. The plaintiff also filed a further affidavit on **13/7/2017** in support of his Notice of Motion.
5. According to the plaintiff, he is the bona fide owner of **Plot No. 45** in Kapsituwet Farm Ltd which he purchased from the 1st defendant. However despite having entered into an agreement for sale of the land which the plaintiff occupied even before the date of the agreement, the 1st defendant is yet to effect a transfer of the property to the plaintiff.
6. Sometime in the year 2016 the plaintiff discovered that the 4th and 5th defendant had caused the suit land to be registered in the name of the 2nd respondent under the title Number **Kwanza Namanjalala Block 4/Kapsituwet/45**. He also found that the 2nd defendant was the registered proprietor of **Parcel No. 44**.
7. The plaintiff avers that he has learnt that the 5th defendant wants to carry out survey on the land the plaintiff is occupying, ostensibly to confirm the acreage of the 3rd defendant's **Land Parcel No. 45** and **131** do not even neighbour one another on the ground. Thus, the plaintiff urges, it would amount to trespass.
8. In the plaint the plaintiff seeks an injunction restraining the defendant from whatsoever dealings or interfering with the suit land, a declaration that **Parcel No 45** was not available for registration to the 2nd defendant or any other person, and a declaration that all steps taken and all the documents held by the defendant over **parcel No 45** are null and void ab initio, that they do not confer any legal interest on the 2nd defendant and that the title 2nd defendant be cancelled and expunged from the registry.
9. In response to the application the 3rd respondent avers in a sworn Affidavit that he has no interest or claim in whatsoever in **parcel No. 45** and that **parcel No. 45** borders his land which is **parcel No. 131** and that the plaintiff is attempting to deny the 3rd respondent the right to have his own land surveyed.
10. Strangely, the plaintiff swore a further affidavit stating that after the filing of the suit, the 4th defendant called him and informed him that the title deed to his parcel is ready for collection. He does not say whether he went to collect it. The plaintiff seems anxious that the 4th defendant and the 5th defendant be summoned to court before the determination of the instant application or that the court do visit the land in question.
11. I have noted that on both maps or sketches produced by the plaintiff and the 3rd defendant respectively the parcel numbers **45** and **131** do appear to be contiguous to one another despite the plaintiff's denial of that fact. I must state here and now that it cannot be understood from the pleading what the plaintiff would want from the 3rd defendant if the parcels do appear on the map as separate parcels and the 3rd defendant has started under the oath that he has no claim over the plaintiff's plot **No. 45**. I therefore find that the plaintiff has not established a prima facie case with probability of success against the 3rd defendant at the moment.
12. However I find that the plaintiff has established a prima facie case with a probability of success as

against the rest of the defendants in respect of plot No. 45 alone. Consequently I find that the orders sought in the application may issue against them. I therefore grant, pending the hearing and determination of this suit, prayer **No. (c)** as against the **1st, 2nd, 4th, 5th, and 6th** defendants only in so far as interfering or dealing with plot **No. 45** is concerned. However I do decline to strike out the suit against the 3rd defendant at the moment. The costs of the application shall be in the cause.

Dated, signed and delivered at Kitale on this **24th** day of **August, 2017**.

MWANGI NJOROGE

JUDGE

24/8/2017

Before - Mwangi Njoroge Judge

Court Assistant – Isabellah/Picoty

Mr. Ngumbi holding brief for Okara for Plaintiff/Applicant

Mr. Bisonga for 3rd defendant

Mr. Ngumbi for 4th, 5th and 6th Respondents

Ruling read in open court.

MWANGI NJOROGE

JUDGE

24/8/2017