



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 77 OF 2016

PETER VIDIJA SERETE 1ST PLAINTIFF

RICHARD WASIKE WAMAKONDI.....2ND PLAINTIFF

GRACE NASENYA KHAEMBA 3RD PLAINTIFF

VERSUS

CHARLES OWITI MUDUNYI1ST DEFENDANT

IGNATIUS WERE OTSYENGI 2ND DEFENDANT

FREDRICK OJUKU OKARO3RD DEFENDANT

R U L I N G

1. The three applicants namely **Peter Vidija Serete, Richard Wasike Wamakondi** and **Grace Nasenya Khaemba** brought a Notice of Motion dated 27/4/2016 against three Respondents namely **Charles Owiti Mudunyi, Ignatius Were Otsyengi** and **Fredrick Ojuku Okora** seeking an injunction. The Applicants seek to restrain the Respondents or their agents from surveying, trespassing into, fencing, further fencing, construction upon or further construction upon, selling, transferring, encumbering, cultivating or further cultivating and or otherwise interfering with the suit parcels of land being one acre, half acre and another half acre out of parcel No. **Gutungorio/Kapkoi/Part of/4** pending hearing and determination of the suit.

2. The Applicants contend that they are neighbours of the Respondents and that both the Applicants and Respondents bought their respective Plots from one **Appollos Kennedy Mwangi** and each of them settled on their respective portions after they fenced the portions. They contend that the Respondents have recently commenced survey work which has resulted in their fences being pulled down and their portions hived off and that the Respondents have erected new fences and cultivated on the hived off portions.

3. The Applicants application has been opposed by the Respondents through a replying affidavit sworn by the first Respondent who has authority of his co-respondents. The respondents contend that they are merely implementing a court order having successfully litigated against **Appollos Kennedy Mwangi** and having obtained the consent of the Land Control Board to sub divide the land belonging to **Appollos Kennedy Mwangi**. The Respondent contend that there is enough land for both the Applicant and the Respondents and that the portions which were shown to the Applicants was subject to confirmation by the surveyor.

4. I have gone through the Applicant's application as well as the opposition thereto by the Respondents. I must point out at the outset that the pleadings of both the Respondents and the Applicants leave a lot to

be desired. Some of the Applicants annexures are illegible. The Respondents have not annexed any of the documents referred to in their affidavit. However this notwithstanding, I have to decide whether the Applicants have disclosed a case for grant of temporary injunction.

5. The principles for grant of temporary injunctions are now well settled since the decision in the case of **Giella -Vs- Cassman Brown CO. Ltd 1973 EA 358**. First, an Applicant must demonstrate that there is a prima facie case with probability of success. Second, an injunction will not normally be granted unless the Applicant will suffer loss and injury which will not be compensated in damages. Third, if the court is in doubt, it will decide the application on a balance of convenience.

6. In the instant case, all the three Applicants are contending that they all bought their respective parcels from **Appollos Kennedy Mwangi**. They all claim to have bought their portions from parcel known as **Gutungorio/Kapkoi/Part of/4**. I do not think that there is land which can be described as **Gutungorio/Kapkoi/Part of/4**. Maybe the Applicants bought their portions which were part of **LR No. Gutungorio/Kapkoi/4**. I do not wish to speculate for I do not know the actual position. Be that as it may I have to decide whether the Applicants have disclosed a prima facie case against the Respondent.

7. A prima facie case was defined in the case of of **Mrao Ltd. -Vs- First American Bank Of Kenya Ltd & 2 others** as follows:-

“ A prima facie case in a civil application includes but is not confined to a “genuine and arguable case”. It 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”.

8. Whereas all the Applicants claim to have bought their portions from Appollos Kennedy Mwangi, documents annexed to the supporting affidavit of the Applicants application show that the second Applicant bought his portion from one **Lazaro Asiago Omogo**. It is not clear whether **Lazaro Asiago Omogo** bought the half acre claimed by the second Applicant from **Appollos Kennedy Mwangi**.

9. The agreement of the third Applicant was prepared and signed on behalf of **Appollos Kennedy Mwangi** by **Ben Simiyu** who is described as an agent of **Appollos Kennedy Mwangi**. Whereas the said agreement states that the third Applicant had paid Kshs 100,000/- into the account of **Appollos Kennedy Mwangi** the truth of the matter is that only Kshs 89,000/= was deposited. The rest of the money i.e Kshs 1,000/- and kshs 10,000/= was taken by **Ben Simiyu** allegedly for the agreement and loan as per a handwritten note which is part of the annexures.

10. It is not clear from the material presented before me that the Applicants were put in possession of the portions which they are now claiming . There are two letters written by the chief of Sirende location addressed to Kenya Electricity Transmission Company. (KETRACO) regarding compensation to the first and third Applicants. The chief was confirming that the two Applicants had land for purposes of compensation. These letters do not assist the case at hand.

11. The Applicants did not even attempt to demonstrate even through photographs to show that their fences had been destroyed and that the Respondents have cultivated on part of their portions. Without such evidence, it is difficult or if not impossible to hold that the Applicants portions have been interfered with as to call for an explanation from the Respondents. The manner in which the injunction application is couched is so amorphous as to decipher what actually the Applicant intend to secure. I do not find in the circumstances that the Applicants have demonstrated that they have a prima facie case with probability of success.

12. If it turns out that there is actually any encroachment , this is something which can be remedied. It cannot be said that the Applicants will suffer loss which will not be compensated. If the Applicants were put in possession before survey work was carried out, it is common knowledge that once survey is carried out, parties are bound to be affected slightly depending on their positions on the ground.

13. For the reasons given herein above, I find that the Applicants have not made out a case for grant of injunction. Their application is dismissed with costs to the Respondents.

It is so ordered.

Dated, signed and delivered at Kitale on this 11th day of July 2016.

E. OBAGA

JUDGE

In the presence of 1st Defendant.

Court Assistant – Winnie

E. OBAGA

JUDGE

11/7/16