



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 83 OF 2016

JAMES TAKO LOPOYETUM.....PLAINTIFF

VERSUS

THE COUNTY GOVERNMENT OF WEST POKOT.....DEFENDANT

RULING

1. The applicant brought a Notice of Motion dated 17/5/2016 in which he seeks to restrain the respondent from carrying out further construction on his land known as **LR. No. West Pokot/Karinget A/768** (suitland). The applicant contends that he is the registered owner of the suitland. That on 15/5/2016, the respondent forcefully invaded the suitland, shifted his fence and hived off $\frac{3}{4}$ of the suitland. The respondent has since then enclosed the hived off portion and has started constructing a stadium.
2. The applicant contends that he did not authorize the respondent to take part of his land and that the respondent has not acquired the said land by way of compulsory acquisition or otherwise. That the respondent has since stationed armed men who are guarding the perimeter fence they have put up.
3. The respondent has opposed the applicant's application through replying affidavit sworn by the County Attorney on 16/6/2016. The respondent denies that it has encroached on the suitland as alleged. That the applicant has not demonstrated that it has encroached on to his land and that the title held by the applicant is not genuine as it does not have a registry index map number and its existence cannot be established on the ground.
4. The respondent further contends that it is merely renovating an old stadium which has been in existence since independence and that it has not encroached on any part of the applicant's land.
5. I have carefully gone through the applicant's application together with the supporting affidavit as well as the further affidavit. I have also gone through the response by the respondent through its county attorney. There is no doubt that the applicant is the registered owner of the suitland. He has provided a copy of title and green card which shows the history of the suitland. There are even documents from the lands office which confirm that the applicant is the registered owner of the suitland.
6. From the documents provided by the applicant, it is clear that the suitland adjoins that of the respondent. The applicant contends that the respondent has hived off $\frac{3}{4}$ of his land and enclosed it and have started constructing a stadium. The applicant is seeking for a temporary injunction to stop further construction on his land. The principles for grant of temporary injunction are now well set out. First an applicant must demonstrate that he has a prima facie case with probability of success. Secondly, an injunction will not normally be issued unless otherwise the applicant will suffer loss which will not be compensated in damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience. *See Giella –vs- Cassman Brown Co. Ltd [1973] E.A 358.*

7. In the instant case, the applicant is contending that there is encroachment into his land by $\frac{3}{4}$. The question which then arises for determination is whether the applicant has demonstrated that the respondent has hived off $\frac{3}{4}$ of his land. The answer to this question is simply no. There is no evidence of any encroachment. The applicant himself has stated in his further affidavit that he is unable to access the suitland for survey purposes because the respondent has stationed armed personnel to guard the area. Without any evidence of encroachment, it is impossible for this court to restrain the respondent from carrying out construction work. To this extent, I find that the applicant has not demonstrated that he has a prima facie case. It will be unfair to restrain a party in a case of boundary dispute as in this case without prove that there is actually encroachment.

8. The applicant is contending that the respondent removed his fence made of iron sheets and posts and moved its boundary into his plot. That the respondent has already put up a perimeter wall on the encroached portion. The photographs which he has annexed clearly show a perimeter fence. Should it turn out after the hearing that the respondent encroached on to the suitland, whatever damage the applicant would have suffered will be quantified and he will be compensated. The boundary which has been put in place can always be removed and put in a proper place. I therefore find that the applicant will not suffer loss which will not be compensated.

9. Even on a balance of convenience, an injunction should not be granted in the circumstances. The correct position of the boundary has not been established. The respondent has already built the boundary where it thinks the stadium land reaches. The truth or otherwise will come out after a full trial. I therefore find that the applicant's application cannot be allowed. The same is hereby dismissed with costs to the respondent.

It is so ordered.

Dated, signed and delivered at Kitale on this 31st day of **August, 2016**.

E. OBAGA

JUDGE

In the presence of Ms. Munialo for Mr. Teti for Plaintiff/Applicant.

Court Assistant – Isabellah.

E. OBAGA

JUDGE

31/8/2016