



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 111 OF 2016

SUSAN WANGECI KIRAGU & 8 OTHERS.....PLAINTIFFS/APPLICANTS

-VERSUS-

SHABAN SALIM NYERE & 6 OTHERS.....DEFENDANTS/RESPONDENTS

RULING

1. For determination is the notice of motion dated 19th May 2016 brought under the provisions of Order 40 & 51 of the Civil Procedure Rules and Section 1A, 1B & 3A of the Civil Procedure Act. The applicants are seeking the following orders ;

3. That pending the hearing and determination of the main suit, this Honourable Court be pleased to issue orders restraining the Respondents jointly and severally, whether by themselves and/or through their servants, agents, representatives or any of them from preventing, frustrating, interfering or in any way howsoever thwarting the Applicants’ efforts to erect individual boundary fences on the parcels of land identified as Title Numbers:

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|---------------------------------------|---|
| KWALE/RAMISI PHASE II S.S/153, | KWALE/RAMISI PAHASE 11 S.S/241, |
| KWALE/RAMISI PHASE II S.S/246, | KWALE/RAMISI PHASE II S.S/883, |
| KWALE/RAMISI PHASE II S.S/888, | KWALE/RAMISI PHASE II S.S/947, |
| KWALE/RAMISI PHASE II S.S/948, | KWALE/RAMISI PHASE II S.S/949, |
| KWALE/RAMISI PHASE II S.S/950, | KWALE/RAMISI PHASE II S.S/951, |
| KWALE/RAMISI PHASE II S.S/952, | KWALE/RAMISI PHASE II S.S/953, |
| KWALE/RAMISI PHASE II S.S/954, | KWALE/RAMISI PHASE II S.S/955, |
| KWALE/RAMISI PHASE II S.S/956, | KWALE/RAMISI PHASE II S.S/957, |
| KWALE/RAMISI PHASE II S.S/958, | KWALE/RAMISI PHASE II S.S/959, |
| KWALE/RAMISI PHASE II S.S/960, | KWALE/RAMISI PHASE II S.S/961, |
| KWALE/RAMISI PHASE II S.S/962, | KWALE/RAMISI PHASE II S.S/964, |
| KWALE/RAMISI PHASE II S.S/965, | KWALE/RAMISI PHASE II S.S/966, |
| KWALE/RAMISI PHASE II S.S/967, | KWALE/RAMISI PHASE II S.S/968, |
| KWALE/RAMISI PHASE II S.S/969, | KWALE/RAMISI PHASE II S.S/970, and |
| KWALE/RAMISI PHASE II S.S/971. | |

4. That pending the hearing and determination of the main suit, this Honourable Court be pleased to issue orders restraining the Respondents jointly and severally, whether by themselves and/or through their servants, agents, representatives or any of them howsoever from entering, remaining, removing beacons or in any way howsoever interfering with the

Applicants' possession and enjoyment of their parcels of lands known and identified as Title Numbers: KWALE/RAMISI PHASE II S.S/153, KWALE/RAMISI PHASE II S.S/241, KWALE/RAMISI PHASE II S.S/246, KWALE/RAMISI PHASE II S.S/883, KWALE/RAMISI PHASE II S.S/888, KWALE/RAMISI PHASE II S.S/947, KWALE/RAMISI PHASE II S.S/948, KWALE/RAMISI PHASE II S.S/949, KWALE/RAMISI PHASE II S.S/950, KWALE/RAMISI PHASE II S.S/951, KWALE/RAMISI PHASE II S.S/952, KWALE/RAMISI PHASE II S.S/953, KWALE/RAMISI PHASE II S.S/954, KWALE/RAMISI PHASE II S.S/955, KWALE/RAMISI PHASE II S.S/956, KWALE/RAMISI PHASE II S.S/957, KWALE/RAMISI PHASE II S.S/958, KWALE/RAMISI PHASE II S.S/959, KWALE/RAMISI PHASE II S.S/960, KWALE/RAMISI PHASE II S.S/961, KWALE/RAMISI PHASE II S.S/962, KWALE/RAMISI PHASE II S.S/964, KWALE/RAMISI PHASE II S.S/965, KWALE/RAMISI PHASE II S.S/966, KWALE/RAMISI PHASE II S.S/967, KWALE/RAMISI PHASE II S.S/970, and KWALE/RAMISI PHASE II S.S/971.

5. That the Honourable Court be pleased to order the local police through the Officer Commanding Diani Police Station to provide security during the exercise in (3) and (4) above.

6. That costs of and occasioned by this Application be awarded to the plaintiff/Applicants.

2. The application is supported by the several grounds listed on its face, the detailed supporting affidavits sworn by Christopher Githaiga, George Ndungu Gitau & Lewis Kamau Kanyoko, the documents annexed thereto and the supplementary affidavit of Christopher Githaiga.

3. The application is opposed by the defendants/Respondents through affidavit sworn by the 1st Respondent on behalf of all the Respondents.

4. The advocates for the parties agreed to argue this application by filing of written submissions. Only the applicants' did. My part now is to consider whether the applicants have met the principles set in *Giella vs Cassman Brown* for granting of injunctions.

5. The applicants while relying on the case of **Mrao vs First American Bank Ltd & Another (2003) eKLR** submitted that they have produced evidence of ownership by annexing copies of their title deeds. They also submit that the Respondents have not produced any evidence to contradict the applicants' titles. On irreparable loss, the applicants submit the Respondents are keen on intimidating them and disrupting the officially replaced beacons thus causing them financial loss. Further that the respondents are intent on encroaching on the suit properties. Lastly but not least the applicants submitted that an injunction would issue even where damages would be an adequate remedy. The applicants cited the holding in **Muigai vs HFCK & Another civil case No 1678 of 2001** to support this averment.

6. In opposing the application the 1st defendant deposed that some time back, the government decided to properly demarcate the area so that they are given titles. That they co-operated with the government agencies involved in the exercise. However when the letters and titles came out, it was apparent some people were being allocated other people's homes. The Respondents deposed that some people want to place beacons and marks in their homes. The Respondents wondered why no government department has been made a party to this proceedings yet this was a program of the government.

7. The Respondents depose that if the orders are granted they will suffer immense injustice because ;

i) The orders are final

ii) It amounts to depriving them of their land

iii) It is clear abuse of the Court process

That although the 1st Respondent also has a title, he has refrained from looking at the boundaries because he is waiting on the promise of the adjudication officer so that he does not engage in any illegalities. He therefore urged the Court not to grant the orders sought.

8. From the pleadings, the applicants have annexed copies of their titles and postal searches obtained from the lands registry showing they own the suit parcels. In the replying affidavit, the Respondents have not questioned the legality or otherwise of these titles. The closest they questioned is by deposing that it is apparent that some people were being allotted other people's homes without specifying whose homes have been affected or pointing a finger at the applicants as the "unknown" people who have been given titles. To the extent that the applicants have shown their interests on the suit parcels I am satisfied that they have shown a prima facie case with a probability of succeeding.

9. The application would be granted even on proof of this principle only as the law is that not all the principles must be proved. However I will also consider the second principle of irreparable loss. Mr Githaiga deposed in his affidavit of 18th May 2016 that the Respondents are neighbours who usually trespass on to these parcels and without any colour of right habitually cause damage to beacons placed on the suit properties. Further that the applicants have on three separate occasions and at their costs instructed surveyors to place boundary beacons for ease of erecting fences but the Respondents have in the all three instances caused the removal of the said beacons. The Respondents did not deny this deposition.

10. The applicants averred further that when they went to view the plots after the beacons were placed for the third time, they were accosted by a group of people comprising the Respondents and their agents where daggers were drawn and blows exchanged. As a result of this they have been denied their right to peacefully enjoy their properties. The costs of replacing beacons every now and then, the likelihood of being physically injured and the loss of opportunity to peacefully enjoy their properties without any valid reason in my considered view and I so hold constitutes loss that may not necessarily be compensated by an award of damages.

11. The facts set out by the pleadings also demonstrate that the Respondents are not living on the suit parcels. It would be prudent and or the balance of convenience demands that this state of affairs be preserved pending hearing and determination of this suit. The orders sought are not final as the applicants have specifically pleaded that the Respondents be stopped from doing the illegal acts complained of pending the final determination of suit. If the applicants lose the suit, the land will revert back to the Respondents. Beacons do not in any way interfere with rights to property.

12. I am therefore satisfied that the application meets the threshold set in Giella's case on all fours. I hereby allow it in terms of prayer 3, 4 & 5 of the motion. The costs of the application shall abide the outcome of this suit.

Dated and delivered at Mombasa this 30th day of November 2016

A. OMOLLO

JUDGE