



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC. CASE NO. 847 OF 2013**

**MATON ENE MASEA.....1<sup>ST</sup> PLAINTIFF**

**TALE ENE KESEA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**DICKSON YIAILE SITEI.....1<sup>ST</sup> DEFENDANT**

**KIPINO SITEI.....2<sup>ND</sup> DEFENDANT**

**KELENGO SITEI.....3<sup>RD</sup> DEFENDANT**

**NKIRIMBA SITEI.....4<sup>TH</sup> DEFENDANT**

**RULING**

Coming before me for determination are two applications, the first one being the Plaintiff's Notice of Motion dated 10<sup>th</sup> July 2013 (hereinafter referred to as the "Plaintiff's Application") and the second one being the 2<sup>nd</sup> Defendant's Notice of Motion dated 13<sup>th</sup> September 2013 (hereinafter referred to as the "Defendant's Application").

The Plaintiff's Application seeks for orders of a temporary injunction to issue restraining the Defendants from trespassing upon the land parcel known as KAJIADO/EWUASO-KEDONG/1983 pending the hearing and determination of the Plaintiff's Application and of the suit. The Plaintiff also sought orders that compliance of these orders be enforced by the OCS of Ewuaso Location and that costs of this Application be in the cause.

The Plaintiff's Application was premised on the grounds appearing on the face of it together with the Supporting Affidavit of the 1<sup>st</sup> Plaintiff, Maton Ene Masea, sworn on 10<sup>th</sup> July 2013, wherein he averred that he is the registered proprietor of the land parcel known as KAJIADO/EWUASO-KEDONG/1983. He produced a copy of his title deed in which he is indicated to be a joint proprietor of this land parcel together with the 2<sup>nd</sup> Plaintiff. He further averred that on 2<sup>nd</sup> July 2008, he was confronted by the Defendant accompanied by one Dickson Maisido together with a surveyor who trespassed his said land ostensibly for the purpose of carving out a piece of land therefrom for the Defendant's use. He further stated that he immediately instructed his lawyers M/s Ojienda & Co. Advocates to write to the District

Officer Ewuaso-Kedong informing him of the intended trespass. He attached a copy of this letter. He further stated that on 29<sup>th</sup> July 2008, he filed suit against one Sitei Ole Masaido being **Kajiado Civil Case No. 139 of 2008** wherein he obtained injunction orders but that the said Defendant died in 2009 and the suit abated. He further stated that the Defendants in this suit subsequently commenced to trespass on his said land parcel and to destroy his properties thereon leading to his filing this suit.

The Application is contested. The 2<sup>nd</sup> Defendant, Kipino Sitei, filed his Replying Affidavit sworn on 12<sup>th</sup> August 2013 wherein he averred that he together with his co-Defendants have not trespassed onto the said Plaintiff's land since their deceased father, Sitei Ole Kiano owns land in the same area known as KAJIADO/EWUASO-KEDONG/1421. He produced a copy of the title deed. He further stated that it is the Plaintiffs who have trespassed onto their late father's said land. He also averred that the Plaintiffs obtained title to the land parcel known as KAJIADO/EWUASO-KEDONG/1983 by mistake or fraud and without a survey being done on the ground. He further stated that they engaged the services of a surveyor to determine the boundary of their late father's land KAJIADO/EWUASO-KEDONG/1421 and that the Plaintiffs have not demonstrated how they stand to lose if a survey is done on the land.

The Defendant's Application seeks for orders that the District Land Surveyor Ngong and the District Land Registrar Ngong do visit the following lands and determination their boundaries:

- i. KAJIADO/EWUASO-KEDONG/1421
- ii. KAJIADO/EWUASO-KEDONG/1982
- iii. KAJIADO/EWUASO-KEDONG/1983
- iv. KAJIADO/EWUASO-KEDONG/1984
- v. KAJIADO/EWUASO-KEDONG/1985
- vi. KAJIADO/EWUASO-KEDONG/1986
- vii. KAJIADO/EWUASO-KEDONG/1987
- viii. KAJIADO/EWUASO-KEDONG/1988
- ix. KAJIADO/EWUASO-KEDONG/1993

and that the order apply to cases numbers ELC No. 846/13, ELC No. 847/13, ELC No. 848/13, ELC No. 849/13, ELC No. 850/13, ELC No. 851/13 and ELC No. 852/13.

The Defendant also sought for the court to issue an order directing the OCS Ngong Police Station to provide security to the Surveyor and Registrar.

The Defendant's Application is contested. The 1<sup>st</sup> Plaintiff filed his Replying Affidavit sworn on 28<sup>th</sup> November 2013 in which he stated that the surveyor cannot determine the boundaries and acreage of any land unless expressly authorized or approved by this court. He also stated that the rectification or alteration of boundaries which the Defendants are seeking should be addressed to the Registrar who is not a party to this suit. He denied that there was any overlap between the Plaintiffs' parcels of land and that belonging to the Defendants.

I will address both applications together. In deciding whether to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

***“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”***

Has the Plaintiff made out a *prima facie* case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a *prima facie* case was described 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.”***

Looking at the facts of this case as enumerated above, it emerges quite clearly that this is a dispute regarding the physical location of land parcel known as KAJIADO/EWUASO-KEDONG/1421 as opposed to all the 8 parcels of land enumerated as (ii) to (ix) above all claimed by all the Plaintiffs in the consolidated suit. I have looked at **Section 18(2)** of the **Land Registration Act** which provides that:-

***“The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section”***

Subsection 3 thereof provides:-

***“Except where it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary Provided that where all the boundaries are defined under section 19(3), the determination of the position of any uncertain boundary shall be done as stipulated in the Survey Act (Cap. 299).”***

In a dispute of this nature, specifically the boundaries and situation of a parcel of land, the Registrar is the determinant of such a dispute as provided in the cited legal provisions above. Accordingly, I find that the Plaintiffs have not established a prima facie case with high chances of success at the trial. Since the Plaintiff has failed to prove the first ground in the grounds set down in the celebrated case of **Giella versus Cassman Brown**, this Honourable Court need not venture into the other grounds. This position was upheld in the Court of Appeal case of **Kenya Commercial Finance Co. Ltd versus Afraha Education Society (2001) 1 EA 86** as follows:

***“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is ... sequential so that the second condition can only be addressed if the first one is satisfied...”***

In light of the foregoing, I hereby dismiss the Plaintiff’s Application with no order as to costs.

Further, I find that the Defendant’s Application clearly stipulates the way forward with this matter. The matter must now be placed in the hands of the District Land Surveyor and District Land Registrar of the area in which the disputed parcels are located for identification of the physical location of the same and for the filing of a report in court to that effect. With that in mind, the Defendant’s Application is hereby allowed and the exercise shall be completed within 90 days from today’s date.

**SIGNED AND DELIVERED AT NAIROBI THIS 2<sup>ND</sup>**

**DAY OF MAY 2014.**

**MARY M. GITUMBI**

**JUDGE**