



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NAKURU**

**ELC CASE NO. 626 OF 2013**

**KIPKERENG ARAP KOECH.....PLAINTIFF**

**VERSUS**

**PAUL KIPKECH KUKERE.....1<sup>ST</sup> DEFENDANT**

**KIPSYENAN FARMERS CO LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The plaintiff/applicant filed a **Notice of Motion** dated **16<sup>th</sup> December, 2013** seeking the following substantive order:-

**That pending the hearing and determination of the main suit a temporary injunction be issued, restraining the defendants by themselves, their servants and/or agents from trespassing, subdividing, selling disposing and/or dealing with L.R. No 9535 (formerly L.R. No 487/10) (“the suit property”).**

2. The application is premised on the grounds on the face of the application and is supported by the affidavit of the plaintiff sworn on **16<sup>th</sup> December, 2013**. He deposes that he is the registered owner of the suit property, while the 1<sup>st</sup> defendant is the registered owner of **Kampi ya Moto/Kampi ya Moto Block 6/130 and 6/131 (Kipsyenan)**; that the estate of **Kipkereng Arap Koech** is the owner of **Kampi ya Moto/Kampi ya Moto Block 6/146** being held in trust by the 2<sup>nd</sup> defendant for the children of the deceased; that these parcels are adjacent to the suit property separated by a 200 ft wide road reserve and murrum road; that the Government had earmarked part of the suit property for the construction of the Nakuru- Eldama Ravine road but he continued occupying and using this portion without any interruption until **November 2013** when the defendants trespassed on the said portion and began subdividing it despite them having no claim over the land.

3. The defendants oppose the application and have filed a replying affidavit sworn by **George K Morogo**, a director of the 2<sup>nd</sup> defendant, dated **22<sup>nd</sup> January, 2014**. He affirms that the plaintiff is the registered owner of the suit property; that the 1<sup>st</sup> defendant is a member of the 2<sup>nd</sup> defendant and the registered owner of **Kampi ya Moto/Kampi ya Moto Block 6/130 and 6/131 (Kipsyenan)**; that the estate of the late **Kipkereng Arap Koech** are the owners of **Kampi ya Moto/Kampi ya Moto Block 6/146**. He also affirms that all the other portions are adjacent the suit property with a murrum

road separating them. His point of departure is that in 1994 the 200 ft stock route was allocated to the 2<sup>nd</sup> defendant by the Government which is the portion the plaintiff alleges has been encroached upon by the 2<sup>nd</sup> defendant; that the plaintiff is the one who had earlier encroached on the portion belonging to the estate of **Kipkereng Arap Koech** but in 1998, the children of the deceased had taken it back and started grazing their cattle therein; that the plaintiff had been avoiding coming together with the defendant with a view to finding an amicable solution to this dispute, refused to participate in a survey exercise undertaken in 2003 by the District Land surveyor, had uprooted beacons and fences and ploughed the land used for grazing; that the plaintiff had not come to court with clean hands and therefore did not deserve the equitable relief sought.

4. The application was disposed of by way of written submissions. The plaintiff filed their written submissions on 5th February, 2014 while the defendants filed theirs on 6th May, 2014 which I have read and taken into consideration.

5. In determining whether or not to grant the plaintiff the order he seeks of an interlocutory injunction, I will rely on the principles laid down in the celebrated case of **Giella vs. Cassman Brown (1973) EA 358** 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 on doubt, it will decide an application on the balance of convenience”.**

6. So has the plaintiff shown a prima facie case with a probability of success? A *prima facie* case as described in the decision of **Mrao vs First American Bank of Kenya Limited & 2 Others** (2003) KLR 125

**“... 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.”**

7. From the affidavit evidence and submissions, it is common ground that each party in this suit has their respective parcels of land. The only issue in contention is the stock route (road reserve) and the 4 acres hived off from the suit parcel for purposes of construction of the Nakuru-Eldama Ravine road.

8. According to the plaintiff, he continued occupying the 4 acres even after the Government acquired it and had been using it as part of the suit property. He relied on **Section 24** of the **Land Registration Act, 2012** claiming that as the registered owner, his interest in the land was indefeasible. On the other hand, the defendants submit that they were allocated the stock route by the Government (**GKM 4**). It is not clear to me whether the stock route, unused murram road and the 4 acres claimed by the plaintiff are from the same land in dispute.

9. Due to this long standing dispute between them the District Commissioner convened a meeting on 22nd December, 2013 where he advised the parties to seek the help of the Land Registrar. The Land Registrar and District Surveyor visited the site on 4th December, 2013 to assess the boundaries and ascertain ownership of the disputed parcels. This exercise was not successful because the plaintiff was absent despite having knowledge of the meeting.

10. From the material placed before me, I find that the plaintiff has not established a prima facie case. He has not satisfied this court that he is the rightful owner of the 4 acres he claims are part of the suit property and therefore entitled to their use to the exclusion of anybody else.

11. As to whether the applicant will incur irreparable damages, I find that the harm caused may be

adequately compensated by way of damages. The respondent is already in occupation of some portion of the land in dispute and granting the orders sought will result in evicting the beneficiaries to the estate of **Kipkereng Arap Koech** who have been using the land for grazing. In the event that during trial it is found that the plaintiff is entitled to the land in dispute, then the respondents can compensate him by way of damages.

12. Since I am not in doubt, I see no need to consider the third limb on balance of convenience.

13. In light of the foregoing, the Notice of Motion dated **16<sup>th</sup> December 2013** is dismissed with costs.

14. Since at this stage of the proceedings, it is difficult for the court to determine among the parties in this suit who is entitled to which portion of the land in dispute and who has encroached on which portion, it is only prudent for the court to enlist the help of the Land Registrar and Surveyor to determine the boundaries. **Section 18 (2) of the Land Registration Act, 2012** is clear 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. ”**

13. For the above reasons, I order that the **Nakuru County Land Registrar** and **Nakuru County Surveyor** do visit the site in the presence of all the parties in this suit within 60 days and establish the following;

The areas in dispute being the stock path/ road reserve and the 4 acres hived from L.R. **No 9535 (formerly L.R. No 487/10)** by the Government for purposes of constructing the Nakuru -Eldama ravine road, the Land Registrar and Surveyor shall;

- a) Establish in whose names the disputed parcels are registered.
- b) Establish the boundaries and proceed to mark them by placing beacons.
- c) Establish who among the parties has encroached on which parcel and to what extent.
- d) File their report in court 14 days after the site visit but within 75 days from the date hereof.

**Dated, signed and delivered on this 3rd day of October 2014.**

**L N WAITHAKA**

**JUDGE.**

**PRESENT**

Mr Kagucia for the plaintiff/Applicant

Mr Waiganjo Mwangi for Defendant/Respondent

Emmanuel Maelo : Court Assistant.

**L N WAITHAKA**

**JUDGE**