Mutuli v Ngugi & 5 others (Environment & Land Case E017 of 2023) [2024] KEELC 3447 (KLR) (25 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3447 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ENVIRONMENT & LAND CASE E017 OF 2023

LC KOMINGOI, J

APRIL 25, 2024

BETWEEN

PRAXIDES ASENDWA MUTULI ..... PLAINTIFF

AND

RODRICK MUHORO NGUGI ..... 1ST DEFENDANT

DANIEL KELEMBU KATITIA ..... 2ND DEFENDANT

ROSEMARY ACHIENG OWINO ..... 3RD DEFENDANT

DISTRICT LAND REGISTRAR, KAJIADO ..... 4TH DEFENDANT

DISTRICT LAND SURVEYOR, KAJIADO ..... 5TH DEFENDANT

HON. ATTORNEY GENERAL ..... 6TH DEFENDANT

RULING

1. This is the Notice of Motion on 7th March 2023, brought under:

   Sections 1A, 1B, 3, 3A and 63 of the *Civil Procedure Act*, Order 40 Rule 1 and (2), Order 51 Rule 1of the Civil Procedure Rules, Section 18 of the *Land Registration Act*, Rule 40 of the Land Registration (General) Regulations 2017, Article 159 of *the Constitution* of Kenya and all other enabling provisions of Law;

2. It Seeks Orders:

   i. Spent

   ii. Spent

   iii. Spent

iv. That a temporary injunction be and is hereby issued restraining the Defendants whether by themselves, their agents, servants, employees, personal representatives or otherwise howsoever from evicting, interfering into, occupying, destroying erecting structures, interfering with beacons, alienating and/or in any manner whatsoever dealing with and/or interfering with the Plaintiff's proprietorship, occupation and use of all that parcel of land known as Kajiado/Kaputiei- North /38142 measuring approximately 1.61 Ha pending the hearing and determination of the main suit.

v. That pending the hearing and determination of the main suit, this Hon. Court be pleased to conduct a site visit.

vi. That the costs of this application be provided for.

3. The grounds are on the face of the application. It is also supported by the Affidavit of Praxides Asendwa Mutuli who avers that she resides in the United Kingdom and is the registered owner of Kajiado/Kaputiei- North/38142 measuring approximately 1.61 ha having purchased it in 2010 from the 2nd Defendant. The 1st Defendant and 3rd Defendant are the alleged owners of Kajiado/Kaputiei-North/26709 and Kajiado/Kaputiei- North/27082; and Kajiado/Kaputiei- North/25749 which was as a subdivision of Kajiado/Kaputiei- North/38141 respectively all purchased from the 2nd Defendant.

4. She further avers that sometime in April 2022, her workers informed her that the 1st Defendant visited her property and asked them to stop working on it because it belonged to him. Thereafter, the 5th Defendant called her seeking authority to conduct a survey on her property and the adjacent properties. The 4th Defendant subsequently issued summons dated 19th December 2022 requiring her and other parties to attend a boundary dispute hearing on 13th January 2023. She travelled back to Kenya and attended the said hearing with one other party. The 4th Defendant then rendered its ruling dated 16th February 2023 which alleged that she was the complainant which is incorrect because she had never lodged any complaint with the 4th Defendant. The 4th Defendant in its ruling also indicated that it relied on the 5th Defendant's report but the two reports are different in several aspects. Following this, she engaged surveyors to establish the actual location of her land.

5. Based on the 4th and 5th Defendants' reports, the 1st Defendant commenced the process of erecting beacons claiming that his parcels Kajiado/Kaputiei- North/26709 and 27802 fall within her parcel of land. She is thus at risk of losing her property and suffering irreparable damages.

6. The 1st Defendant/Respondent in his Replying Affidavit confirmed that he was the registered owner of properties; Kajiado/Kaputiei- North/26709 and 27802 which were both registered on 19th January 2022. He deponed that he purchased the properties from one Festus Mwaniki Lonzi and they arose from subdivision of Kajiado/Kaputiei- North/26181 and 26708 respectively. He deponed that sometime in April 2022 he visited the land and found people cultivating on his land, which was an act of trespass. He then reported a boundary dispute vide a letter dated 14th November 2022. On 13th January 2023 a boundary hearing was held attended by the Plaintiff and himself, and a ruling subsequently issued.

7. He stated that there was no nexus between the Plaintiff's property title number Kajiado/Kaputiei-North/38142 and the 1st Defendant's titles Kajiado/Kaputiei- North/27082 and 26709. And should there be any claim then it should be between the plaintiff and the owner of property Kajiado/Kaputiei-North/38141.

8. The 4th, 5th and 6th Defendants abstained from participating in the application.

9. The 2nd and 3rd Defendants are yet to enter appearance.

10. This application was canvassed by way of written submissions.

The Plaintiff's/Applicant's Submissions

11. Counsel for the Applicant submitted that the Applicant being dissatisfied with the 4th Defendant's ruing dated 16th February 2023 moved to this court pursuant to Section 18 of the *Land Registration Act* and Rule 40 of the Land Registration (General) Regulations, 2017. Counsel submitted that it was not in dispute that the Applicant was the registered owner of Kajiado/Kaputiei-North/38142 measuring 1.61ha as per her legally title deed thus protected by Section 26 of the *Land Registration Act* and Article 40 of *the Constitution*.

12. Counsel submitted that the report dated 16th February 2023 had several discrepancies such as indicating that the Applicant was the complainant instead of the 1st Defendant who acknowledged to have lodged the complaint on 14th November 2022. Further, the report indicated that the 1st Defendant's properties Kajiado/Kaputiei-North 26709 and 27082 were not beaconed on the ground yet they were registered on 19th January 2022 long after the Applicant's property was registered on 30th May 2012. In addition, counsel submitted that the ruling indicated that the boundary dispute was between properties 38141 and 38142 and the 1st Defendant therefore had no basis to seek a resurvey. Counsel added that the 4th Defendant used the 5th Defendant's report in making its determination, but the 5th Defendant's report was factually incorrect with several discrepancies. A highlight of the discrepancies is the Plaintiff's registered acreage vis a vis the actual acreage. And the 4th Defendant's finding that the 1st Defendant's parcels 26709 and 27082 are not beaconed on the ground which is contrary to the 5th Defendant's report which indicate that the ground dimensions and acreage of these parcels are well within the registered mutation forms.

13. Therefore the Applicant had established she has a prima facie case and would suffer irreparable damage if the injunction sought was not granted citing Giella vs Cassman Brown (1973) EA 358, Nguruman Limited vs Jan Bonde Nielsen & 2 others (2003) eKLR and Paul Githonga Wanjau vs Gaththi Tea Factory Company Ltd & 2 others (2016) eKLR.

The 1st Defendant/Respondents' submissions

14. Counsel submitted that the 4th Defendant in his ruling found that there was no dispute between the boundary between the Plaintiff's property and the 1st Defendant. Therefore, the application for injunction on properties that have no correlation is unmerited and should be dismissed with costs to the 1st Defendant.

Analysis and determination

15. I have considered the Notice of Motion, the affidavit in support, the response thereto, the rival submissions and the authorities cited. The issues for determination are:

    i. Whether the Plaintiff/Applicant's Application meets the threshold for grant of interlocutory injunction.

    ii. Who should bear the costs of this application?

16. When deciding whether to issue an interim injunction, courts adhere to the principles outlined by the Court of Appeal in the well-known case of Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR which held:

> "In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;
>
> (a) establish his case only at a prima facie level,
>
> (b) demonstrate irreparable injury if a temporary injunction is not granted, and
>
> (c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.
>
> These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially... If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted..."

17. Has the Plaintiff/Applicant established a prima facie case and irreparable damage? The Plaintiff/Applicant claims that the ruling dated 16th February 2023 and the report dated 16th January 2023 have adverse discrepancies and that should the 1st and 3rd Defendants implement the decision, she will suffer irreparable loss and damage.

18. I have reviewed the impugned ruling dated 16th February 2023 and the report dated 16th January 2023. Save for claim that the ruling dated 16th February 2023 indicates that the Plaintiff/Applicant is the complainant, I have not noted any other discrepancies in the reports. Both documents show that beacons for parcels number 38141 and 38142 do not tally on the ground; the ruling dated 12th February 2023 shows that parcels number 26709 and 27082 are not beaconed; and the boundary dispute report dated 16th January 2023 shows that some beacons are missing and should be re-established as well as ground dimensions and acreage of parcels 26182, 26709 and 27082 tally with the registered mutation forms.

19. The Plaintiff/Applicant has also decried that she will suffer irreparable loss and damage should the Defendants effect the ruling. I am not convinced that the loss and damage claimed by the Plaintiff/Applicant cannot be compensated by way of damages.

20. I therefore find no merit in the application and the same is dismissed.

21. Costs shall abide the outcome of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 25TH DAY OF APRIL 2024.

L. KOMINGOI

JUDGE.

In the presence of:

Mr. Ngaira for the Plaintiff/Applicant.

Ms. Nduta for Mr. Kimani for the 1st Defendant/Respondent.

N/A for the 2nd – 6th Defendants/Respondents.

Court Assistant - Mutisya