



REPUBLIC OF KENYA



**KENYA LAW**  
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**Eberege Tea Factory Company Limited v Nagusiet & 2 others (Environment & Land Case E012 of 2022) [2023] KEELC 153 (KLR) (19 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 153 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS  
ENVIRONMENT & LAND CASE E012 OF 2022**

**EM WASHE, J  
JANUARY 19, 2023**

**BETWEEN**

**EBEREGE TEA FACTORY COMPANY LIMITED ..... PLAINTIFF**

**AND**

**OLE SITONIK NAGUSIET ..... 1<sup>ST</sup> DEFENDANT**

**WILSON L. KUKUTIA ..... 2<sup>ND</sup> DEFENDANT**

**OLOKEDIANYE MACHARIA ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The plaintiff herein (hereinafter referred to as “the applicant”) filed a Notice of Motion Application dated September 26, 2022 (hereinafter referred to as “the present application”) seeking for the following Orders; -
  - i. That this Application be certified as urgent and service be dispensed with at the first instance and the same be heard ex-parte.
  - ii. That this honourable court be pleased to issue a temporary injunction restraining and prohibiting the defendants/respondents either by themselves, their servants, employees and agents or anybody claiming under them, from encroaching, removing beacons, grazing, erecting structures, transferring, alienating and/or dealing with the suit property known as Transmara/Kimintet “D”/1459 owned by the plaintiff pending the hearing and determination of this Application.
  - iii. That this honourable court be pleased to issue a permanent injunction restraining and prohibiting the defendants/respondents either by themselves, their servants, employees and agents or anybody claiming under them, from encroaching, removing beacons, grazing, erecting structures, transferring, alienating and/or dealing with the suit property known as



Transmara/Kimintet “D”/1459 owned by the Plaintiff pending the hearing and determination of this Application.

- iv. That an Order do issue to the Land Registrar, Transmara and Land Surveyor Transmara to visit the disputed parcel of land known as L.R.NO. Transmara/Kimintet “D”/1459 in order to ascertain the correct position of the land, determine and re-fix its beacons.
  - v. That the Officer Commanding Esot Police Station and or Officer Commanding Administration Esot to ensure compliance of this honourable court’s Orders.
  - vi. That costs of this Application be provided for.
2. The grounds in support of the above prayers have been outlined in the body of the present Application and the supporting Affidavit of one Enosh Okiagera Anyonasworn on the 26<sup>th</sup> of September 2022.
  3. A summary of the grounds relied upon in seeking the prayers of the present application are as follows; -
    - a. The plaintiff/applicant is the registered and/or beneficial owner of the property known as L.R.NO. Transmara/Kimintet “D”/1459 (hereinafter referred to as “the suit property”)
    - b. However, the defendants/respondents without any legal right have removed the beacons demarcating the suit property and encroached on the same by grazing their cattle, cutting down trees, erecting buildings and/or alienating the same to strangers without any justification and/or authority.
    - c. Consequently therefore, it is therefore imperative that this honourable court issue a temporary injunction against the defendants to preserve the suit property and/or avoid the same being occupied by strangers who have no legal right over the same.
  4. The applicant in support of the above grounds produced a copy of the Title Deed of the suit property issued on the 6<sup>th</sup> of July 2011, a copy of an Official Search of the suit property issued on the 22/11/2021 and two reports from the Land Registrar, Transmara dated May 12, 2022 and the District Land Surveyor, Transmara dated 12/05/2022.
  5. The present Application was then served on the defendants who filed a replying affidavit sworn by the 2<sup>nd</sup> defendant/respondent sworn on the October 29, 2022 opposing the issuance of the prayers sought in the present Application.
  6. The summary of the grounds adduced in the Replying Affidavit sworn on the 29<sup>th</sup> of October 2022 are as follows; -
    - a. The Respondents herein are registered owners of the properties known as L.R.NO. Transmara/Kimintet “D”/1524, Transmara/Kimintet “D”/1481 and Transmara/Kimintet “D”/452 respectively.
    - b. Consequently therefore, the defendants denied the allegation of encroachment on the applicant’s suit property in toto.
    - c. The respondents stated that each of them occupies their own properties as identified in their Registered Index Maps and have even fenced the same to demarcate their boundaries.
    - d. In addition to the above, the respondents further stated that their properties do not share any common boundary with the applicant’s suit property and therefore there can be no trespass and/or encroachment as alleged in the present Application.



- e. Referring to the applicant's annexures and in particular the two ground reports done by the District Land Registrar, Transmara and the District Land Surveyor, Transmara, the respondents submission is that none of the two reports make any conclusions that the respondents had encroached on the plaintiff's suit property.
  - f. The defendants also drawn the court's attention to the provisions of section 18 and 18 of the Land Registration Act, No.3 of 2012 which provides that resolution of boundary disputes is to be undertaken by the relevant Land Registrar before any proceedings can be filed in a court of law.
  - g. In conclusion therefore, the defendants were of the view that the applicant has not established a *prima facie* case to warrant the granting of the prayers sought and is simply abusing the court's process.
7. The court on the 8<sup>th</sup> of November 2022 directed that the present application be canvassed by way of written submissions.
  8. The applicant therefore filed his submissions on the 3<sup>rd</sup> of November 2022 and the respondents filed theirs on the 21<sup>st</sup> of November 2022.
  9. The court has gone through the prayers in the present application numerous times and has the following comments to make.
  10. As regards Prayer No. 2, the Applicant herein simply sought for a temporary injunction pending the hearing and determination of the present Application.
  11. The understanding of the court as appertains this prayer is that the temporary injunction sought under Prayer No. 2 was to be effective between the period the present Application was filed and when a determination was pronounced.
  12. This ruling is to determine the present application in its totality and therefore Prayer No. 2 can not be issued post this Ruling as drawn.
  13. In other words, Prayer No. 2 has been overtaken by events and/or will have lapsed by the act of this court pronouncing its ruling.
  14. In the case of Issa Ahmed & 16 others v Mohamed Al-Sawae (2021) eKLR, the court held as follows; -

“a court cannot assume or infer a case by referring to a stray sentence here and a stray sentence there in pleadings. A court cannot exercise its judicial discretion to grant a relief which is not even sought by parties in their pleadings as granting the same would lead to a miscarriage of justice.”
  15. This court fully associates itself with the above finding and adds that it would be a dangerous trend for courts to suo motto either imply and/or premeditate a party's prayers even where the same has not been sought for.
  16. In conclusion therefore, the court is of the considered view that Prayer No.2 is incapable of being granted at this point and the same is denied.
  17. As regards Prayer No. 3, the Applicant is seeking for a permanent injunction against the Defendants at an interlocutory stage.



18. In the case of *Kenya Power & Lighting Co Ltd v Sheriff Molana Habib* (2008) eKLR, the court held as follows; -

“ a permanent injunction which is also known as a perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the Court and it thus is a decree of the Court. The injunction is granted upon merits of the case after evidence in support and against the claim have been tendered.”
19. In the case known as Nairobi Civil Appeal No. 77 of 2012 Between *Nguruman Limited & another v Herman Philip Stein*, the Court of Appeal stated as follows; -

“ once more, we remind ourselves that in considering this Appeal, it would be both premature and prejudicial to the rights of the parties to make any conclusive pronouncements on matters either of fact or law, while the suit where such merits will be decided is still pending.”
20. This court being guarded by the two decisions, it is of the considered opinion that the applicant’s Prayer No. 3 can not be granted at this interlocutory stage of these proceedings.
21. As regards Prayer No.4 in the present Application, the applicant is seeking for an Order directing the District Land Registrar, Transmara and District Land Surveyor, Transmara to visit the suit property and determine and refix the beacons thereof.
22. The applicant has placed before the court a Title Deed of the suit property as well as two ground reports by the District Land Registrar, Transmara and the District Land Registrar, Transmara both dated May 12, 2022.
23. The Defendants on the other hand have stated that any boundary disputes regarding general boundaries must be resolved in line with section 18 and 19 of the *Land Registration Act*, No.3 of 2012.
24. Section 18 and 19 of the *Land Registration Act*, No. 3 of 2012 provides that disputes relating to titled properties with general boundaries must first be registered and determined by the relevant Land Registrar prior to any suit being filed in court.
25. The Replying affidavit filed by the respondents does not have any clause that opposes this particular prayer by the Applicant.
26. Referring to the Ground Report by the District Land Registrar, Transmara dated May 12, 2022, the court takes note that while the applicant granted full access to the Land Registrar, Transmara to verify the boundaries as provided by the Registered Index Map, the Respondents herein flatly denied access to the said District Land Registrar, Transmara to enter and pick out the boundaries of their properties known as Transmara/Kimintet “D”/1542,1481 AND 1482.
27. The District Land Registrar, Transmara further stated that owners of the neighbouring parcels have occupied the ground of the suit property by erecting homes and paddocks on the allegation that there have been in occupation of the said land since they settled there.
28. It is further indicated in the Ground Report by the District Land Registrar, Transmara dated May 12, 2022 that the actual ground occupancy of the suit property by the Applicant does not conform with the Registered Index Map thereof.
29. Referring to the observations contained in the Ground Report by the District Land Registrar, Transmara dated May 12, 2022, it is no doubt that the applicant and the defendants are neighbours on the ground.



30. In addition to the above fact, the Ground Report by the District Land Registrar, Transmara observes that part of the suit property has been occupied by the neighbours.
31. Unfortunately, the neighbours and in particular the defendants herein have expressly denied access of their properties to the District Land Registrar, Transmara to enter and pick out their appropriate boundaries as per their Registered Index Maps.
32. This act of the respondents denying the District Land Registrar, Transmara access to enter, identify and fix the appropriate boundaries of their relevant properties can not be accepted and/or tolerated by this Court.
33. In conclusion therefore, the applicant's prayer No. 4 is hereby merited and accordingly granted.
34. In conclusion therefore, the court hereby makes the following Orders as appertains the Application dated September 26, 2022;-
  - A. The Sub-County Land Registrar, Transmara West, East and South be and is hereby directed to officially register a boundary dispute between the Applicant's property known as L.R. NO. Transmara/Kimintet "D"/1459 and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents properties known as L.R.NO. Transmara/kimintet "D"/1524,1481 AND 1482 respectively.
  - B. The Sub-County Land Registrar, Transmara West, East and South together with the Sub-County Land Surveyor, Transmara West, East and South be and are hereby directed to hear and determine the boundary dispute between the applicant's property known as L.R. No. Transmara/Kimintet "D"/1459 and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents properties known as L.R.No. Transmara/Kimintet "D"/1524,1481 AND 1482 within Sixty (60) days from the date of this Ruling.
  - C. The Sub-County Land Registrar, Transmara West, East and South together with the Sub-County Land Surveyor, Transmara West, East and South be and are further directed upon determination of the boundary dispute between the Applicant's property known as L.R. NO. Transmara/Kimintet "D"/1459 and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents properties known as L.R.NO. Transmara/Kimintet "D"/1524,1481 and 1482 do proceed to demarcate, re-establish, restore and/or affix the boundary features on each of the above properties within 30 days thereof.
  - D. The 1<sup>st</sup> respondent, 2<sup>nd</sup> respondent and 3<sup>rd</sup> respondent be and are hereby ordered and/or directed to grant full and unlimited access of their property known as L.R.No.Transmara/ Kimintet "D"/1524,1481 and 1482 to the Sub-County Land Registrar, Transmara West, East and South together with the Sub-County Land Surveyor Transmara, West, East and South to undertake their duties in the establishment of the boundaries of the applicant's suit property and the defendants properties.
  - E. The Officer In Charge of Esoit Police Station and/or the Officer in Charge of the Administration Police Service in Esoit do provide sufficient police officers to accompany and provide security to the Sub-County Land Registrar, Transmara West, East and South as well as the Sub-County Land Surveyor, Transmara West, East and South during the relevant ground visits in execution of their mandate under section 18 and 19 of the [Land Registration Act](#), No. 3 of 2012 as well as the directions of the Court provided herein above.
  - F. The Sub-County Land Registrar, Transmara West, East and South shall after 90 days from the date of this Ruling file a comprehensive Report of the Resolution reached by his office



in line with Section 18 and 19 of the *Land Registration Act*, No. 3 of 2012 together with a ground report detailing the ground status upon implementation of his resolution relating to the boundary dispute registered between the applicants and the defendants herein.

G. The costs of this Application shall abide the outcome of the main suit.

**DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 19<sup>TH</sup> JANUARY 2023.**

**EMMANUEL.M.WASHE**

**JUDGE**

**IN THE PRESENCE OF:**

**COURT ASSISTANT: NGENO**

**ADVOCATES FOR THE APPLICANT: MR. OCHAKO**

**ADVOCATES FOR THE RESPONDENTS: O. M OTIENO**

