



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC CASE NO. 47 OF 2018**

**HUSSEIN ZADEH TAGHI.....PLAINTIFF**

**VERSUS**

**MIRDIF INVESTMENTS LIMITED.....1<sup>ST</sup> DEFENDANT**

**HEZRON OSELE OTIENO.....2<sup>ND</sup> DEFENDANT**

**THE MINISTRY OF LANDS, HOUSING**

**& URBAN DEVELOPMENT.....3<sup>RD</sup> DEFENDANT**

**THE HONOURABLE ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT**

**RULING**

What is before Court for determination is the Plaintiff’s Notice of Motion dated the 23<sup>rd</sup> March, 2018 brought pursuant to section 1A, 1B and 3A of the Civil Procedure Act, Section 46 of the Physical Planning Act, Rules 5, 30, 34 and 35 of the Physical Planning (Building and Development) (Control) Rules 1998, Order 40 Rule 1 and 2; and Order 51 Rule 1 of the Civil Procedure Rules and all the other enabling provisions of the law.

In the said application, the applicant is seeking injunctive as well as demolition orders against the Defendants. The application is premised on the grounds that the Plaintiff is the owner of land parcel number Kajiado/ Kaputiei North/ 17283 hereinafter referred to as the ‘suit land’ which he purchased from one SAIMON NTASIKOI NOONKANAS. The Plaintiff was issued with a title deed to the suit land on 5<sup>th</sup> March, 2015. The Plaintiff visited the suit land on 27<sup>th</sup> November, 2016 and discovered that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had trespassed thereon and were erecting illegal structures on it. Despite the Plaintiff reporting the matter to the CIDs, the Defendants have persisted in their acts of trespass. By a Notice dated the 5<sup>th</sup> September, 2017, the 3<sup>rd</sup> Defendant summoned the Plaintiff, the 1<sup>st</sup> as well as the 2<sup>nd</sup> Defendants to appear before the Land Registrar Kajiado on the 5<sup>th</sup> October, 2017 for hearing of the dispute between the parties. On the 5<sup>th</sup> October, 2017, the 3<sup>rd</sup> Defendant through the Land Registrar heard the dispute and undertook to deliver a ruling within fifteen (15) days from the said date, but to date the said ruling is yet to be delivered. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants claim to the suit land is misconceived as well as misconstrued because their properties KAJIADO/ KAPUTIEI NORTH/4616 and KAJIADO/ KAPUTIEI NORTH/ 4615 were resultant subdivisions of KAJIADO/ KAPUTIEI NORTH/ 4199. Further, that the suit land was subdivided from KAJIADO/ KAPUTIEI NORTH/ 15743. That KAJIADO/ KAPUTIEI NORTH/4199 and KAJIADO/ KAPUTIEI NORTH/ 15743 are distinct parcels of land situate in different locations. Further, that KAJIADO/ KAPUTIEI NORTH/4616 and KAJIADO/ KAPUTIEI NORTH/ 4615 cannot be the same as KAJIADO/ KAPUTIEI NORTH/ 15743 or situated in the same location as the parcels which they came from. By a Survey conducted by ACME Land Surveyors & Consultants on 1<sup>st</sup> March, 2014, it confirms that the location of the suit land is the correct one as shown in the Mutation Form. As a result of the Defendants’ acts of trespass, the Plaintiff has suffered damages and his right to own property as enshrined in Article 40 of the Constitution has been violated.

The application is supported by the affidavit of the Plaintiff HUSSEIN ZADEH TAGHI who deposes that he purchased the suit land for Kshs. 400, 150/= on 5<sup>th</sup> March, 2015 and paid the purchase price. He states that he was registered as the proprietor of the suit land. He contends that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have trespassed on his land while the 3<sup>rd</sup> as well as 4<sup>th</sup> Defendants have acquiesced to their said acts of fraud including trespass. He avers that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants failed to stop the aforementioned acts of trespass. He claims the 4<sup>th</sup> Defendant failed to supply him with the approved plans issued to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to construct their illegal structures as well as to demolish them.

The 2<sup>nd</sup> Defendant opposed the application and filed a replying affidavit sworn by HEZRON OSELE OTIENO where he deposes that the precise position of the suit land is superimposed upon the boundaries of his land parcel number KAJIADO/ KAPUTIEI NORTH/ 4615 registered in his name while KAJIADO/ KAPUTIEI NORTH/ 4616 registered in the 1<sup>st</sup> Defendant's name. He denies having been near the suit land on 27<sup>th</sup> November, 2016 and disputes the alleged trespass by the 1<sup>st</sup> Defendant that is a corporate entity. He denies being summoned by the CID offices Kajiado to deliberate on the dispute herein nor persistently digging the foundation on the suit land. He contends that his representative gave evidence at the Land Registrar's office and demonstrated that boundaries for KAJIADO/ KAPUTIEI NORTH/ 4615 and KAJIADO/ KAPUTIEI NORTH/ 4616 were surveyed, ascertained and fixed sometime in 1997 which evidence was corroborated by the District Surveyor who had Mutation Forms for KAJIADO/ KAPUTIEI NORTH/ 4199 and KAJIADO/ KAPUTIEI NORTH/ 15743 in his custody. He confirms that the Land Registrar is yet to deliver his ruling after the deliberations of the dispute herein. He insists the Plaintiff's claim has no basis in law as he has deliberately attempted to mislead the court by failing to disclose that KAJIADO/ KAPUTIEI NORTH/ 4199 resulted in title number KAJIADO/ KAPUTIEI NORTH/ 4614 and that the suit land is a subdivision from KAJIADO/ KAPUTIEI NORTH/ 14773 which had resulted from KAJIADO/ KAPUTIEI NORTH/ 4614. Further that KAJIADO/ KAPUTIEI NORTH/4615 is situated within the same location as the parcel numbers from which it mutated. He disputes the report from ACME Land Surveyors & Consultants as it is based on mutation form No. 184627 that is fraudulent and erroneous. He reiterates that the particulars of trespass are misconceived as well as misconstrued and that the Plaintiff has not suffered any loss or damage. Further, that the Plaintiff is not entitled to the orders sought and the allegations that the 1<sup>st</sup> as well as the 2<sup>nd</sup> Defendants may transfer suit land is merely speculative. He avers that the application herein should be heard on an urgent basis so that the Plaintiff is restrained from their parcels of land. He states that he has had possession and control of his parcel KAJIADO/ KAPUTIEI NORTH/4615 until 3<sup>rd</sup> January, 2017 when the Plaintiff including his agents illegally entered therein and claimed ownership as well as purportedly placed beacons across it. He further states that the Plaintiff maliciously lodged criminal complaints against them, with the CID at Kajiado, so as to harass as well as intimidate them in order to clandestinely obtain their titles. He explains that on 10<sup>th</sup> March, 2017 he pointed out his beacons to the 3<sup>rd</sup> Defendant's Surveyor Mr. Masinde who recorded the particulars and confirmed their positions via Global Positioning System (GPS). Further, that the Plaintiff was unable to point out beacons to the suit land and commenced illegally fencing off their parcels of land KAJIADO/ KAPUTIEI NORTH/4615 and KAJIADO/ KAPUTIEI NORTH/4616 which actions have continued unabated, despite their reporting to the CID. He further contends that he acquired his parcel of land in January, 1997 pursuant to a transfer from KIDONGO PASHU, for valuable consideration. Further, that the Plaintiff's claim over their parcels of land is fraudulent and as such, he has no colour of right to break, enter, or erect a fence over the same. He further explains that parcel number KAJIADO/ KAPUTIEI NORTH/17283 was created pursuant to a falsified Mutation Form NO. 184627 which purport to give the area of the suit land as 15.39 hectares and yet the said suit land is a Mutation from 14773 together with 14774 which emanated from 4614 that measured 14 hectares. He reaffirms that the acreage of the suit land has been exaggerated by 5 hectares giving the purported proprietor a right to deal with the land he did not own.

The 1st Defendant opposed the application and filed a replying affidavit sworn by one of its directors SWALEH ULEDI KANYEKI who reiterates the averments contained in the affidavit of the 2<sup>nd</sup> Defendant.

Both the Plaintiff as well as the 1<sup>st</sup>, and 2<sup>nd</sup> Defendants filed their written submissions that I have considered.

### **Analysis and Determination**

Upon perusal of the Notice of Motion dated the 23<sup>rd</sup> March, 2018 brought together with the supporting and replying affidavits including the parties' submissions, the only issue for determination at this juncture, is whether the interim injunction sought by the Plaintiff ought to be granted pending the hearing and determination of the main suit.

Both the Plaintiff and the 1<sup>st</sup>, and 2<sup>nd</sup> Defendants are staking claim over their various parcels of land. The Plaintiff insists he is the registered proprietor of the suit land and has been issued with a title deed. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' contend that they own their respective parcels of land and it is the Plaintiff who has trespassed thereon. They deny trespassing on the suit land. The fulcrum of this suit revolves around dispute relating to location of parcels of land, which were resultant subdivisions of one parcel. Both the Plaintiff as well as the 1<sup>st</sup> and 2<sup>nd</sup> Defendants cited case of **Ahmed Ibrahim Suleiman and another v Noor Khamisi Surur [2013]**

eKLR to buttress their respective arguments.

The principles for consideration in determining whether temporary injunction can be granted or not is well settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358.**

In line with this principle, the Court will proceed to interrogate whether the applicant has made out a prima facie case with a probability of success at the trial.

In the first instance as to whether the applicant has demonstrated a prima facie case with probability of success, I note the Plaintiff has a title deed to the suit land; while the 1<sup>st</sup> and 2<sup>nd</sup> defendants also have a title to their respective parcels of land.

Looking at the documents presented by the Plaintiff and the 1<sup>st</sup> as well as the 2<sup>nd</sup> Defendants, it is clear they all have legitimate claims over their respective parcels of land which they all hold titles to. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants contend that the KAJIADO/ KAPUTIEI NORTH/ 4199 resulted in title number KAJIADO/ KAPUTIEI NORTH/ 4614 and that the suit land is a subdivision from KAJIADO/ KAPUTIEI NORTH/ 14773 which had resulted from KAJIADO/ KAPUTIEI NORTH/ 4614. From their presentations, I note the suit land including parcels of land owned by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants mutated from a mother title. Both parties admit the Land Registrar, Kajiado has deliberated on the dispute herein and is yet to prepare a report. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants have provided a history of the mutation of the mother title and dispute the mutation as well as acreage of the Plaintiff's parcel of land. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants insist that the suit land was created pursuant to a falsified Mutation Form NO. 184627 which purport to give its acreage as 15.39 hectares, and yet the said suit land is a Mutation from 14773 together with 14774, which emanated from 4614 measured 14 hectares. He reaffirms that the acreage of the suit land has been exaggerated by 5 hectares. The stake each party is claiming herein cannot be determined at this juncture but once viva voce evidence is adduced and the Land Registrar is called upon to present evidence on the various mutations that were undertaken which resulted in the Plaintiff's title as well as the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' title.

Section 25(1) of the Land Registration Act provides as follows:-

*'25. (1) The rights of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act and shall be held by the proprietor together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever but subject.'*

I concur with both parties and being persuaded by the case of **Ahmed Ibrahim Suleiman and another v Noor Khamisi Surur [2013] eKLR, where it was held that: 'The Plaintiffs having been registered as proprietors and having been issued with a certificate of lease over title No. Nairobi/Block 61/69 are in terms of section 26 (1) of the Registration of Lands Act entitled to the protection of the law.'**, I find that both the Plaintiff as well as the 1<sup>st</sup> and 2<sup>nd</sup> Defendants titles to the suit land are entitled to be protected by law.

*It is against the foregoing that I find the applicant has indeed established a prima facie case.*

On the second principle as to whether the Applicant will suffer irreparable loss which cannot be compensated by way of damages. Both the Plaintiff as well as the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are registered proprietors of their respective parcels of land. The Plaintiff claims the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have encroached on his land, which fact they dispute. 1<sup>st</sup> and 2<sup>nd</sup> Defendants' are also seeking to restrain the Plaintiff from interfering with their respective parcels. I find that with these allegations it is pertinent for the obtaining status quo to be maintained pending the outcome of the suit.

On the question of balance of convenience, from the evidence presented by the parties, I am not in doubt that the balance does not tilt in favour of any of them until proper evidence is adduced to enable the court make a determination of the matter.

Since both the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are staking claim over the respective locations of their respective parcels of land and with the dispute as to the location having been deliberated upon by the Land Registrar who is legally mandated to do so, although he is yet to issue his decision, I will decline to grant the orders as sought but will proceed to make the following order:

1. The obtaining Status Quo be maintained and each party is to remain in possession of their respective parcels of land, pending the outcome of the suit.

2. The costs will be in the cause.

The parties are urged to comply with Order 11 and set the suit down for hearing as soon as possible.

**Dated signed and delivered in open court at Kajiado this 21st day of November, 2018.**

**CHRISTINE OCHIENG**

**JUDGE**



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