



Njue & another v Director General Kenya Urban Roads Authority & 4 others (Environment & Land Case E005 of 2022) [2023] KEELC 19027 (KLR) (26 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19027 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT & LAND CASE E005 OF 2022**

**CK YANO, J
JULY 26, 2023**

BETWEEN

KENNETH NYAGA NJUE 1ST PLAINTIFF

JOSEPH MUGENDI NJUE 2ND PLAINTIFF

AND

**THE DIRECTOR GENERAL KENYA URBAN ROADS
AUTHORITY 1ST DEFENDANT**

HYPERTECK CONTRACTORS & EQUIPMENT LIMITED 2ND DEFENDANT

THE INSPECTOR GENERAL OF POLICE 3RD DEFENDANT

THE OCS CHUKA POLICE STATION 4TH DEFENDANT

THE HONOURABLE ATTORNEY GENERAL 5TH DEFENDANT

RULING

1. Before this court for determination is Notice of Motion of application dated 30th November, 2022 in which the Plaintiffs/Applicants are seeking an order of temporary injunction restraining the 1st, 2nd and 3rd Defendants, their agents, servants or anybody acting at their behest from entering, excavating, or constructing a road on the Plaintiffs' plot No. Chuka Township/202 (M3) (the suit property) pending the hearing and determination of the application and the suit. The application is supported by the affidavit of Joseph Mugendi Njue sworn on 30th November, 2022 wherein he avers that he is a joint registered owner of the suit property which is family land owned by all the children of their late father. He has annexed copies of the certificate of lease and official search.
2. The applicants aver that sometime in 2007, they sought and got approval from the County Government of Tharaka Nithi to construct a commercial building on the suit plot which they built for purposes of earning income for the family. That the commercial building comprised 3 front shops



and 12 single rooms all earning a monthly income of approximately Kshs.81,000/= a month. They have annexed copies of the approved construction documents and photographs.

3. The Applicants aver that on or about 7th February, 2020 agents of the 1st Defendant/Respondent marked building in Chuka Township for demolition to ostensibly pave way for the tarmacking of the “Moi Girls” Road and informed the tenants therein that the building on the suit premises was going to be demolished to pave way for the construction of the said road. That being alarmed, the Applicants rushed to court and obtained an injunction to stop the intended demolition vide Chuka CM ELC No. 20 of 2020. Copies of the pleadings and order are annexed.
4. The Applicants aver that in the evening of 29th March, 2020 and morning of 30th March, 2020 during curfew hours, the 1st Defendant’s agent’s demolished the Applicants’ building on the suit plot in contravention of a court order in Chuka CM ELC No. 20 of 2020.
5. It is the Applicants’ contention that there exists beacons on the established boundary of the suit plot and the Nkubu-Thuchi Road which were put up by the Kenya National Highway Authority.
6. The Applicants have also annexed a copy of a valuation report prepared by a valuer to determine the damages and loss of the business allegedly suffered.
7. The Applicants aver that it is in the interest of justice that this court arrests this dire situation where officers of the 1st Defendant have forcibly demolished the Applicants’ property, entered into and alienating the land without adhering due legal process and now want to construct a road thereon. The Applicants state that if the orders sought are not granted, they stand to suffer irreparable loss, reputation and ridicule which cannot be compensated by way of damages. That no party stands to be prejudiced in the event the orders sought are granted.
8. In response, the 1st, 3rd, 4th and 5th Respondents filed a Replying Affidavit sworn on 22nd May, 2023 by Dorcas Mungai, the 1st Respondent herein. The Deponent avers that she is responsible for the day to day operations and administration of Kenya Urban Roads Authority [KURA] in respect of which she is appointed and specifically responsible for inter alia, the implementation of the policies and programmes of the Authority and reporting of the board, the development of an operations plan for achieving the Authority’s objectives and for the implementation of the [Kenya Roads Act](#) as may be assigned to her.
9. The deponent states that the Kenya Urban Roads Authority for the purposes of discharging its responsibility under section 10 of the [Kenya Roads Act](#), has the power and duty to inter alia construct, upgrade, rehabilitate and maintain roads under its control, control urban road reserves and access to roadside developments and to performing such other functions related to the implementation of the Act.
10. That the suit plot abuts the Embu-Meru road (A9), where part of its frontage and right hand side encroaches on the Embu-Meru Road (A9) reserve and that a portion of the suit property actually encroaches onto the reserve of Moi Girl’s road at the back.
11. It is admitted that the suit plot is registered in the names of the Applicants and seven others.
12. It is the respondents’ contention that the suit parcel encroaches because the Part Development Plan (PDP) used to allocate the suit plot (Ref TN 350/93/4 of 30/11/93 and Survey Plan (i.e FR No. 253/67 resulted to the parcels number 202-259 are different in terms of the location, the number and the dimensions of the plots.



13. The deponent further depones that therefore the PDP (Ref TN/350/93/4 of 30/11/93 provides for smaller width of the road as opposed to the width of the road of the Original Development plan of the town which was approved in 1988. She has annexed a copy of the 1988 Original Development plan marked “DM1”.
14. The Respondents state that the erroneous PDP and the Survey Plan ought to have been referenced to the town Master plan approved in 1988. That the marking of the road corridor was based on the approved plan of 1988 due to the notable discrepancies of the Survey Plan (FR No.253/67), the PDP (Ref TN 350/93/4 of 30/11/93 and the situation on the ground.
15. The deponent avers that they have held a series of consultative public meetings with all who had encroached onto the road reserve, the Applicants included, whereupon it was agreed that they would mark the extent of encroachments to enable the encroachers clear therefrom to pave way for construction of the Moi Girls Road. That soon thereafter, the markings were done, notices issued and the owners of encroaching structures willingly and voluntarily removed and/or demolished the structures, vacated shops, carted away the interior furnishings, the doors and window thereof and what remained was for them to clear the remaining debris to pave way for the road construction which they did.
16. The respondents aver that the suit is unfounded as the Applicants were already beneficiaries of a road reserve grabbed through an irregular PDP and Survey Plan, and besides, they voluntarily demolished their own encroaching properties and cannot now turn around and demand that they be compensated.
17. The deponent further states that the Authority acted within its scope and mandate as provided under the *Kenya Roads Act* and specifically section 10, and that the Applicants have neither satisfied the conditions laid down by the law for the court to exercise its discretion in their favour, nor have they proved the grounds relied upon in their prayers to warrant grant of the orders sought.
18. It is the Respondents contention that the application lacks merit and warrants dismissal with costs.
19. The court directed the appeal to be canvassed through written submissions and the applicants filed their submissions dated on 14th June 2023 through the firm of Muthomi Gitari while the respondents filed their submissions dated 22nd June 2023 through the Hon. Attorney General.

The Applicants’ Submissions

20. The Applicants counsel relied on the case of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358 and *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR and submitted that from the supporting affidavit and annexures, it is not in dispute that the Applicants are the registered owners of the suit property. That the 1st Respondent has confirmed that indeed the Applicants developments on the property were demolished though denies demolishing them. That the 1st Respondent further avers that the property sits on a road reserve. Counsel for the Applicants submitted that the issues as to whether the Applicants’ property sits on a road reserve or not and whether the 1st Respondent followed legal procedures in demolishing the developments on the property are to be canvassed in a full trial and submitted that at this stage, the court is not required to determine those issues. That looking at the documents annexed to the respective affidavits, it is evident that the Plaintiffs’ claim is not baseless.
21. The Applicants’ counsel further relied on the case of *Mbutia v Jimba Credit Finance Corporation Ltd* [1988] eKLR, *Edwin Kamau Muniu vs Barclays Bank of Kenya Ltd* Nbi HCCC No. 1118 of 2002, and *Virginia Edith Wambui v Joash Ochieng Ougo* Civil Appeal No. 3 of 1987. That in the present case, it is not in dispute that the Applicants are the registered owners of the suit land and that it is



evident that the Respondents proprietary claim over the suit property is anchored on the development plan for Chuka Town.

22. The Applicants submit that they stand to suffer irreparable harm that cannot be compensated by way of damages if the suit property is alienated illegally. That there is need for this court to maintain the status quo on the suit property and allow the parties ventilate their dispute at a full trial. It is the Applicants' submission that they have met the threshold for the grant of a temporary injunction.

1st, 3rd, 4th and 5th Respondents' Submissions

23. The Respondents also relied on the case of *Giella vs Cassman Brown* (supra), and *Mrao Ltd vs First American Bank of Kenya Ltd* (supra) on the threshold for granting temporary injunction and submitted that the Plaintiffs having illegally encroached on the road, cannot claim a breach of rights that were not in existence as they had no right to encroach on the road. It is the Respondents submission that an award of damages is sufficient as the value of land and structures can be ascertained as evidenced by the valuation report forming part of the documents relied on by the Applicants.
24. The Respondents further submitted that the balance of convenience lies with the Respondents as the injunctive orders are going to stop them from performing their statutory mandate under section 10 of the *Kenya Roads Act* which will ultimately affect the general public. It is therefore the Respondents' submission that the application does not satisfy the threshold to warrant this court exercise its discretion in favour of the Applicants, and urged the court to dismiss the application with costs.

Analysis and Determination

25. I have considered the application, the response and the submissions made. The issue for determination is whether the Applicants have met the threshold for grant of a temporary injunction.
26. Both parties are in agreement that the conditions for the grant of an order of temporary injunction were settled in the locus classicus case of *Giella vs Cassman Brown* (supra). An Applicant has to demonstrate firstly, that he has a prima facie case with a probability of success, secondly, an Applicant has to show that he will suffer irreparable loss or damage which would not be adequately compensated by an award of damages if the interlocutory injunction is not granted, and lastly, if the court is in doubt, then it will decide the application on the balance of convenience.
27. A prima facie case was defined in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* (supra) 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.”
28. In this case, it is not in dispute that the Applicants are the registered owners of the suit property known as Plot No. Chuka Township/202 (M3). However, it is said that the 1st Respondent demolished the premises on the suit property on allegation that the same were constructed on a road reserve. The issue as to whether or not the Applicants' property encroached on a road reserve can only be canvassed at the full trial when evidence is called and interrogated by the parties. However, looking at the affidavit in record, it is apparent that the demolition has already taken place and therefore there is nothing to restrain. It is trite that a court cannot issue orders in vain. Further, from the material on record, it is apparent that there were other proceedings over the suit property, including Chuka CM ELC No. 20 of 2020. The Applicants have not stated what became of that previous suit. Therefore, from the



material on record, I find that the Applicants have not established a prima facie case with a probability of success.

29. And as rightly pointed out by the Respondents, the Applicants have annexed a valuation report as part of their documents in support of the application. Therefore, the Applicants have demonstrated that an award of damages will suffice in this case in the event the Applicants succeed at the trial. In my view, the Applicants have not demonstrated that they stand to suffer irreparable harm not compensable in damages. This is because they have already valued the loss as shown by the valuation report filed.
30. The upshot is that the notice of motion dated 30th November, 2022 is without merit and the same is dismissed with costs to the Respondents.
31. Orders accordingly.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 26TH DAY OF JULY, 2023.

In the presence of:

CA: Martha

Muthomi for Plaintiffs/Applicants

Ms. Kendi for 1st, 3rd, 4th & 5th Defendants

N/A for 2nd Defendant

C. K. YANO,

JUDGE.

