



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT OF KENYA
AT KAPSABET
ENVIRONMENT AND LAND CASE E003 OF 2021

ALEXANDER KIPLIMO SEGO.....APPLICANT

VERSUS

THE SUB COUNTY

ADMINISTRATOR NANDI EAST SUB COUNTY.....1ST RESPONDENT

MINISTRY OF ROADS AND

INFRASTRUCTURE -NANDI COUNTY.....2ND RESPONDENT

COUNTY GOVERNMENT OF NANDI.....3RD RESPONDENT

COUNTY PHYSICAL PLANNER-NANDI COUNTY.....4TH RESPONDENT

COUNTY LAND REGISTRAR -NANDI COUNTY.....5TH RESPONDENT

COUNTY LAND SURVEYOR NANDI COUNTY.....6TH RESPONDENT

CYRILUS KIPKEMBOI KIRUI.....7TH RESPONDENT

RULING

1.The Applicant, ALEXANDER KIPLIMO SEGO, vide his Notice of Motion application dated 5th November 2021 seeks injunctive orders against the respondents jointly and severally. the nature of the reliefs sought are;

i) Spent

ii) That this Court be pleased to issue an order of injunction to restrain the 1st, 2nd 3rd 4th,5th,6th and 7th Respondents jointly and severally either by themselves , or through their servants and/or agents and/or others claiming through them from entering trespassing, ploughing, tilling, fencing, surveying, erecting structures on excavating, constructing roads on the road of access, culverting or in any way other manner damaging, destroying, wasting, or otherwise unlawfully dealing with the said NANDI/LESSOS/462 pending hearing and determination of this Application inter-

parties

iii) That this court be pleased to issue an order of injunction to restrain the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Respondents jointly and severally either by themselves, or through their servants and/or agents and/or others claiming through them from entering trespassing, ploughing, tilling, fencing, surveying, erecting structures on excavating, constructing roads on the road of access, culverting or in any way other manner damaging, destroying, wasting, or otherwise unlawfully dealing with the said NANDI/LESSOS/462 pending hearing and determination of this Suit.

iv) That this Honourable Court be pleased to issue any further orders as it may deem fit.

v) that costs of the Application be provided for.

2. The Application was filed under a Certificate of Urgency and at the ex parte stage the application was certified as urgent and an order for status quo to be maintained was issued with the interparte hearing date given on 11.11.2021

3. On 11.11.2021 the Respondents filed a memo of appearance and Ms. Chepngetich Learned Counsel appeared for them although primarily she appeared for the 3rd Respondent as the other Respondent did not file their responses and while Mr. Kiprotich together with Mr. Mbogo appeared for the Applicant. Mr. Kiprotich Learned counsel urged the Court to issue an order in terms of prayer 2 of the application so as to preserve the suit property.

4. The Court issued the order in terms of prayer 2 of the Application and issued directions that the application was to proceed by way of filing written submissions and granted time frames within which the responses as well as the submissions would be filed.

APPLICANT'S CASE

5. It is the Applicant's case that the Respondents had on 25th October 2021 without any lawful authority and/or cause entered and trespassed upon all that piece of land known as Title number NANDI/LESSOS/462 and purported to carry out a survey and mapping of a purported access road through the property.

6. That the said action greatly infringed the proprietary rights of the Estate of Tirop son of Kiplagat the registered proprietor thereon and that the said actions were commenced by the 7th Respondent who was avoiding the creation of the access road within his father's property

7. That there has never been an access road in use at all since the land was adjudicated in 1971 and he sought the injunctive orders so as to stop the Property from being wasted irredeemable and irremediable.

8. The Applicant in support of the application swore an affidavit describing himself as the Grantee of the Letters of Administration Ad litem, in respect of the Estate the late Tirop son of Kiplagat. In the said supporting affidavit the applicant annexed two annexures the grant of the letters of administration Ad litem as well as a copy of the Certificate of Official Search of NANDI/ OLESSOS/462

9. In support of the application the Applicant filed a supplementary affidavit reiterating that no access road has ever existed on the suit property and that he had a prima facie case with probability of success hence the application ought to be allowed.

10. In its written submission the Applicant addressed the Court on a preliminary issue as to

whether an injunction can issue against a County Government and placed reliance on the case of **Kitamaiyu Limited vs County Government - Kiambu and another 2018 eklr**

11. The applicant further submitted generally on the principles of grant of an injunction and in support of the said principles cited the cases of **Giella vs Cassman Brown, Mrao Limited** on the definition of a prima facie case as well as **Nguruman Limited** on what the Court should consider in granting of an application for Injunction.

RESPONDENT'S CASE

14. The Respondents filed a replying affidavit through a Mr. Jonah Biwott, the Chief Officer in charge of the Roads and infrastructure of the 3rd Respondent. It is the Respondents case that the officers of the 3rd Respondent and other officer of the National Government gained access to the suit property so as to inspect and survey an access road that passes through the suit property.

15. The Respondent further state that there is a 6.6 metre road that passes through the suit property and it is this road that they had gone to survey. The said road appears on the map and is a public road and been a public road the same has never been alienated by lawful means to the Estate of the late Tirop son of Kiplagat

16. That the map has not been amended hence the access road ought to be opened in line with the mandate of the 3rd respondent so as to give access to people accessing public utilities like Tigityo Dispensary, Tigityo primary and secondary school as well as St.Mary's ACK Church. The respondent has annexed a map as well as a copy of the Certificate of Official Search of NANDI/ OLESSOS/462 in the replying affidavit

17. In their submissions the Respondents have taken issue with the locus of the Applicant who has brought the suit in his name and not as an administrator of the estate of the late Tirop son of Kiplagat and they submit that the Applicant has no locus to bring in the suit in his name.

18. The Respondents further submit that the Applicant has not made out a Prima facie case and should not be granted the injunction. In this regard the Respondent places reliance on the case of **Nguruman Limited** which has been cited by the Applicant too.

ANALYSIS AND DETERMINATION

19. Both the Applicant and Respondents have filed a common document to wit the Certificate of Official Search in respect of NANDI/OLESSOS/462. On part A (property section which includes easements) the search reveals '**A 6.6 Metre road passes through this plot**'.

20. A reading of Section 29 of the Land Registration Act implies the import of a Certificate of Search. And in so far as the search exhibited before court reveals an easement in terms of '**a 6.6 metre road passing through the property**' ...it follows therefrom that there was reserved in the suit property **a 6.6 metre access road**.

21. The 3rd Respondent through Jonah Biwott depones at paragraphs 5,6,7 and 8 of his Replying Affidavit of the existence of this road as captured in the map which has not been amended. The Applicant did file a Supplementary Affidavit but did not specifically respond to the issue but explained that the existence of such a road was made unlawfully at the behest of the 7th Respondent yet in his own document the Certificate of Official Search it appears that **A 6.6 Metre road passes through this plot**'. and was registered as an easement.

22. Section 2 of the **Land Act** defines an easement as;

"a non possessory interest in another's land that allows the holder to use the land to

a particular extent, to require the proprietor to undertake an act relating to the land or to restrict the proprietors use to a particular extent, and shall not include a profit'

23 From that definition it is clear that **the 6.6 metre road** that passes through NANDI/OLESSOS 246 is indeed an easement. Although under Section 28 of the Land Registration Act, it is not a must to register an easement. In this particular instance the said easement was registered.

24. The effect of the registration of the easement is that under **Section 25 of the Land Registration Act**, the rights of the proprietor in this case the Applicant, were subject to the easements. The Section provides that;

“The right of a Proprietor, whether acquired on first registration or subsequently for valuable consideration or by order of court, shall not be liable to be defeated except as provided by 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, subject;

(a) to leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register.

25. Consequently, the explanation offered by the Applicant in relation to the existence of **“the 6.6 metre”** in their own document is not convincing. In fact, under section 29 of the Land Registration Act which provides that; **“Every proprietor at the time of acquiring any Land Lease or Charge shall be deemed to have had notice of every entry in the Register relating to the land, lease or charge and subsisting at the time of the acquisition.”** The Applicant was thus deemed to have known of the existence of **“the 6.6 metre road reserve”**.

26. The court accepts the explanation offered by the Respondent, to wit, that the road existed even before adjudication and hence the registration of it as an easement to be more plausible.

23. The 3rd Respondent indicates that it is this same road that they have intended to survey and open up for purposes of access by members of the public. The question that follows is can members of public be barred from using the access road which the Applicant was deemed to know of its existence.

24. The 3rd Respondent depones that the access road so reserved is a public road and the same has not been alienated to the estate of the Tirop son of Kiplagat and the court finds this factually true and therefore in answer to the question posed above, is that the public cannot be barred from accessing the access road.

25. The court finds that the Applicant was deemed to be aware of the existence of the easement and that his rights as the right of a registered proprietor over property was and is subject to overriding interest such as easements. For that reason the easement, in this case right of way/road, overrides proprietor's right and ought to be protected even by the proprietor himself as was held in **Kenya Power & Lighting Co.Ltd v Mosiara Trading Company Ltd [2016] eKLR** where the court observed

“It is evident that the Plaintiff applied for a public right of way or wayleave in 1953 and the same was granted. The Defendant's Grant is therefore subject to that public right of way (wayleave). The Defendant has a duty to safeguard that wayleave.”

26. Has the Applicant demonstrated a prima facie case for the grant of the orders sought? Both the Applicant and the Respondent agree on the principles for the grant of injunction as stated in **Giella vs cassman Brown**, and what a prima facie case as stated in **Mrao Limited** and when the Court can grant an injunction as stated in the **Nguruman** case which they have both cited.

27. In the **Nguruman** case the court of appeal held ‘**we reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must examine the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case.....** ‘

28. Noting that the 3rd Respondent in exercise of its duties intends to open an access road that was duly registered as an easement in the suit property and further that the **6.6 metre road** reserve also appears in the Certificate of Official Search presented by the Applicant. The Applicant has not demonstrated a prima facie case to warrant the issue of the orders as the access road is a public road and they can be no violation of any right as the existence of the said access road was reserved and registered as an easement in the suit property.

29. Having failed to establish the prima facie case the court is not obligated to inquire on the remaining limbs of **Giella vs Cassman Brown** as was held in the case of **Kenya Commercial Finance Limited vs Afraha Education Society (2001) Vol 1 E.A 86** where the court held inter alia” **.....if prima facie case is not established then irreparable harm and the balance of convenience need no consideration.**’

30. In Light of the above finding that no prima facie case has been established, the application is hereby dismissed with costs to the 3rd Respondent and the interim orders issued on 11.11.2021 are hereby discharged.

31. Orderly accordingly.

DATED AT KAPSABET THIS 31ST DAY OF JANUARY 2022

HON. M.N.MWANYALE

JUDGE