



REPUBLIC OF KENYA
IN THE ENVIRONMENTAL AND LAND COURT
AT MOMBASA

ELC CASE NUMBER 143 OF 2021

**RUTH LINET ANYANGO (suing as the legal representative of the
Estate of John Douglas Omondi)PLAINTIFF/APPLICANT**

- VERSUS -

MERCY WANJIRU THUKU.....DEFENDANT/RESPONDENT

RULING

I. Preliminaries.

1. The Notice of Motion application before this Honorable Court for its determination, is the one dated 26th July 2021 filed by the Plaintiff/Applicant hereof. It is brought under the provisions of Sections 1A, 1B, 3A & 63 (e) of the Civil Procedure Act, Cap. 21, Order 40 Rules 1, 2, 3 & 4 of the Civil Procedure Rules, Section 110 of the Land Act, of 2012 and the Article 40 of the Constitution of Kenya.

II. The Plaintiff/Applicant's case

2. The Plaintiff/Applicant from the afore stated application, sought for the following orders:-

a. Spent.

b. Spent.

c. Spent.

d. THAT a temporary order of injunction do issue restraining the Defendant/Respondent by herself, her agents, servants, employees and/or persons acting under their instructions or any other person whomsoever and whatsoever from trespassing on the property known as Sub - division No. 9958/I/MN and continuing with the ongoing constructing on the property known as Subdivision No. 9961/I/MN (Original No. 9617/12 Section/MN) pending the hearing and determination of this suit.

e. THAT the Defendant/Respondent be ordered and/or compelled by this Honourable court to pull down and/or demolish part of the Defendant's/Respondent illegal structure which have been erected or build on the boundary or perimeter wall separating the Plaintiff/Applicant and Defendant/Respondent's respective premises without the Plaintiff/Applicant's consent.

f. THAT this Honourable court do compel the Defendant/Respondent to erect barriers/hoardes on the construction site.

g. THAT any other relief that this Honourable court may order for the interest of justice.

h. THAT costs of this application be provided for.

3. The application is founded on the grounds, testimony and averments of the 17 Paragraphed Supporting affidavit of RUTH LINET ANYANGO and six (6) annexures marked as "RLA – 1 to 6" annexed hereto. It is the Plaintiff/Applicant's case that her late husband, is the registered owner of the suit property Sub - division No. 9958/I/MN, while the respondent is her neighbor and the registered owner of Sub - division No. 9961/I/MN.

4. She claimed that the Defendant/Respondent was undertaking some constructions of apartments on her property, had led to the

encroachment into her suit property and destroyed both her perimeter wall and the electric fence thereon.

5. The Plaintiff/Applicant further claimed that construction materials and dust that were being deposited into the suit property were causing immense nuisance, annoyance and imminent danger to her. She held that the Defendant/Respondent had been encroaching onto the access road leading to the suit property thereby obstructing the Plaintiff/Applicant from accessing the road. The Plaintiff/Applicant pleaded with court to restrain the Defendant/Respondent lest she continued to suffer substantial loss and damages as well as the infringement threat and/or violation on her right to quiet possession and enjoyment of her suit property.

III. The Defendant/Respondent's Case

6. The Notice of Motion application was opposed by the Defendant/Respondent vide a 19 Paragraphed Replying Affidavit sworn by MERCY WANJIRA THUKU dated 7th October, 2021. She affirmed her ownership to all that property known as the Land Reference numbers Sub - division No. 9961/I/MN as well as to the ongoing construction on her property which was adjacent that of the Plaintiff/Applicant. However, she refuted all the assertion made against her by the Plaintiff/Applicant. She stated that the construction commenced after she obtained the requisite approvals from the relevant authorities. She stated that the construction was well within the boundaries and precincts of her property as seen from the survey report attached. She denied having encroached onto the Plaintiff/Applicant's suit property. She maintained that the alleged encroachment could only be proved by a survey report and not through mere sets of photographs as taken and being used by the Plaintiff/Applicant. She claimed the Plaintiff/Applicants had failed to particularize the loss and damage the construction had occasioned to the suit property.

7. She asked Court not to restrict her right to property, as it would cause her to suffer more loss more than the Kenya Shillings Ten Million Four Twenty Four Thousand and Seventy (Kshs. 10,424,070/=) she had already suffered since the scuffle with the Plaintiff/Applicant began. She argued that the balance of convenience tilted in her favour as the application lacked merit and ought to be dismissed with costs.

IV. Submissions

8. On 12th October 2021, while all the parties were present in Court, court directed the parties to have this application be canvassed by way of written submission. Subsequently, the Honorable Court ascertained that they had all complied with the said directions. Accordingly, the Honorable Court reserved 24th January, 2021 as the day to deliver its ruling.

A. The Plaintiff/Applicants Written Submissions

9. On 5th November 2021, the Learned Counsel for the Plaintiff/Applicant, the law firm of Messrs. Mburu Nyamboye & Co. Advocates filed their submissions in support of the application. The Learned Counsel submitted that the applicant had fulfilled the requirements set out in the "*Classius Locus case*" "**Giella - Versus - Cassman Brown & Co. Limited (1973) EA 358**, which are; the existence of a prima facie case with high chances of success and that she would suffer irreparable damage which could not be adequately compensated by an award of damages if the injunction was not granted and finally, that the balance of convenience tilted in her favor. The Learned Counsel submitted that the Respondent's encroachment on the Plaintiff/Applicant's perimeter wall and electric fence, and the construction debris falling into her suit property had caused loss and exposing her and her family to security risks, nuisance anguish, agony and injury. The Learned Counsel maintained that the Plaintiff/Applicant had a prima facie case as seen from the evidence in support where the Defendant/Respondent had admitted in a letter written to the National Construction Authority of the damages caused. The Learned Counsel argued that unless the Defendant/Respondent's construction was stopped the Plaintiff/Applicant would continue to suffer irreparable harm. The balance of convenience tilted to the Plaintiff/Applicant's advantage since she stood to suffer more damage if the construction continued.

10. The Learned Counsel contended that the damage caused on the Plaintiff/Applicant's suit property could only be reversed by a mandatory injunction directing the Defendant/Respondent to demolish part of the structure built on the perimeter wall. To buttress the point, the Learned Counsel relied on the case of **Kenya Breweries Limited – Versus - Washington O. Okeyo (2002)**, where the Court of Appeal stated that a mandatory injunction could only be granted at an interlocutory application where there was the presence of special circumstances. The Learned Counsel argued that the admission by the Defendant/Respondent in her letter to the National Construction Authority of the damage caused by the construction was ground enough to issue a mandatory injunction for part demolition of the said structures. The Learned Counsel further prayed to court to direct the Defendant/Respondent to put up well identified safety measures such as barriers as per the Building Code to prevent the debris from falling into the Defendant/Applicant's property and hence metering the environmental nuisance as stated.

B. The Defendant/Respondent's Written Submissions.

11. On 15th November 2021, the Learned Counsel for the Defendant/Respondent through the Law firm of Messrs. Muthee Kiniko Soni & Associates filed their submissions in opposition of the application. The Learned Counsel submitted that the Plaintiff/Applicant had failed to meet the requirements meted out in case of **Giella - Versus - Cassman Brown & Co Ltd (1973) EA 358** since the encroachment had not been supported by any survey report. The Learned Counsel maintained and denied that no nuisance had been occasioned on the Plaintiff/Applicant taking that the Defendant/Respondent had followed all the construction guidelines. Indeed, they held on the contrary it's her who would continue to suffer irreparable loss and damage if the construction was stopped by court. The Learned Counsel argued that the Defendant/Respondent had not built any structures on perimeter wall as seen from the survey report attached to the Replying Affidavit. Further to that, she argued that the Defendant/Respondent had put the necessary protective gear to avert any unintended nuisance from afflicting the Plaintiff/Applicant. Nonetheless, she admitted that there was a slight damage to the Plaintiff/Applicant's electric fence which was inspected by the National Construction Authority. All said and done, the Learned Counsel urged court to dismiss the Plaintiff/Applicant's claims with costs to the Defendant/Respondent.

V. Analysis And Determination

12. I have read and considered all the filed pleadings by the parties, the written submissions, cited authorities and the relevant provisions of Law with regard to the Notice of Motion application by the Plaintiff/Applicant dated 26th July, 2021. In order to arrive at an informed just and fair decision. I have framed the following issues for determination. These are:-

- a. **Whether the Plaintiff/Applicant meets the threshold for a grant of temporary injunction against the Defendant/Respondent as provided for under the Provisions of Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules 2010.**
- b. **Whether the Plaintiff/Applicant meets the threshold for a mandatory injunction against the Defendant/Respondent.**
- c. **Who will meet the costs of the Application.**

ISSUE No. a). Whether the Plaintiff/Applicant meets the threshold for a grant of temporary injunction against the Defendant/Respondent as provided for under the Provisions of Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules 2010.

13. The principles for granting an interlocutory injunction are well settled into law:-

- a. the applicant must show a prima facie case with high chances of success,
- b. the applicant stands to suffer irreparable damage which cannot be adequately compensated by an award of damages,
- c. if the court is in doubt, it will decide the application on the balance of convenience.

14. A prima facie case was defined in **MRAO LIMITED – Versus - FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS (2003) KLR 125 stating thus:-**

‘So what is a prima facie case, I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself would 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. The Plaintiff/Applicant’s case is that the Defendant/Respondent’s ongoing construction had encroached into her suit property by destroying her perimeter wall and electric fence causing her loss, damage, and nuisance and exposing her to harm and injury. The Defendant/Respondent admitted to constructing on her property which was next to the Plaintiff/Applicant’s suit property but has denied the encroachment, which according to her was not supported by any survey report.

15. A prima facie case is more than an arguable case. The Plaintiff/Applicant has demonstrated ownership to the suit property as well as how it’s being negatively affected by the ongoing construction. The annexure marked as “RLA – 3” are a set of photographs attached to the supporting affidavit which clearly showed that the Plaintiff/Applicant’s electric fence had been damaged. The photographs also showed the debris from the ongoing construction had fallen into the Plaintiff/Applicant’s compound which the Plaintiff/Applicant stated posed imminent danger to her family and clearly evidence **based on the Tort Maxim “Res Ipsa Loquitor”**. It would cause imminent danger to her. The Plaintiff/Applicant had further attached a letter dated 30th March 2021 from the National Construction Authority, which stated the Authority had requested the Defendant/Respondent to put up sufficient safety measures such as hoarding and to fence the construction site. The letter further indicated that the Defendant/Respondent was willing to undertake repair works. This had been supported by the submissions by Learned Counsel for the Defendant/Respondent who admitted and confirmed that there was a slight damage to the Plaintiff/Applicant’s electric fence. However, the Learned Counsel never confirmed whether the Defendant/Respondent made good the damage or not. It’s quite important to remember that this is an interlocutory application and the dispute between the parties still ranged on. This Honorable Court has to fore warn itself and be aware of the risk of permeating into the horizons of a full hearing and making a final determination of the matter prematurely.

16. The Plaintiff/Applicant had claimed the construction had deprived her of the right to quiet possession and peaceful use and enjoyment of her suit property. Other than that, the construction debris and waste that deposit into her compound were causing her nuisance and would injure her family. On this aspect, her Learned Counsel advanced the argument that was irreparable damage that could not be compensated by damages. The effects of the construction by the Defendant/Respondent on the Plaintiff/Applicant’s suit property went beyond the day to day inconvenience, though the damage to the perimeter wall and electric fence could be qualified, the nuisance of construction debris, waste falling into her home, the blocking of the access road to the suit property could not be qualified. The fact that the Plaintiff/Applicant’s home sat on the suit property, was justifiable reason to believe that the environmental damage that the construction was causing would adversely affect the lives of third parties unless the injunction was granted.

17. It must be remembered and pursuant to the fundamental right to private property enshrined under Article 40 (1) and (2) of the Constitution of Kenya and Section 24 and 25 of The Registration Act, 2012, on the sanctity of a title and that it was a serious thing to restrain a registered proprietor of a property, like the Defendant/Respondent over what was undeniably her right to develop her suit property. However, the fundamental rights were not absolute and were limited under the provisions of Article 24 of the Constitution of Kenya. In saying so, it is trite law that where one’s rights infringed on another person then it ceases from being a right. The irreparable injury that the ongoing construction perpetrated by the Defendant/Respondent had caused the Plaintiff/Applicant was a justifiable ground to protect her and grant the orders as prayed. Therefore, in my considered view, the balance of convenience inevitably tilts in favour of the Plaintiff/Applicant and into preserving the suit property until the case was heard and finally determined.

ISSUE b). Whether the Plaintiff/Applicant meets the threshold for a mandatory injunction against the Defendant/Respondent.

18. On the second issue for determination is whether the Plaintiff/Applicant ought to be granted a mandatory injunction that would compel the Defendant/Respondent to pull down and/or demolish part of the structures that had been erected onto the Plaintiff/Applicant’s suit

property, as well as compelling the Defendant/Respondent to erect barriers on the construction site.

A mandatory injunction does more than restrain a person from doing an action, but also compelled performance of certain actions necessary for putting an end to a wrongful state of things created by him or otherwise in fulfillment of his legal obligation. In the case of **Locabail International Finance Limited - Versus - Agroexport and others (1986) All ER 906**, the court held thus:-

‘A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can easily be remedied, or if the Defendant attempted to steal a march on the Plaintiff...a Mandatory injunction will be granted on an interlocutory application.’

The Honorable Court must be very cautious and vary that the matter before court is not only an application for mandatory injunction, but is one which, if granted would amount to the grant of a major part of the relief claimed in the action. Such applications should be approached with great circumspect and caution and the relief granted only in a clear case lest the suit is finalized at the interlocutory stage and there is nothing left to be heard and determined at the chagrin of the opposing party. Certainly, that would not be equity, fair and just at all to the other party.

19. I am bound to say that the question of whether or not the Defendant/Respondent had constructed into the Plaintiff/ Applicant’s suit property would be best answered and initially tackled during a full trial where evidence will be adequately adduced and parties accorded ample opportunity to cross-examine all the witnesses and interrogate the documents evidence before it. In my view, the injury caused to the perimeter wall and electric fence could be estimated and sufficiently compensated by a pecuniary sum. In my view, and in all fairness, just and equity. In the given circumstances an order of status quo would adequately protect the Plaintiff/Applicant’s interest until the matter is heard and determined. In my opinion, I reiterate, it would be such a draconian move by court to direct the pulling down of a part of a building before thorough determination of evidence at trial. Therefore, I hesitate to grant an order of mandatory injunction at this early stage of the suit.

20. Be that as it may, the Plaintiff/Applicant has demonstrated that the Defendant/Respondent lacked sufficient safety measures such as hoarding and fencing around her construction site, which has been confirmed by the submissions of the Learned Counsel for the Defendant/Respondent admitting that there had been a slight damage to the electric fence. The Defendant/Respondent, however needed to sufficiently adhere to the Building Code as established by the National Construction Authority on placing safety measures such as the hoarding and fencing of the construction site to ensure safety to not only the Plaintiff/Applicant but also to passersby and the general public. The need for safeguarding the construction site was echoed in the letter to the Plaintiff/Applicant from the National Construction Authority dated 30th March 2021.

VI. DETERMINATION

21. The upshot of this elaborate and indepth analysis, this Honorable Court is fully satisfied that the Plaintiff/Applicant has proved her case on preponderance of probability. Consequently, I do proceed to allow the Notice of Motion dated 26th July, 2021 and for avoidance of any doubts specifically make the following orders:-

a. THAT a temporary order of injunction do issue in favour of the Plaintiff/Applicant restraining the Defendant/Respondent by herself, her agents, servants, employees and/or persons acting under their instructions or any other person whomsoever and whatsoever from trespassing on the property known as Land Reference Numbers Sub - division No. 9958/I/MN and continuing with the ongoing constructing on the property known as Subdivision No. 9961/I/MN (Original No. 9617/12 Section/MN) pending the hearing and determination of this suit.

b. THAT the Defendant/Respondent be and is hereby compelled at her own expense to erect sufficient safety protective measures such as hoarding and fencing on the construction site as stipulated in the Building Code within the next 14 days from the date of this ruling.

c. THAT for expediency sake this matter be heard and determined within the next three (3) months from the date of this ruling and therefore it should be fixed for Pre – trial Conference session on pursuant to the provision of Order 11 of the Civil Procedure Rules 2010, on 1st March, 2022.

d. THAT the costs of the application are awarded to the Plaintiff/Applicant to be borne by the Defendant/ Respondent herein.

IT IS ORDERED ACCORDINGLY.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 24TH DAY OF JANUARY, 2022

HON. JUSTICE L. L. NAIKUNI

JUDGE

ENVIROMNENT AND LAND COURT

MOMBASA

In the presence of:

M/s. Yumna Court Assistant.

Mr. Nyamboye Advocate for the Plaintiff/Applicant.

Mr. Ndege Advocate for the Defendant/Respondent.