



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

E&L NO.228 OF 2013

ASHOK KHETSHI SHAH

RASILA ASHOK SHAH.....PLAINTIFFS

VERSUS

KENYA NATIONAL HIGHWAYS AUTHORITY.....DEFENDANT

R U L I N G

1. The plaintiffs herein – **ASHOK KHETSHI SHAH** and **RASILA ASHOK SHAH** – are registered lease owners of land parcels NO. **KISUMU MUNICIPALITY BLOCK 11/114, 115, 116** and **117** situated along Kisumu – Dunga road. The defendant – **KENYA NATIONAL HIGHWAYS AUTHORITY** – is in charge of some classified roads in Kenya; Kisumu – Dunga road being one of them.
2. On 9/7/2013 the plaintiffs received a notice from the defendant informing them of having encroached on the road reserve of Kisumu/Dunga road. The plaintiff were said to have erected a perimeter wall on the said road reserve and were given 2 months to remove it.
3. The plaintiffs felt aggrieved and came to court vide this suit, which was filed on 5/9/2013. Contemporaneously with the suit was also filed a Notice of Motion seeking some temporary reliefs.
4. The application is brought under Sections 3, 3A of Civil Procedure Act (Cap 21) and Order 40 rules 1,2,4,5 and 8 of Civil Procedure Rules and all other enabling provisions of law. Six prayers were sought but at this stage, prayers (i), (ii), (iii) and (iv) are moot. For consideration at this stage therefore are prayers (iv) and (vi), which are as follows:-

Prayer (IV): Pending hearing and determination of this suit a temporary injunction do issue against the respondent, its agents, employees or any person deriving authority from them restraining them from removing, demolishing or interfering with plaintiff's perimeter wall situated on KISUMU MUNICIPALITY BLOCK II/114,115,116 and 117 along KISUMU – DUNGA ROAD.

Prayer iv: Costs of this application borne by the respondent.

5. From the grounds set out in the application and from the supporting affidavit sworn by first plaintiff, it appears clear that the two plaintiffs are the current owners of **KISUMU MUNICIPALITY 11/114,115,116, and 117** (suit land hereafter). There were previous other owners in the past. The facts and circumstances surrounding and/or leading to the current deadlock between the parties seem to have arisen during the period of previous ownership. The only thing that can be attributed to the current

ownership is construction of the perimeter wall, which the defendant wants demolished.

6. The replying affidavit from the defendant has some background information. The suit land, it appears, was originally parcel No.1148 when it was first surveyed in 1935. Its size was 0.6445Ha at the time.

7. Then in 1982, there was a resurvey; the suit parcel was merged with an adjacent one and its new description became **KISUMU MUNICIPALITY/BLOCK 11/86** measuring 0.9776Ha. It seems to me the adjacent land comprised wholly or partially of a road reserve.

8. According to the defendant, the resurvey was tainted with illegality, having bypassed or ignored some crucial procedural steps. The defendant now claims the portion that comprised the road reserve.

9. But the plaintiffs are not ready for this. The process, according to them, was all legal, and the defendant is engaged in an illegal endeavour trying to wrest a portion of the suit land from them.

10. It appears to me that vide this application, both sides have dug in for a long drawn out legal tussle. I say so because the plaintiff filed their application and shortly after, they filed a further affidavit. The defendant filed a replying affidavit and a supplementary affidavit. Not to be outdone, the defendants followed lastly with its own further affidavit. These depositions from both sides are very detailed. The issues raised are weighty. There is real danger that an exhaustive look at the issues may lead to a premature determination of some aspects of the main suit before trial. For instance, is the applicant's property encroaching a road reserve? Was the survey merging and enlarging the suit land in 1982 legal or procedural? These are issues that the court needs to address after trial when all the evidence is in. But they are issues also raised for determination of this application.

11. Alive to the fact that a conclusive determination of the issues raised is not an option at this stage, I have decided to pay attention to what was laid before me and assess the relative strengths of each side's case.

12. That the plaintiffs are the legal owners of the suit land is hard to deny. They are holders of lease titles that have not, as yet, been legally impugned. That the current stand off is as a result of a resurvey conducted by relevant government agencies in 1982 is also difficult to deny, the alleged illegality of the exercise notwithstanding. The plaintiffs were not party to this.

13. When the plaintiffs set out to construct the perimeter wall, it appears clear that they did it according to the boundaries established during the 1982 survey. This is what the defendant is challenging. But the challenge is being mounted in a manner that makes the plaintiffs feel that their legal rights are being stifled.

14. I have paid careful attention to the application, the replying affidavit, the supplementary affidavit, the further affidavits filed by both sides and the submissions. I have had a look at the decided authorities too.

15. In particular, I have considered what was held by the Court in **CHURCH COMMISSIONERS FOR KENYA VS KENYA NATIONAL HIGHWAYS AUTHORITY & AG. NAIROBI, ELC NO.883/2013** and **MAHESH KANTILAL SANRAJKA VS KENYA NATIONAL HIGHWAY AUTHORITY; MOMBASA, HCC NO.137/2011**. The facts of these two cases were broadly similar to the facts of the case at hand. A restraining order was granted against the defendant, who is the same party here.

16. In an application of this nature, the court has to consider, among other things, whether the applicant has established a prima facie case with a probability of success; whether the applicant will suffer irreparable loss; and, where in doubt, consider the balance of convenience – See **GIELLA VS CASSMAN BROWN & CO. LTD (1973) EA 358**.

17. I have considered also the cases of **BEDROCK SECURITY LTD VS NZOIA SUGAR COMPANY LTD (2013) eKLR** and **FRANCIS MUTHIKE NJUKE & ANOTHER VS CO-**

OPERATIVE BANK OF KENYA LTD (2006) Eklr. In these two cases availed by the defendant, restraining orders were not granted because the first two considerations in Giella's case (Supra) were not met. For balance of convenience, there is the case of **JAMES NGARA GAITHO VS HOUSING FINANCE COMPANY OF KENYA & ANOTHER: (2007) eKLR.** I wish to point out that, the facts and circumstances of all these cases are different from the facts of the case here.

18. In this case, the plaintiffs hold titles to the suit land. The defendants would have us believe that the titles were acquired unprocedurally or illegally. But the documentation availed by the plaintiffs seem to show a different picture. It appears clear that the relevant government agencies were involved. Contrary allegations by the defendant would require more and better demonstration than is currently availed. It is also necessary to consider that the current owners are not the one associated with the illegalities alleged to have taken place in the past. They came to the scene later.

19. Public interest is important but not more important than due process, which is the entitlement of both sides. I consider that the fact that the plaintiffs have legal titles is a pointer to the possibility that they have a good case. They are entitled to preservation of Status Quo before their case is determined. They have shown a prima facie case. I also note that the defendant has not undertaken to compensate the plaintiffs with damages should it ultimately turn out that the plaintiffs are right. As things stand, the plaintiffs are not not guaranteed of damages for any unjustified loss they may suffer.

20. And when everything availed by both sides is considered, I think the balance of convenience favours the plaintiffs. They seem to be late comers to the scene. Whatever the defendants are alleging cannot squarely be attributed to them. They need therefore to be heard and it is unfair to start hearing hem when the defendant has already undermined the status Quo. For all these reasons, the restraining order as sought in prayer IV is hereby granted.

Costs of the application (Prayer VI) will however be in the cause.

A.K. KANIARU – JUDGE

19/3/2015

19/3/2015

Before A.K. Kaniaru – Judge

Diang'a G. - Court clerk

No party present

Interpretation – English/Kiswahili

Indumuli for Applicant

Wasuna A. for Mongusu for Respondent

COURT: Ruling on application filed on 5/9/2013 read and delivered in open **COURT.**

Right of Appeal – 30 days.

A.K. KANIARU – JUDGE

19/3/2015

WASUNA: I apply for certified copies of ruling.

COURT: To be supplied.

A.K. KANIARU – JUDGE

19/3/2015