



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 729 OF 2014

EMMANUEL KURIA GATHONI..... PLAINTIFF

-VERSUS-

CONSTITUENCY DEVELOPMENT FUND BOARD.....1ST DEFENDANT

THE CHAIRMAN, DAGORETTI SOUTH CONTITUENCY

DEVELOPMENT FUND COMMITTEE..... 2ND DEFENDANT

NAIROBI CITY COUNTY 3RD DEFENDANT

RULING

The plaintiff filed the present suit on 10th June 2014 where he claims to be the registered owner of two parcels of land located in Dagoretti South Constituency being **L.R.NO. Dagoretti/Waithaka/175** and **L.R. NO. Dagoretti/Waithaka/229** where he has established his home. The plaintiff has erected a perimeter wall around his two parcels of land and claims that the defendants have intentions to upgrade Kamwene Road which runs adjacent to his parcels of land and that such upgrading would entail hiving out 3 metres of part of his parcels of land along the said road and demolishing of his perimeter wall.

Simultaneously with the plaint the plaintiff filed a Notice of Motion application grounded under Order 40 Rules 1 (a) 2 & 4 and Order 51 (1) of the Civil Procedure Rules, sections 1A, 1B, 3A of the Civil Procedure Act, Article 40 of the constitution, sections 107, 110,111 to 115 of the Land **Act NO. 6 of 2012**. By the Notice of Motion the plaintiff prays for a temporary injunction restraining the defendants from demolishing the perimeter wall erected by the Applicant around land parcels number **LR.NO. Dagoretti/waithaka/175** and **299** and from acquiring any part of the said parcels of land or interfering in any other manner whatsoever with the Applicant's right to quiet user, possession and enjoyment of all rights to the said parcels of land until the hearing and final determination of the suit herein.

In support of the application the plaintiff states that the defendants have without any colour of right marked the perimeter wall to his property for demolition. The plaintiff states he is the registered owner

of the parcels of land and that the defendants acts constitute a violation of his property rights under article 40 of the constitution and urges the court to step in to ensure his rights are protected by injuncting the defendants from carrying out their unlawful actions.

The plaintiff swore a supporting affidavit in support of the Notice of Motion and deposes that he is registered proprietor of the parcels of **Dagoretti/Waithaka/175** and **Dagoretti/Waithaka/229** as per the copies of certificates of ownership annexed and marked “**KG1**”. The plaintiff has annexed photographs of the perimeter wall constructed around the parcels of land marked “**KG2**” and further has annexed a survey map (plan) marked “**KG3**” showing the alignment of the plaintiff’s parcels of land and Kamwene Road earmarked for upgrading. It is the plaintiffs averment that the defendants intended actions amount to compulsory appropriation of his land without any compensation in violation of the constitution. The plaintiff states that he has not been given any notice of any intended compulsory acquisition of his land by any state organ and for the defendants to commence demolition of his perimeter wall without the appropriate due process being undertaken would be illegal and would constitute unfair treatment, abuse of authority and would be unjust.

The 1st Defendant by a replying affidavit sworn by one **Simon Ndeka**, Corporation Secretary on 25th June 2014 denied any knowledge of the contents of the Plaintiff/Applicants application and stated that no complaints had been brought to the 1st Defendant’s attention. The 1st Defendant stated that they are not involved in project design or implementation and thus the suit against them is unmaintainable.

The 3rd Defendant for their part filed a replying affidavit sworn by **Eng. Christine A. Ogut**, Chief Officer of the 3rd Respondent’s Department of Public Works and Transport. Like the 1st defendant the 3rd defendant denied being involved in the implementation of the road project that goes through the applicant’s property and stated that it had no intention of demolishing the applicant’s perimeter wall or in any way to interfere with the said property. The 3rd Defendant averred that the plaintiff had not demonstrated a prima facie case against the 3rd defendant to warrant a grant of injunction against the 3rd defendant.

The 2nd Defendant, Dagoretti South Constituency Development Fund Committee though served with the application on the 13th of June 2014 as per the affidavit of service sworn by **Paul Githinji Wanjohi** on 24th June 2014 filed on the same date did not file any response to the application. On the 2nd Defendant’s part the application for injunction by the plaintiff is therefore taken as unopposed.

On 4th November 2014 the 1st Defendant filed a notice of preliminary objection to the suit against it dated 3rd November 2014 and raised the following points:-

- a. That the suit as drawn against the 1st Respondent does not disclose a reasonable cause of action against it.
- b. That the said suit as drawn against the 1st Respondent is frivolous, vexatious and an abuse of the court process geared towards wasting precious judicial time.
- c. That the issues and/or actions complained of in the said suit are untrue and do not fall within the mandate of the 1st Defendant which is in any event not privy and/or has nothing to do with the alleged claim.

The Plaintiff and the 3rd defendant filed written submissions to canvass the application while the 1st and 2nd defendants did not file any submissions. I have perused and considered the pleadings together with the plaintiffs application for injunction and the affidavits in support and in opposition and the filed submissions. The issue that arises for determination is whether the plaintiff has satisfied conditions for grant of a temporary injunction as established in the case of **GIELLA –VS- CASSMAN BROWN & CO. LTD (1973) EA 358** to warrant the court to issue an injunction in his favour as sought. The conditions for grant of a temporary injunction have arising from the holding in the **GIELLA** case (supra) been more or less settled as follows:-

- i. An applicant must establish a prima facie case with a probability of success.
- ii. An applicant must demonstrate that he stands to suffer irreparable harm that cannot be compensated for by an award in damage if the injunction is not granted and he is not granted and he is successful at the trial.
- iii. And incase the court is in any doubt it can determine the application on the basis of consideration of the balance of convenience.

What is the case for the plaintiff?

The plaintiff avers that he is the registered proprietor of title numbers **Dagoretti/Waithaka/175 and 229** and he has annexed copies of titles to demonstrate this fact. The Defendants have not at all disputed the plaintiff's ownership of the suit properties. The 1st and 3rd Defendants state they have not in any manner interfered with the plaintiff's parcels of land and have no intention of carrying out any demolition of the plaintiffs perimeter fence as alleged by the plaintiff. Under paragraph 9 of the plaint the plaintiff pleads as follows:-

9. The defendants intend to illegally hive off 3 metres of the part of the plaintiff's parcels of land that adjoins and runs along Kamwene Road and have in that regard marked the perimeter wall erected by the plaintiff around his home for demolition.

The plaintiff repeats this averment under paragraph '6' of the supporting affidavit and annexes a copy of a survey map marked "KG3" to pin point the area he states is to be affected by the said demolitions. This survey map is not indicated as originating from any of the defendants and neither does it bear any marks of any of the defendants. From a casual look at the survey map it appears to be a copy of the land registry index map (RIM) obtained from the Land Registry or Survey Department which has been hand marked with a pen to denote the intended access road adjustments. It is silent as to who made the hand markings. Under paragraph "7" of the supporting affidavit the applicant depones thus:-

7. The defendants/ respondents have already marked the perimeter wall around my home for demolition. (see the photographs marked "KG2").

The plaintiff does not state who made the markings and when this was done. The plaintiff further does not adduce any evidence to show that the marking of the perimeter wall signified the wall would be demolished. There does not appear to be any evidence that the defendants were in anyway culpable as there is nothing to show they were responsible for any of the actions the plaintiff attributed to them. The plaintiff's case is predicated on inferences and conjecture that the defendants intended to carry out the demolition of the perimeter wall but where is the evidence to support such intentions. A court of law cannot rely on presumptions and conjecture which are unsupported by any evidence. Yet the plaintiff is inviting the court to do exactly that which invitation the court must decline.

In the circumstances of this case I am not satisfied the plaintiff has demonstrated a prima facie case with any probability of success against the Defendants. The Court of Appeal in the case of **MRAO of LTD – VS- FRIST AMERICAN BANK OF KENYA LTD & 2 OTHERS (2003) KLR 125** considered what would constitute a prima facie case and held that:-

“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”.

In the present case the plaintiff has not shown how either of the defendants were associated with the actions complained of so as to be held to be culpable and as it were called upon to give an explanation or rebuttal for the actions. The Defendants at least the 1st and 3rd, have distanced themselves from the actions complained of and the plaintiff has not shown in what manner, if at all, they were involved. Equally even in regard to the 2nd defendant, the plaintiff has not tendered any evidence to demonstrate that it had any intention to demolish the perimeter wall. For instance the plaintiff did not produce any

evidence to show that there was a proposal to upgrade the service roads through expansion that would entail demolition of any structures to achieve that expansion. There is simply no evidence to connect the 2nd Defendant with any intended demolitions. The plaintiff in my view did not show there was any project approved under the Constituencies Development Fund Act and what such project entailed and in the absence of such evidence the court cannot make a “**unsupported inference**” that there was such a project as claimed by the plaintiff.

It is the court’s finding therefore that the plaintiff has not demonstrated a prima facie case with a probability of success to warrant the court to grant him the relief sought. The conditions for grant of a temporary injunction are sequential such that when the applicant fails to establish he has a prima facie case with a probability of success his application for injunction of necessity must fail. Thus, I need not consider the second limb of the conditions for grant of an injunction as to whether or not the applicant stands to suffer irreparable harm which would not be compensatable in damages unless the injunction is granted. Likewise not being in doubt as to whether a prima facie case has been demonstrated by the plaintiff the court would not need to consider the balance of convenience.

I would nonetheless observe that under article 40 of the constitution where it is shown that any land is required for public purposes, such land can be compulsorily acquired and the relevant provisions of the Land Act No.6 has set out an elaborate procedure as to how such acquisition is to be carried out. Thus ultimately if the plaintiff’s portion of land was to be required for public purposes and therefore liable to be compulsorily acquired then he would be entitled to be paid adequate compensation under the provisions of article 40(3) of the constitution and therefore damages would be an adequate remedy.

Respecting the preliminary objection taken by the 1st Defendant my view is that the preliminary objection taken was not purely on a point of law within the meaning of what constitutes a preliminary objection as held in the case of **Mukhisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) EA 696** where the court stated:-

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion”.

In the same case their Lordships further held:-

“-----a preliminary objection consists of a point of law which has been pleaded or which has been pleaded or which arises by clear implication out of the pleadings and which if argued may dispose of the suit. In my view, the objection that the suit is against the wrong parties or the issue of what exactly is the identity of the dispute property are matters for trial and are in dispute so they cannot be issues for disposal by a preliminary objection”.

The issue raised by the 1st defendant is whether it has been properly enjoined to these proceedings. That is a matter for trial and cannot be disposed off by way of a preliminary objection.

The upshot is that the court having considered the applicant’s application dated 10th June 2014 for injunction finds the same to be devoid of merit and orders the same dismissed. The preliminary objection by the 1st defendant is equally declined.

The court orders that each party bears their own costs of the application and the objection.

Ruling date, signed and delivered this 23RD day of JULY 2015.

J. M. MUTUNGI

JUDGE

In the presence of:

Njenga For the Plaintiff

Mr. Muga for Matwere..... For the Defendant