



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO.E146 OF 2020

JESUS IS ALIVE MINISTRIES REGISTERED TRUSTEES.....1ST PLAINTIFF
KIRITKUMAR RAMBHAI PATEL.....2ND PLAINTIFF
S&H INVESTMENTS LTD.....3RD PLAINTIFF
SOMA PROPERTIES LIMITED.....4TH PLAINTIFF

=VERSUS=

KENYA RAILWAYS CORPORTATION.....1ST DEFENDANT
NAIROBI METROPOLITAN SERVICES.....2ND DEFENDANT
KENYA URGAN ROADS AUTHORITY.....3RD DEFENDANT

RULING

1. This is the Notice of Motion dated 24th September 2020 brought under order 40 rules 1, 2, 3 and 4 of the Civil Procedure Rules.

2. It seeks orders:-

1. Spent.

2. Spent.

3. Spent

4. *At the hearing of this application inter partes, this honourable court be pleased to issue a temporary injunction to prohibit the Defendants, jointly and severally through their workmen or agents from constructing or continuing to construct a wall or walls or putting up a gate or gates or undertaking other works or putting in place any measures whatsoever blocking or restricting the plaintiff's free access and use of railway lane from their properties namely, LR Nos 209/16778, 209/1254, 209/1253 and 209/1077 pending the hearing and determination of this suit filed herein.*

5. *At the hearing of this application inter partes, this honourable court be pleased to issue a temporary injunction to prohibit the Defendants jointly and severally, through their workmen or agents from putting in place or continuing to put in place any measures calculated to obstruct the Plaintiffs' access to service roads servicing the Plaintiffs' properties, that is to say, LR Nos. LR Nos 209/16778, 209/1254, 209/1253 and 209/1077 the service roads being Railway Lane, Exchange Lane, Weruga Lane and Haile Sellassie Avenue pending the hearing and determination of the suit filed herein.*

6. *At the hearing of this application inter partes, this honourable court be pleased to issue a mandatory injunction to compel the 1st Defendant to demolish the wall/walls or partly built wall/walls blocking access to Railway Lane from LR Nos LR Nos 209/16778, 209/1254, 209/1253 and 209/1077 (the Plaintiffs' properties).*

7. *At the hearing of this application inter partes, this honourable court be pleased to issue a mandatory injunction to compel the Defendants jointly and severally to remove or demolish any gate or barriers installed or put in place to block or hinder the*

Plaintiffs' access and use of service roads/lanes serving their properties.

8. Costs hereof be provided for.

3. The grounds are on the face of the application and are set out in paragraphs 1 to 10.
4. The application is supported by the affidavits of Margaret Wanjiru Kariuki, Kiritkumar Rambhai Patel and Sarit Shah, sworn on the 24th September 2020.
5. The application is opposed. The 1st Defendant/Respondent filed a notice of preliminary objection dated 24th November 2020.
6. The 2nd Defendant filed a Replying Affidavit dated 4th December 2020 confirming that there are construction works going on, on the aforementioned roads and their actions are well sanctioned by the National Government and Nairobi City County Policies and Development Plans.
7. It appears the 3rd Defendant did not file any response.
8. On 25th November 2020, the court with the consent of the parties directed that the Notice of Motion and the preliminary objection be heard together. It also directed that parties do file written submissions.

The Plaintiffs'/Applicants' submissions

9. They are dated 14th April 2021. The defendants have commenced works on a neighbouring property calculated to block the Plaintiffs from accessing and using Railway Lane, Weruga Lane and Exchange Lane all being public access roads which service the Plaintiff's properties.
10. The principles upon which this court exercises its discretion are well settled. They have put forward the cases of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358; Nguruman Limited vs Jan Bonde Nielsen & 2 Others [2014] eKLR; Mrao Ltd vs Frist American Bank of Kenya Ltd & 2 Others [2003] KLR 125.**
11. The Plaintiffs' are entitled to access and use of all access roads and lanes that serve their properties. These are public roads that have been blocked by the Defendants' actions.
12. A mandatory injunction will only be granted by the court in clearest cases. They have put forward the case of **Shepherd Homes Ltd vs Sandham [1971] 1 CH 340; Redland Bricks Ltd vs Morris [1970] AC 652.** The acts of trespass and an assault to the Plaintiffs' right to access and exit their properties have been detailed in the supplementary affidavit and the exhibits attached thereof.
13. The Plaintiffs have the legitimate expectation that the Respondents would at least notify them of the impending construction as the lawful owners of the suit properties.
14. The Plaintiffs being members of the public are entitled to use and enjoy public roads. There was a flagrant violation of the Plaintiffs' rights to the protection of their property under the law as granted by the constitution. They pray that the application be allowed.

The 1st Defendant's/Respondent's submissions

15. They are dated 10th October 2021. The Plaintiffs' have not established a prima facies case. The entire area in which their properties sit was initially owned by the 1st Defendant. The allocations were in any event done irregularly and hived off the 1st Defendant/Property. The alleged wall being constructed by the 1st Defendant is within its own property and not on a public road as claimed. It has put forward the case of **Mrao Ltd vs First American Bank Ltd & 2 Others [2003] KLR 125.**
16. On the prayer for a mandatory injunction, the Plaintiffs not having established a prima facie case are not entitled to the relief. It has put forward the case of **Kenya Breweries Ltd & Another vs Washington O. Okeyo 2002 [eKLR]** where the Court of Appeal quoted with approval an English decision in the case of **Labail International Finance Ltd vs Agro export and Others [1986] 1 All ER 901; Nation Media Group & 2 Others John Harun Mwau [2014] eKLR.**

It prays that the application be dismissed with costs.

17. The 1st and the 3rd Defendants/Respondents did not file any submissions.
18. I have considered the notice of motion, the supplementary affidavit and the annexures. I have also considered the affidavits in response, the rival submissions and the authorities cited. The issues for determination are:-

(i) Whether the preliminary objection is merited?

(ii) Whether the Plaintiffs'/Applicants' application meets the threshold for grant of temporary injunction.

(iii) *Has it met the threshold for grant of mandatory injunction?*

(iv) *Who should bear costs of this application?*

19. The preliminary objection dated 24th November 2020 is premised on the following grounds; (i) – (iv).

(i) *The application before the Honourable Tribunal offends the mandatory provisions of Section 87(1) of the Kenya Railways Corporation Act, CAP 397 Laws of Kenya.*

(ii) *The application before the Honourable Tribunal offends the mandatory provisions of Section 87(a) of the Kenya Railways Corporation Act, Cap 397 Laws of Kenya which provides that legal proceeding shall not be commenced against the Corporation until at least one month after written notice containing the particulars of the claim, and of intention to commence the action of legal proceeding, has been served upon the Managing Director by the Plaintiff of his agent.*

(iii) *The application before the Honourable Tribunal offends the mandatory provisions of Section 87(b) of the Kenya Railways Corporation Act, Cap 397 Laws of Kenya which provides the legal proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained.*

(iv) *The application is an abuse of Court process and ought to be dismissed.*

20. It is the 1st Defendant's/Respondents case that the Plaintiffs/Applicants failed to comply with Section 87(a) of the Kenya Railways Corporation Act before instituting this suit.

21. Section 87 of the Kenya Railways Corporation Act, (cap 397 Laws of Kenya) provides that:-

“Where any action or other legal proceeding is commenced against the Corporation for any act done in pursuance or execution, or intended execution, of this Act or of any public duty or authority or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority the following provisions shall have effect-

(a) the action or legal proceeding shall not be commenced against the corporation until at least one month after written notice containing the particulars of the claim, and of intention to commence the action or legal proceeding, has been served upon the Managing Director by the Plaintiff or his agent.

(b) the action or legal proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of a continuing injury or damage, within six months after the cessation thereof”.

It therefore means that the above section requires any person who intends to take court action against the 1st Defendant/Respondent to issue a 30 days notice of intention to sue.

22. In the case of *Joseph Nyamamba & 4 Others vs Kenya Railways Corporation [2015] eKLR* the Court of Appeal observed thus:-

“.....The Appellants in this appeal submit that the said Section 87 of the said Act is an impediment to access to justice which to them would be a violation of Article 48 of the Constitution of Kenya 2010. The Appellants therefore ask us to hold that the said section is unconstitutional and must give way to access justice rights provided in the said article of the Constitution....”.

23. Article 48 of the Constitution provides that:-

“The state shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice”.

24. The Court of Appeal in the above case went further to state:-

“...The scope of access to justice as so enshrined in very wide- It includes ability of a party to file suit in court, ability to access the police with legitimate expectation of fair expeditious and prompt investigation of one's complaint, prosecution of suspects, enforcement of decree and orders issued by a court and prompt and fair compensation by government upon compulsory acquisition of one's property for public use- see, for exposition of these principles Dry Associates vs Capital Markets Authority & Another Pet 328 of 2011 (unreported).”

The Court of Appeal further observed:-

“...Article 48 of the Constitution has no retrospective application and the retired constitution did not have rights similar to what we have today....”

25. In the case of *Kenya Bus Services Limited & Another vs Ministry of Transport & 2 Others [2012] eKLR* Majanja J held thus:-

“37. By incorporating the right to access to justice, the constitution requires us to look beyond the dry letter of the law. The right to access to justice is a reaction to and a protection against legal formalism and dogmatism.....

Article 48 must be treated within the Constitutional imperative that recognizes as the Bill of Rights as the framework for social economic and cultural policies. Without access to justice the objects of the Constitution which is to build a society founded upon the rule of law, dignity, social justice and democracy cannot be realized for it is within the legal process that the rights and fundamental freedoms are realized. Article 48 therefore invites the court to consider the conditions which clog and fetter the right of person to seek the assistance of the court of law.....”

26. Similarly, in the case of **Catherine Njeri Majani vs Kenya Railways Corporation & Another [2021] eKLR** Angote J observed thus:-

“Considering the provisions of Article 48 of the Constitution which requires the state to ensure access to justice for all persons, and the pronouncement of the superior courts on the applicability of Section 87 (a) of the Kenya Railways Corporation Act, it is my finding that the failure by the Plaintiff to issue to the 1st Defendant a thirty (30) days’ notice, if at all, is not fatal to the suit”.

27. I am guided by the above authorities in finding that the failure by the Plaintiffs herein to issue notice to the 1st Defendant before institution of this suit is not fatal to the suit. I find no merit in this preliminary objection and the same is dismissed.

28. The principles governing the grant of temporary injunction were set out in the case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358**. In the case of **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**, the Court of Appeal stated what amounts to a prima facie case.

29. It is the Plaintiffs’/Applicants’ case that the 1st Defendant/Respondent has commenced the construction of a wall that will completely block the exit from the Plaintiffs’ property on to Railway Lane a public utility road. The 1st Defendant/Respondent’s case is that it is developing its own property and there is no encroachment on the Plaintiffs properties or on a public road.

30. I find that the Plaintiffs/Applicants have failed to establish a prima facie case with a probability of success at the trial.

31. In the case of **Kenleb Cons Ltd vs New Gatitu Services Station Ltd & Another [1990] KLR 557** Bosire J (as he then was) held that:-

“to succeed in an application for injunction an applicant must not only make a frank and full disclosure of all relevant facts to the just determination of the application but must also show that he has a right, legal or equitable, which requires protection by injunction”.

The Plaintiffs/Applicants have stated that the wall is being constructed on the 1st Defendant’s/Respondent’s property. I find that they do not deserve this court’s protection.

32. I also find that the balance of convenience tilts in favour of the 1st Defendant/Respondent who is the owner of the suit property.

33. The Plaintiffs/Applicants also seek that the 1st Defendant/Respondent be compelled to demolish the walls that are blocking access to Railway Lane. In the case of **Kenya Breweries Ltd vs Washington O. Okeyo [2002] eKLR** where the Court of Appeal quoted the approval the English decision in the case of **Locabail International Finance Ltd vs Agroexport and Others [1986] 1 AllER 901** where it was stated.

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in a clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a match on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for prohibitory injunction.”

34. I am guided by the above authority in finding that the Plaintiffs/Applicants have not demonstrated any special circumstances to warrant this court to issue orders to compel the 1st Defendant/Respondent demolish the wall.

35. In conclusion, I find no merit in this application and the same is dismissed. The costs do abide the outcome of the main suit.

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 10TH DAY OF FEBRUARY 2022.

.....

L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the Plaintiffs

Mr. Obuya for the 1st Defendant

No appearance for the 2nd and 3rd Defendants

Victor - Court Assistant