



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ENVIRONMENT AND LAND CASE NO. 96 OF 2015

1. RAJHNIKANT MANIGAL GOHIL

2. KAMAL MANILAL GOHIL

3. VIRJAJKUNVER MANILAL GOVIND GOHI.....PLAINTIFFS

-VERSUS-

COUNTY GOVERNMENT OF MOMBASA.....DEFENDANT

RULING

1. In the notice of motion application dated 13th May 2013 the applicants sought 5 prayers. At the time of hearing of this application, prayer 1 had been dispensed with and prayer 2 submitted to have been overtaken by events. Prayer 5 is on costs. The two substantive prayers for determination is No 3 and 4 ;

3. The honourable Court be pleased to issue a temporary injunction restraining the defendant or his agents from constructing or erecting any permanent or semi - permanent structures whatsoever along the service lane stretching from Gusii Street Haile Selassie road and serving plot No Mombasa/Block XX/178 pending inter partes hearing and determination of this suit.

4. The Court be pleased to issue a mandatory injunction directing the defendant at its own costs and within ten (10) days of the order or within such other time as the Court deems fit to demolish the concrete floors and any other structure already constructed along the service lane stretching from Gusii Street to Haile Selasie road and serving Plot No Mombasa/Block XX/178.

2. The application is premised on the seventeen (17) grounds on the face of it and the supporting affidavit sworn by Kamal Manlal Gohil the 2nd applicant . The applicants are tenants in common for the property Mombasa/Block XX/ 178 which is leased to Safaricom. The 2nd applicant deposed that while building, they left a space of at least 3 metres at the rear to serve as service lane in compliance with the local Government Planning & Building Regulations. The 2nd applicant deposes that the defendant's action is unlawful and set out the reasons why in his affidavit, which actions he deposes has interferred with the plaintiffs peaceful enjoyment of their property

3. The application is opposed by the defendant/respondent through a replying affidavit sworn by Paul Manyala and dated 30th June 2015. The respondent does not deny ownership of the plaintiffs property comprised in Mombasa/ Block XX/178. Mr Manyala deposes that the service lane on the rear is

designated for human traffic only and not for vehicles. He continued that the defendant decided to relocate the hawkers from the CBD through a well thought out resettlement plan of building stalls under temporary licence. The defendant states that certain mitigating factors were to be met before the construction began. The defendant denied any encroachment or blockage of the service lane as only 2 metres has been occupied leaving out space of 2 metres to serve service lane. According to the defendant its action has resulted in cleaning and restoring the area therefore the plaintiffs should be grateful. The defendant deposes it is willing to repair or replace anything broken during the construction if and when the plaintiffs present appropriate complaints. He urged the Court to dismiss the application with costs.

4. The advocates for the parties filed written submissions. The plaintiffs' submissions was quite elaborate, annexing 13 case laws and the relevant statues and regulations. I have read the submissions rendered by both parties and I am tasked to determine whether the circumstances of this case merits the granting of mandatory injunctive orders at a temporary stage in terms of prayer (4) of the motion. From the pleadings and the submissions, it is admitted by both parties that there is a service lane behind plot No Block XX/ 178. The applicants depose it is 3 metres while the respondent depose it is 4 metres because the defendant avers to have used 2 metres and left 2 metres for as access.

5. The plaintiffs complain the temporary structures put up by the respondent have;

- i. Blocked emergency exits from the plaintiffs' building
- ii. There are no toilet facilities to be used by the traders therefore a health hazard
- iii. Broken and left exposed the water supply pipes
- iv. Blocked sewer man holes making it hard to service the sewer lines.
- v. Renders it impossible for the plaintiffs to access the suit property from the rear for purposes of loading and offloading goods.
- vi. The tenant (Safaricom) will not be able to ferry cash from the rear thus seriously compromising their tenancy.

6. In paragraph 15 of the supporting affidavit, the applicant deposed that the defendant was able to erect the stalls and as at 5pm of 12th May 2015, the construction had been completed. In paragraph 17, the applicant deposed further that the defendant's actions were calculated and designed to ensure that they are denied the use of their property even if this Court halts the construction of the illegal structures which was a clear attempt to steal a march. The defendant on its part deposed that it made some considerations before starting the constructions i.e;

- i. The selected reserves are disused/abused.
- ii. An existing fire exit is not blocked
- iii. The structures are built of temporary materials which can be demolished if abused.
- iv. Planning the kiosks by staggering them to ensure passage way is not inhibited.

7. The defendant denied the constructions have denied the plaintiffs access road from the rear and annexed photographs to confirm this. The defendant deposed further that this service lane was disused and was deserted due to the insecurity and health concerns. And that the decision was undertaken to execute its role as the authority on City/County Planning and development control according to the relevant statues and ensuring hawkers dignity and livelihoods are upheld.

8. In submissions, the applicant submitted that the space at the rear is a road reserve. In my opinion it is too early to determine whether the service lane is a reserve or not because it is a matter that require evidence to be adduced. The decisions referred to by the applicants, e.g **Mohamed Said Shimay vs Hamid Mohamed (2009) eKLR** was a decision reached after hearing evidence in a final judgement and therefore distinguishable to instant application. Similarly the finding in **Kamau vs Kamau (1984) eKLR** was a final judgement. In the case of **Nelson Mwangi vs Kikuyu Town Council & Another (2012) eKLR** the proposed development was a permanent structure (or lock up kiosk) and the plot in question was curved out of a road reserve to a private developer. In the instant case, the structures are temporary and the photographs marked as PM 1 a – d shows there is space between the plaintiffs' buildings and the structures erected which still enables the plaintiffs to gain access to their property from the rear.

9. On the provisions of Regulation 22 of the Building Code, the Court can only determine whether there is abuse at a full trial when it is workable to present evidence on the dimensions approved for the service lane in dispute. This Court is unable to interpret these dimensions based on annexure KM – 2 and KM – 3 only. As regards irreparable loss, the plaintiffs have alluded that the loss cannot be compensated and referred to the Court of Appeal decision in **KACC vs Bhangra Limited & Another (2012) eKLR** quotation

“ As regards damages which the learned Judge said can be quantifiable if indeed the Suit Land is a road reserve we agree with Ms Bor damages cannot adequately compensate the public for the inconvenience and loss of time leave alone the loss in terms of high fuel consumption caused by traffic jams resulting from the closure or narrowing of that road “.

10. From the photographs annexed by both the plaintiffs and the defendant, the service lane appeared disused and on available evidence from the pleadings was being used by the plaintiffs (or their tenant) only. The plaintiffs have stated that Safaricom (tenant) was using the lane to ferry cash from the premises. There is no evidence presented of loading or offloading of goods to the premises using the rear lane. In fact some of the inconveniences alluded to by the applicants are anticipatory as deposed in paragraph 11 of the affidavit of Kamal Manilal Gohil. The applicants did not explicitly state that they do not have water in their premises as a result of the broken pipes.

11. Therefore taking into account the circumstances of this application and the response thereto, I find prayer 3 of the motion is not available to be granted as the applicants have admitted that the construction was completed on 12th May 2015 at 5 pm. Further prayer 4 is also not available as the issues pleaded require evidence to be adduced before the orders can be granted. Consequently I do find the application failed to meet the threshold for granting of mandatory injunction. The application is hereby dismissed with an order that each party bears their costs.

Ruling dated and Delivered at Mombasa this **18th** day of **September, 2015**

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A. OMOLLO

JUDGE