



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. E008 OF 2020

MUTHOMI MUNGANIA, NKATHA MUNGANIA

GIDEON MUGAMBI MWORIA, SILAS KIMATHI A. MBUI

(Suing as the Legal Representatives of the Estate of

JEREMIAH MUNGANIA AYUB – Deceased).....1ST PLAINTIFF

GIDEON MUGAMBI MWORIA.....2ND PLAINTIFF

MUTHOMI MUNGANIA.....3RD PLAINTIFF

VERSUS

MERU COUNTY GOVERNMENT.....1ST DEFENDANT

MARTIN MUTHURI MWORIA.....2ND DEFENDANT

STANLEY RIUNGU MBUI.....3RD DEFENDANT

ITOLEKA HOLDINGS.....4TH DEFENDANT

RULING

A. THE APPLICATION

1. Before the court is the application dated 21.12.2020 seeking for temporary orders of injunction barring and restraining the defendants from interfering with the 1st – 3rd plaintiff's land and their properties along the permanent registration boundary separating **Nyaki/Kithoka** and **Kithoka Mwanika registration units in L.N. No's Nyaki/Kithoka/1365, 4171, 4172 and 4179** pending the hearing of this suit. The application is supported by an affidavit of Gedion Mugambi Mworua sworn on the 21.12.2020.

B. GROUNDS

2. The grounds of the application are that the properties belong to the estate of the deceased Jeremiah Mugambi Ayub, now registered in the names of 2nd and 3rd plaintiffs with regard to L.R 1365 and 4172; there exists a road of access; on 20.3.2020, the defendants descended upon the suit parcels purporting to expand the access road bordering Nyaki Kithoka registration unit yet the said road was only located on the Kithoka Mwanika registration unit side; as a result, the defendants caused serious destruction to land and properties; there are threats to continue with the destruction and trespass; the road did not exist; unless restrained, the plaintiff stood to suffer grave loss and damage given that there has been no amendment or alteration of the permanent boundary between the two registration units.

3. In support of the claim, the applicants have attached a grant, search certificate, photographs showing the destruction, correspondences between the plaintiffs and the District land surveyor and the 1st defendant's, sketch map, registry index map and a valuation report for the damage all marked as GMM 1 – 9 respectively.

C. GROUNDS OF OPPOSITION

4. The 1st defendant filed a replying affidavit sworn by George Kimathi on 23.3.2021. The basis of opposition was that the 2nd – 4th defendants were not their authorized agents, had no contractual engagement with them or nexus between them and therefore they did not authorize the alleged works on the suit lands.

5. Lastly, the 1st defendant averred that any tortious action of an independent contractor which could not and should not be attached to the 1st defendant.

6. The 2nd and 3rd defendants opposed the motion through the grounds of opposition dated 1.5.2021 denying any agency or servant relationship and or existence of any vicarious liability with the 1st defendant; they maintained that they were not in any way engaged in the functions of creation, expansion and or excavation of roads and denied that the alleged destruction was caused by them or at their authorization.

D. SCENE VISIT

7. Through a land registrar/County land surveyor's report dated 25.2.2021 and filed in court on 1.3.2021 from an order made on 22.2.2021, the key findings were: that as per published survey records, there existed no public access road at the periphery of Nyaki/Kithoka registration section; there was a public access road at the periphery of Nyaki/Kithoka – Mwanika registration section, which was created during the demarcation and that the widening of the existing public access road had affected Parcels within Nyaki/Kithoka/Mwanika registration section. A map was attached clearly indicating the parcels of land already affected including the plaintiffs' parcel of land.

E. PLEADINGS

8. The pleadings in this case are contained in the plaint dated 24.12.2020, 1st defendant's defence dated 16.2.2021 and a reply to defence dated 25.2.2021 and the 2nd and 3rd defendants' statement of defence dated 25.3.2021 and reply to 2nd and 3rd defendant's defence filed on 19.4.2021.

9. There appears to be no filed affidavit of service to establish if the 4th defendant was ever served with summons and or the application herein. Be that as it may, the motor vehicle copy of records dated 17.12.2020 attached to the plaintiffs' list of document indicating shows the caterpillar registration No. KHMA824J which was used in the expansion of the road belonged to Itoleka Holdings Ltd (the 4th respondent herein)

F. WRITTEN SUBMISSIONS

10. With leave of court, parties filed written submissions dated 29.11.2021 and 2.12.2021 for the plaintiff and the 1st defendants respectively.

11. The plaintiff submitted that they had demonstrated the ownership of the suit properties, the trespass and the destruction which the 2nd and 3rd defendants did not deny through a replying affidavit and in which the 4th defendant has failed to respond to through a replying affidavit or a defence.

12. It was submitted by the plaintiffs that it was the 2nd defendant as a Member of County Assembly for Nyaki West ward who was trying to expand the access road hence the 1st defendant was a necessary party.

13. The plaintiffs submitted the scene visit report confirmed there was no public access road at the periphery of Nyaki/Kithoka registration section meaning the road expansion and the subsequent destruction of the plaintiffs' properties was uncalled for, illegal and that the 2nd defendant ought to have undertaken due diligence and or engaged the plaintiffs before embarking on the activity.

14. The plaintiffs submitted they had therefore met the threshold in *Giella –vs- Cassman Brown Ltd. [1973] E.A 358* for the grant of the orders sought.

15. The 1st defendant submitted the plaintiffs had shown no nexus between the alleged trespass and the 1st defendant vis a vis the 2nd – 4th defendants who were not its agents and that they had not demonstrated any contractual relationship existed for the alleged works.

16. The 1st defendant further submitted no material had been placed before the court to show that the 1st defendant had authorized the works on the suit parcels and insisted acts of an independent contractor should not be visited upon the 1st defendant. Reliance was placed on *Paul Gitonga Wanjau –vs- Gathuthi Tea Factory Co. Ltd & 2 Others [2016] eKLR, RJR MacDonald Inc. –vs- Canada (Attorney General) [1994] 1 S.C.R. 311, David Ngugi Ngaari –vs- KCB Ltd [2015], Mrao Ltd –vs- First American Bank of Kenya Ltd [2003] KLR 125, Wairimu Mureithi –vs- City Council of Nairobi [1981] KLR 322.*

G. ISSUES FOR DETERMINATION

17. Having gone through the application, replying affidavits, grounds of opposition and written submission by the parties, the issue for determination is whether the plaintiffs are entitled to temporary orders of injunction pending hearing and determination of the suit.

18. Both parties herein agree on the principles of law applicable to the grant of a temporary injunction namely a prima facie case with a probability of success, irreparable loss and damage and the balance of convenience as discussed in *Gitonga Wanjau –vs- Gathuthi Tea Factory Co. Ltd & 2 Others [2016] eKLR, Ngugi Ngaari –vs- KCB Ltd [2015], Mrao Ltd –vs- First American Bank of Kenya Ltd [2003]*

KLR 125 all based from **Giella Case (Supra)**.

19. The point of departure however is whether the plaintiffs deserve such discretion at this juncture based on the facts and circumstances obtaining at the moment.
20. The court sanctioned a scene visit report with the consent of the parties in its efforts to dispense substantive in an expeditious manner.
21. The scene report was clear that there was purported expansion of the public access road in the area as alleged by the plaintiffs and which exercise went beyond the existing gazette and known access road boundaries. In the process, there encroachment into private parcels of land where no access road exists. This amounted to trespassing into the private parcels of land belonging to plaintiffs (applicants herein).
22. The defendants have not denied that there was an expansion of the access road, the resultant trespass and or destruction of the plaintiff's parcel of land and properties. Therefore, the scene visit surveyor's report stands uncontested including the attached maps which clearly demonstrate the extent of the encroachment.
23. The plaintiffs/applicants have attached copies of land ownership documents. The pleaded parcels of land neighbor to the public access road while others fell under the purported expanded non-existent access road.

G. CASE LAW ON INJUNCTION

24. In **Mrao Ltd –vs- First American Bank of Kenya Ltd [2003] KLR 125**, the court held a prima facie case is established if a party establishes a right which has been breached by the opposite party to call for the rebuttal by the latter. In this instance, it is not contested there was a road of access expansion which interfered with the plaintiffs' parcels of land.
25. The 1st, 2nd and 3rd respondents have denied authorizing the 4th respondent who is an independent contractor to trespass into and or undertake the road works.
26. However, the plaintiffs at paragraph 16 of the plaint aver that on 20.11.2020, the defendants under the instructions of the 1st defendant with the direction and supervision of 2nd and 3rd defendants, descended on to their parcels of land and caused the destruction while undertaking works on the existing public access road.
27. The 2nd and 3rd defendants as indicated above filed a defence dated 25.3.2021. They did not however specifically deny the contents of paragraph 16 of the plaint as to whether or not they were present at the scene undertaking a lawful activity namely supervising some public road works.
28. **Section 3 (1) of the Trespass Act Cap 294 Laws of Kenya** defines trespasser as states any person who without reasonable excuse enters into a private land without the consent of the occupier or owner.
29. The plaintiffs have pleaded the 2nd, 3rd and 4th defendants allegedly trespassed into their private parcels of land on 20.11.2020 and committed acts of destruction. Trespass is a claim in personam.
30. The plaintiffs have brought an action against the personal liability of the 2nd, 3rd and 4th defendants who allegedly trespassed into their parcels of land and committed acts of destruction while undertaking some road grading and or expansion.
31. Given that the 2nd, 3rd and 4th defendants have not denied their presence on the suit parcels of land on the material day and secondly they have not disputed there were road works which resulted to encroachment of private land, my finding is the plaintiffs have established that their rights were infringed as to land ownership which require protection by this court..
32. As a matter of judicial notice, the access road the subject matter herein falls under the jurisdiction of the 1st defendant in line with **Schedule 4 Part 2** as read together **with Articles 185 (2), 186 (1) and 187 (2) of the Constitution**.
33. Even though the defendants have denied that there exists a nexus between and among themselves vis a vis, the 4th defendant, My finding is, that is a matter to be determined at the trial.
34. Consequently, I find the applicants have met the threshold for the grant of temporary orders of injunction as per **Mrao Ltd (supra)**.
35. Prayers 3 and 5 of the application are allowed to subsist for a period of one year only.
36. Parties to comply with **Order 11 within 45 days** from the date hereof.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU THIS 16TH DAY OF MARCH, 2022

In presence of:

Ken Muriuki for 2nd and 3rd defendants – present

Mwirigi for 1st defendant – present

Nyamu Nyaga for plaintiff – present

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE