



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO.238 OF 2014

1. GEOFFREY TINEGA ISABOKE

2. WILLIAM NYABANDO NYANGAU.....PLAINTIFFS

VERSUS

1. KISII COUNTY GOVERNMENT

2. ENGINEER URBAN DEVELOPMENT

3. SEALOM CONSTRUCTION CO.LTD

4. ROBERT MAINYA..... DEFENDANTS

RULING

1. The plaintiffs are the registered proprietors of all that parcel of land known as **LR Nos. Kisii Municipality/Block III/598**(hereinafter referred to as “**the suit property**”). The suit property originated from un- surveyed Commercial Plot No. “A”, Kisii Municipality that was allocated to one, Samwel Kenani Omwando by the Commissioner of Lands through a letter of allotment dated 13th January, 1995. The suit property was surveyed and Samwel Kenani Omwando was issued with a lease and certificate of lease in respect thereof 15 years later on 31st May, 2010 and 20th September, 2010 respectively. The lease and certificate of Lease in favour of Samwel Kenani Omwando were issued in the name of Gusii County Council as the Lessor. The plaintiffs acquired the suit property on or about 7th July, 2011 from Samwel Kenani Omwando at unspecified consideration.

2. The plaintiffs brought this suit against the defendants on 24th June, 2014 seeking;a declaration that the plaintiffs are the registered and/or lawful owners of the suit property, an order compelling the 1st , 2nd and 3rd defendants to heed and/or honour the ground location of the road of access as established and or confirmed through relevant registry index map(RIM) and not otherwise, an order of eviction against the 4th defendant from the suit property, a permanent injunction to restrain the defendants either by themselves or through their employees, servants and/or agents from entering upon, re-entering, trespassing onto, laying a claim to, constructing a road of access, depositing building materials, building on, interfering with and/or in any other manner dealing with the suit property or any portion thereof. In their plaint dated 23rd June, 2014, the plaintiffs averred that on or about 20th day of June, 2014, the 2nd and 3rd defendants engaged the services of the 3rd defendant to construct a road of access on a road reserve next to the suit property.

3. The plaintiffs averred that the said road of access was supposed to pass between the suit property

owned by the plaintiff and an adjacent parcel of land owned by a person whose particulars are not provided in the plaint. The plaintiffs averred that through acts of manipulation and compromise involving the 1st, 2nd and 3rd defendants on the one hand and the owner of the said adjacent parcel of land on the other hand, the 1st, 2nd, and 3rd defendants diverted and/or distorted the course of the said road of access in such a way that the said road was deflected to the suit property from its lawful course through the said road reserve with a view to accommodate the owner of the adjacent parcel of land who has put up structures on the said road reserve which would have otherwise been demolished if the road had followed its normal and lawful course. The plaintiffs averred that the construction of the said road of access through the suit property has reduced the size of the suit property which is supposed to measure 0.0686 ha. or thereabouts and has thereby deprived the plaintiffs of the use and enjoyment of the portion of the suit property under road construction. The plaintiffs averred further that the 4th defendant has without the plaintiffs' permission or lawful cause entered the suit property and put up temporary structures thereon thereby denying the plaintiffs of the use of the portion of the suit property occupied by the said structures.

4. Together with the plaint, the plaintiffs filed an application by way of Notice of Motion dated 23rd June, 2014 under certificate of urgency seeking a temporary injunction to restrain the defendants by themselves or through their agents, servants and/or anyone claiming under the said defendants from entering upon, trespassing onto, constructing a road of access, sinking trenches, laying foundation, depositing building materials, building on, interfering with and/or in any other manner dealing with the suit property or any portion thereof pending the hearing and determination of this suit. The plaintiffs sought a further order that the O.C.S Kisii Police Station be ordered to enforce compliance with the injunction order if granted. The plaintiffs' application was brought on the grounds set out in the body thereof and in the affidavit of the 1st plaintiff sworn on 23rd June, 2014. In his affidavit in support of the application, the 1st plaintiff reiterated the contents of the plaint part of which I have highlighted herein above.

5. The 1st plaintiff stated that the activities and/or actions of the defendants mentioned above have restricted limited and/or deprived the plaintiffs of their rights and/or interests over the suit property in that the defendants have been unable to carry out any development on the suit property. The 1st plaintiff stated further that the defendants have no right or interest over the suit property that would justify the said unlawful activities. The 1st plaintiff stated that the defendants activities aforesaid are bound to affect or alter the character of the suit property thereby subjecting the plaintiffs to irreparable loss. The 1st plaintiff stated that unless the defendants are stopped by way of an injunction from continuing with the activities mentioned hereinabove, the said activities will continue to the great detriment and prejudice to the plaintiffs and a breach of the peace is likely to occur as the parties may be tempted to take the law into their own hands.

6. The 1st plaintiff annexed to his affidavit as exhibits; a copy of a letter of allotment dated 13th January, 1995, a copy of a certificate of lease dated 20th September, 2010 for the suit property in favour of Samwel Kenani Omwando, a copy of a certificate of official search dated 20th September, 2010 on the title of the suit property, a copy of a certificate of lease for the suit property dated 7th July, 2011 in favour of the plaintiffs, a copy of certificate of official search dated 20th June, 2014 on the title of the suit property and copies of photographs showing the road construction works and temporary structures complained of. The plaintiffs' application was opposed by the 4th defendant only. The 1st and 2nd defendants filed their grounds of opposition outside the time that was fixed by the court when they sought leave to do so and had their belated grounds of opposition struck out by the court on 11th November, 2014. The 3rd defendant did not enter appearance and as such filed neither grounds of opposition nor replying affidavit in response to the application.

7. The 4th defendant filed grounds of opposition dated 7th July, 2014 and replying affidavit and further affidavit sworn by the 4th defendant on 8th July, 2014 and 16th July, 2014 respectively. In his grounds of opposition, the 4th defendant contended that the plaintiffs' application has not satisfied the conditions for granting a temporary injunction. In his affidavit sworn on 8th July, 2014, the 4th defendant stated that he is the owner of un-surveyed parcel of land known as **Plot No. Z, Kisii Town** (hereinafter referred to as

“Plot No.Z”) which plot is situated next to a parcel of land known as **LR No. Kisii Municipality/Block III/29** (hereinafter referred to as “Plot No. 29”). The 4th defendant contended that he purchased Plot No. Z from one, John Nyabwengi Ombati to whom it was allocated by the Municipal Council of Kisii. The 4th defendant contended that it is the plaintiff who is attempting to divert or distort the course of the access road complained of by the plaintiff in this suit.

8. The 4th defendant denied that he has trespassed on the suit property as claimed by the plaintiffs and termed the plaintiffs’ application as misconceived, unmeritorious and an abuse of the process of the court. The 4th defendant contended that the plaintiffs seem to be confused over the ground location of the suit property. The 4th defendant annexed to his affidavit copies of; a Part Development Plan (PDP) pursuant to which the letter of allotment relating to Plot No.Z was issued, a letter of allotment of Plot No. Z that used to be an Open Space by Kisii Municipal Council to John N. Ombati and R. N. Mbeche for temporary occupation, agreement for sale of Plot No. Z between John Nyabwengi Ombati and the 4th defendant dated 18th August, 1997 and a letter of allotment dated 4th September, 1997 issued by the Commissioner of Lands in favour of the 4th defendant. In his further affidavit, the 4th defendant contended that he runs an auto garage business on Plot No. Z with one, Obed M. Nyabaro known as Moon Motor Mart. The 4th defendant stated further that the construction of the road that is the subject of the plaintiffs’ complaint was completed on 10th July, 2014. The 4th defendant annexed to his further affidavit, a copy of a Single Business Permit for Moon Motor Mart dated 3rd April, 2014.

9. The plaintiffs’ application came up for hearing before me on 11th November, 2014 when, Mr. Ochwangi advocate appeared for the plaintiffs, Mr. Onsembe advocate for the 1st and 2nd defendants and Mr. Nyatundo for the 4th defendant. In his submission, Mr. Ochwangi adopted in entirety the grounds set out on the face of the plaintiffs’ application and the contents of the 1st plaintiff’s affidavit filed herein in support of the said application which I have highlighted hereinabove. Mr. Ochwang’i urged the court to grant the orders sought in the application against the defendants. Although, the 1st and 2nd defendants did not file grounds of opposition or replying affidavit in opposition to the application, the 1st and 2nd defendant’s advocate Mr. Onsembe insisted on addressing the court to highlight what he termed as “points of law” that did not need to be set out in grounds of opposition or replying affidavit provided for in the rules. Mr. Onsembe contended that the plaintiffs’ suit is incompetent in that the plaintiff has sued Kisii County Government instead of Kisii County Government Executive Committee. Mr. Onsembe submitted further that the plaintiff has not satisfied the conditions for granting a temporary injunction.

10. For the 4th defendant, Mr. Nyatundo also adopted in entirety the contents of the 4th defendant’s grounds of opposition and replying affidavits filed herein in opposition to the application. Mr. Nyatundo submitted further that the plaintiffs have failed to provide any material to show the ground location of the suit property and as such, there is nothing to show that the road complained of and the structures that have been put up by the 4th defendant are on the suit property. Mr. Nyatundo submitted that the 4th defendant has provided a sketch plan that shows ground location of Plot No. Z owned by the 4th defendant and the road of access under construction by the 1st to 3rd defendants. Mr. Nyatundo submitted that contrary to the plaintiffs’ contention, the access road has not interfered with the suit property in any way. In conclusion, counsel for the 4th defendant submitted that the road construction that has given rise to this suit and the application has been completed and as such the plaintiffs’ application herein has been overtaken by events.

11. In reply to the submissions by the defendants’ advocates, Mr. Ochwang’i urged the court to ignore the submissions of Mr. Onsembe for the 1st and 2nd defendants as they had no basis the 1st and 2nd defendants having failed to file grounds of opposition or replying affidavit to the application. Mr. Ochwang’i submitted further that the plaintiff has established a prima facie case against the defendants with a probability of success. Counsel submitted that there is no doubt that the road of access complained of is being put up on the suit property. He argued that if that was not the case, the 4th defendant would not have found it necessary to defend the application herein. Mr. Ochwang’i submitted in conclusion that

the defendants would suffer no harm if the orders sought are granted having contended that the access road complained of has been built to completion.

12. I have considered the plaintiffs' application together with the affidavit filed in support thereof. I have also considered the 4th defendant's grounds of opposition and replying affidavits filed in opposition to the application. Finally, I have considered the submissions that were made before me by the advocates for the plaintiffs and the advocates for the 1st, 2nd and 4th defendants. In the case of **Giella –vs- Cassman Brown & Co. Ltd. [1973] E. A. 358**, it was held that an applicant for interlocutory injunction must establish a prima facie case with a probability of success against the respondent. He must also demonstrate that unless the injunction is granted, he will suffer irreparable injury that cannot be compensated in damages. It was held further that if the court is in doubt as to the fulfillment of the two conditions, the court would determine the application on a balance of convenience. What I need to determine in the application before me is whether the plaintiffs have shown that they have a prima facie case against the defendants and that unless the orders sought are granted, they will suffer irreparable loss or injury. The plaintiffs' case is that they are the registered proprietors of the suit property which measures 0.0686 ha. or thereabouts. The suit property is situated next to a road reserve. The said road reserve lies between the suit property and another parcel of land whose details have not been furnished. The 1st and 2nd defendants had engaged the 3rd defendant to construct a road of access through the said road reserve. The owners of the said parcel of land whose particulars have not been given and the 1st, 2nd and 3rd defendants have manipulated the existing registry index map for the area and diverted the course of the said access road to the suit property.

13. The plaintiffs have contended that the said road has been diverted to the suit property so as to save a building which has been put up on the said parcel of land whose details have not been given which building would otherwise have been brought down in the course of the construction of the said road. The plaintiffs have contended that the diversion of the said road into the suit property has reduced the size of the suit property causing the plaintiffs to suffer loss and damage. The plaintiffs have contended further that the 4th defendant has constructed temporary structures on a portion of the suit property without their permission thereby reducing the size of the suit property further. The plaintiffs have contended that the defendants' said activities are unlawful because the defendants have no right to enter into the suit property without the plaintiffs' permission. As I have stated above, the 1st, 2nd and 3rd defendants did not defend the application. The application was however opposed by the 4th defendant. In his response, the 4th defendant contended that he owns a parcel of land known as Plot No. Z which is separate and distinct from the suit property. The 4th defendant contended further that the road in dispute is being constructed on a road reserve and that the same has not interfered with the suit property in any way. The 4th defendant denied that he has trespassed on the suit property and put up temporary structures thereon. The 4th defendant contended that what the plaintiffs have referred to as a kiosk or a temporary structure is actually a motor garage which he operates on Plot No. Z aforesaid with a partner. The 4th defendant contended that, the construction of the road that the plaintiffs are complaining about has been completed and as such the application herein which seeks to restrain the same has been overtaken by events. The onus was upon the plaintiffs to prove that the road in dispute is being put up on the suit property and that the 4th defendant has put up the temporary structures complained of on the suit property. The fact that the 1st, 2nd and 3rd defendants did not oppose the application did not discharge the plaintiffs of this burden. An order of injunction is discretionary. It is not granted as of right. A proper basis has to be laid for the same. The conditions that I have set out hereinabove have to be satisfied whether the application is opposed or not. A court cannot grant unmeritorious application merely because it is not opposed.

14. The plaintiffs placed no evidence before the court to prove that the road in dispute is being constructed on a portion of the suit property. The plaintiffs did not place before the court, any survey maps or diagrams to show where the disputed road was supposed to be constructed and how it was diverted to the suit property and the extent of the suit property that has been taken over by the said road. In fact, the plaintiffs made no attempt to show the ground location of the suit property. The plaintiffs have referred to a registry index map in their affidavit in support of the application but did not annex the same to the said affidavit. I have seen in the plaintiffs' bundle of documents at pages 24 and 25 copies of

survey maps for the area where the suit property is situated. The plaintiffs did not refer to these maps in their affidavit in support of the application herein and made no attempt to annex the same. In these survey maps, the road in dispute can be clearly seen next to the suit property. The road seems to be a public road serving several parcels of land in the area. Nothing would have been easy for the plaintiffs than to point out to the court at what point this road was diverted to the suit property and the extent to which it has encroached on the property. The plaintiffs should also have provided the details of the parcel of land that is said to be standing on the road reserve whose owner is said to have colluded with the 1st 2nd and 3rd defendants to divert the course of the road to the plaintiffs' detriment. I am of the view that if at all the said parcel of land exists, the owner thereof should have been made a party to this suit. As concerns the 4th defendant, he has denied trespassing into the suit property. He has adduced evidence showing the ground location of the parcel of land that he claims to occupy. He has also placed material before the court to support his interest in the said parcel of land which he referred to as Plot No.Z. The plaintiff did challenge the 4th defendant's claim over the said Plot No. Z or the existence thereof. On the PDP that was attached to the 4th defendants affidavit that was not contested by the plaintiffs, the parcel of land which the 4th defendant claims to occupy is distinct and separate from the suit property. There is therefore no prima facie evidence that the 4th defendant has occupied a portion of the suit property.

15. For the foregoing reasons, I am not satisfied that the plaintiffs have established a prima facie case against the defendants with a probability of success. The plaintiffs have proved that there is some road construction being carried out by the 1st to 3rd defendants. They have however failed to demonstrate that the said road is being constructed on a portion of the suit property. The plaintiffs have also failed to demonstrate that the 4th defendant has put up temporary structures on the suit property. Having come to this conclusion, I am not obliged to consider whether or not the plaintiffs will suffer irreparable harm unless the orders sought are granted. If I was to determine this issue however, I would have held against the plaintiffs. The plaintiffs did not challenge the contention by the 4th defendant that the construction of the road in dispute has been completed. In the circumstances, if any loss was to be suffered by the plaintiffs then the same has already been incurred. The injunction sought whether granted or not will not change the situation. The upshot of the foregoing is that I find no merit in the plaintiffs' application dated 23rd June, 2014. The same is accordingly dismissed with costs to the 4th defendant.

Delivered, signed and dated at KISII this 19th day of December, 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Ochwang'i	for the plaintiffs
Miss Nyaega	for the 1 st , 2 nd and 3 rd defendants
Mr. Nyatundo	for the 4 th defendant
Mr. Mobisa	Court Clerk.

S. OKONG'O

JUDGE