



**REPUBLIC OF KENYA**  
**IN THE HGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ELC CASE NO. 972 OF 2012**

**JAYANTILAL DHARAMSH GOSRANI.....PLAINTIFF**

**VERSUS**

**THE HON. ATTORNEY GENERAL.....1<sup>ST</sup> DEFENDANT**

**KENYA NATIONAL HIGHWAYS AUTHORITY.....2<sup>ND</sup> DEFENDANT**

**COMMISSIONER OF LANDS.....3<sup>RD</sup> DEFENDANT**

**PERMANENT SECRETARY MINISTRY .....4<sup>TH</sup> DEFENDANT**

**RULING**

By a chamber summons dated 6<sup>th</sup> December, 2012 the applicant herein Jayantilal Dharamshi Gosrani has sought for various prayers against the respondents herein. The applicant has sought for these prayers.

1. Spent
2. Spent
3. That the court do issue a temporary order of injunction of mandatory nature compelling the Respondents and particularly the 2<sup>nd</sup> respondent either by themselves, their agents, servants, employees and any other person acting through them to unconditionally provide an access to and from Muranga Road to the Petitioner's Petrol Station situate at Land LR No. 209/15289 (ORIG No. 209/1581) situate at Ngara area along Muranga Road Nairobi by removing off the pedestrian Kerb pending the hearing and determination of the Petition.
4. That the court do grants any such further orders, directions writs that it may consider appropriate and necessary for purpose of enforcement, conservation and preservation of the subject matter to this suit.
5. Costs of the application.

The application was premised on the following grounds.

- i. That respondents have engaged in acts which are tantamount to violation of the petitioner's fundamental rights and freedoms.
- ii. That respondents have committed acts of discrimination against the petitioner by unlawfully blocking the entry and exit to the petitioner's property developed as a Petrol Station while permitting others along the same location and/or area to continue with normal operations.
- iii. That the respondents' action have exposed the Petitioner to untold suffering and loss hence the

- application should be heard to avert more loss and damage.
- iv. That the petitioner's fundamental rights and freedoms have been, are being and are likely to continue being breached by the respondents unless stopped by an order of this court.
  - v. That the petitioner has made out a prima facie case and stand to suffer irreparable harm unless orders sought herein are granted.
  - vi. That court has inherent powers to exercise its jurisdiction and grant conservatory orders pending the determination of this petition.

The application was further supported by the supporting Affidavit of Jayantilal Dharamshi Gosrani sworn on 6<sup>th</sup> December, 2012 and on a further Affidavit of the said Jayantilala Dharamshi Gosrani sworn on 4<sup>th</sup> February, 2013.

The Chamber Summons was vehemently opposed by the respondents.

The 2<sup>nd</sup> respondent, Kenya National Highways Authority filed fourteen grounds of opposition to the chamber summons. Further one Engineer Samuel Ogege swore a Replying Affidavit opposing the Chamber summons application which was filed on 25/1/2013. He also swore a further affidavit filed on 26/2/2013 in further opposition to the applicant's Chamber Summons.

The parties herein canvassed the Chamber Summons application through written submissions and they also highlighted the submissions on 27/5/2013. The Attorney General, acting for 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents filed a Replying Affidavit on 22/4/2013 which was sworn by Engineer Michael S.M. Kamau who was then the Permanent Secretary, Ministry of Roads. He averred that the Nairobi –Thika Super Highways is a class A, highway and he also stated what are the characteristics of the Highway among them being: - that ingress and egress from Highways is regulated and no property access is allowed.

The court has now considered the instant Chamber Summons application, the pleadings generally, the written submissions and the relevant law and the court makes the following findings.

From the available evidence, there are some facts that are not disputed. From the annexures attached to the applicant's chamber summons, there is no doubt Jayantilal Dharamshi Gosrani, the applicant herein became the registered owner of L.R 209/15289 (Original No. 209/1581), on 20<sup>th</sup> November, 2000. There is no doubt that the applicant has been running a Petrol Station by the name of Fuel Max Service station. From the Grant attached to the pleadings, the said parcel of land was leased to Kenya Oil Company Ltd on 18/4/2001.

There is no doubt that the 2<sup>nd</sup> respondent herein, Kenya National Highways Authority (KeNHA) has and was involved in the construction of Nairobi - Thika Super Highway.

During the construction of the Nairobi-Thika Super Highway, some business premises and parcels of land along Murang'a Road were affected. Among the parcels of Land affected was LR No. 209/15289 (Original No. 209/1581) owned by the applicant herein. The applicant in his own affidavit admitted that the Government compulsorily acquired part of his parcel of land. He was in turn compensated and paid about Kshs.20 million as per the copy of award dated 2/10/2009 attached to the applicant's supplementary written submissions, filed on 6<sup>th</sup> May, 2013.

The applicant alleged that after the completion of the construction of Muranga Road, which is a connection to Nairobi – Thika Super Highway, the 2<sup>nd</sup> respondent blocked the access and exit to the applicant's property by putting up a pedestrian kerb. Applicant averred that due to the act of the 2<sup>nd</sup> respondent, he has lost business and this act by the 2<sup>nd</sup> respondent is discriminatory to him as other properties especially petrol station have entry and exit from the main road to their premises. Applicant further averred that such action by 2<sup>nd</sup> Respondent is discriminatory in nature and thus this prayers in court.

The 2<sup>nd</sup> respondent and the Attorney General did admit that indeed 2<sup>nd</sup> respondent was involved in the construction of Nairobi - Thika Super Highway which is characterised as a Highway. Among the common characteristics of the Highway is that ***ingres and egress from highways is regulated through designated exits and entry into the service roads and no direct private property access is allowed.***

The 2<sup>nd</sup> respondent further averred that though applicant is the registered owner of the property in question that ownership was not absolute. Special Condition No. 11 of the Grant to the Petitioner states that; -

The 2<sup>nd</sup> respondent contented that being the Authority responsible for Nairobi- Thika Super Highway, which is the adjoining road has determined that access and egress from Thika Highway to the suit property is not practical and it is in the process of providing access and egress to the property.

I have considered the applicant's prayers No. 3 and 4 in the Chamber Summons application. The applicant has sought for an injunction of a mandatory nature. The questions now for determination is whether the applicant has met the conditions applicable for grant of injunctive orders as was held in the case of *Giella vs. Cassman Brown & Co. Ltd 1973 (E.A) at page 353.* These conditions are: -

- i. Applicant must show that he has a prima facie case with probability of success.
- ii. That applicant will suffer irreparable loss and if injury (harm) which cannot be compensated by damages if application not granted in his favour.
- iii. When the court is in doubt to decide the application on the balance of convenience.

Applicant has sought for mandatory injunction. 4<sup>th</sup> Halsbury's Law of England volume 24 at page 948 stipulates the conditions for granting of mandatory injunction. It states that

*“In the absence of special circumstances, on interlocutory mandatory injunction will not normally be granted. However if the case is clear and one which the court thinks it ought to be decided at one and if the act done is a simple and summary one which can easily be remedied or if the defendant attempts to steal a march on the plaintiff – a mandatory injunction will be granted”.*

Courts in Kenya have variously upheld the above position. See the case of *Kenya Breweries Ltd & another vs Washington O. Okeyo, civil Appeal No. 332 of 2000 (2000) LLR 4984, IEA.*

The applicant herein apart from satisfying the conditions set out in the case of *Giella vs. Cassman Brown* has to demonstrate special circumstances do exist to warrant the court to grant him the mandatory injunction.

The applicant in his pleadings and submissions stated that he has established a prima-facie case with probability of success. He pleaded that his property was exclusively to be used as a Petrol Station but the 2<sup>nd</sup> respondent has blocked access and exit to this property by construction of a pedestrian kerb. That other property owners along this Murang'a Road have free entry and exit from the main Road and thus it is prima-facie discrimination on the applicant herein to deny him direct access and exit to his property. On their parts, the respondents responded that though the applicant is the owner of the suit land such ownership was not absolute as stated by special condition No. 11 which states that ***“access and egress for the site will be in accordance with the requirements of the local authority and such other Authority may be responsible for any adjoining road.”*** That since 2<sup>nd</sup> respondent was the Authority responsible on the Nairobi – Thika Highway which is the adjoining Road. The 2<sup>nd</sup> respondent did determine that access and egress from the super Highway was not practical. 2<sup>nd</sup> respondent submitted that applicant did not obtain the necessary consents from the 2<sup>nd</sup> respondent to re-develop his property. 2<sup>nd</sup> respondent further submitted that applicant was compensated for property acquired.

I have indeed considered the special conditions on the Grant attached to the Chamber Summons. It is indeed correct that ***condition no. 11*** deals with access and egress for the site which will be in accordance with the requirements of the ***local authority and such other authority as may be responsible of any of***

***the adjoining roads.***

The respondents and applicant admitted that the property is along Muranga Road which was a connector to Nairobi-Thika super Highway. One of the characteristics of the Highway was that; ***ingress and egress from highway is regulated through designated exits and entry into the services road and no direct private property access is allowed.***

The applicant property is along Muranga Road. The 2<sup>nd</sup> respondent submitted that the said property was not supposed to have a direct private access. 2<sup>nd</sup> respondent further submitted that it's continuing to seek for ways to grant the applicant access to his property. Though the applicant objected to this submissions, I find no reason to doubt that line of submission by the respondents. The applicant was well aware from the special condition in his Grant that access and exit to his property was subject to conditions set by the authority responsible for the adjoining road. In this case it is the 2<sup>nd</sup> respondent who have submitted that they are in the process of finding an alternative access to the plaintiff/applicant property.

For the above reasons. The court finds that the applicant has not established that he has a *prima-facie case* with high probability of success.

The applicant further submitted that he has suffered loss and he continues to suffer loss and the application should be decided in his favour. The respondents on their part submitted that applicant has not demonstrated that he will suffer irreparable loss which cannot be compensated by damages. 2<sup>nd</sup> respondent submitted that the pedestrian kerb was not put up overnight nor done in secret.

That applicant was well aware when the construction of the Kerb was ongoing and only came to court when the same was completed. That applicant should have moved to court earlier to prevent the pedestrian kerb from being put up.

Respondents further submitted that the purported loss can be qualified and damages can be on adequate remedy if the court was to find in his favour. From the pleadings herein, there is no doubt that the applicant was compensated with about kshs.20 million when his land was compulsory acquired by the Government. Applicant alleges that he continues to incur loss of about kshs.800,000/= per month which he held the respondents liable to compensate him.

The applicant has been able to qualify his loss per month and if at all the application will be decided in his favour in future then his loss and damages can be compensated by way of damages. Applicant has not been able to establish that he will suffer irreparable loss which cannot be compensated by damages. He has already been awarded Kshs.20 million on compulsory acquisition of his land. The 2<sup>nd</sup> respondent also submitted that it is in the process of providing parallel service lane to allow for access/egress to the applicant's property.

It was the applicant's contention that the balance of convenience tilts in his favour since if the injunction is not granted, he will continue to suffer loss and damages since he cannot make any meaningful use of his property since the permitted use is for Petrol Station which is not possible now due to blocking by a high level Pedestrian Kerb of the entry and exit by the 2<sup>nd</sup> respondent. Applicant relied on the case of *Mahesh Kantilal Sangrajka vs Kenya National Highway Authority (2012) eKLR* where Justice Kasango granted a temporary injunction for a period of 4 months against the defendant. Applicant also relied on the case of *Mbuthia vs Jimba Credit Finance Corporation & another (1988) KLRI* where the court of Appeal held that.

***“The correct approach in dealing with the application on interlocutory injunction is not to decide the issues of fact but rather weigh up the relevant strength of each sides propositions. The lower court Judge in the case had gone far beyond his proper duties and made final findings of act on disputed affidavits”***

The 2<sup>nd</sup> respondent on its part submitted that the 3<sup>rd</sup> condition should not be addressed as the first two

conditions have not been met. The 2<sup>nd</sup> respondent submitted that the balance of convenience does not tilt in favour of the applicant herein.

The 2<sup>nd</sup> respondent relied on the case of Kenya Commercial Finance Co. Ltd vs. Afraha Education Society (2001) I E.A at page 89 (case citation: John Ngumo Murere vs Muriuki Karue & 27 others (2006) eKLR

Where the court of Appeal held that: -

***“The sequence of granting interlocutory injunction is firstly that an appellant must show a prima-facie case with probability of success if this discretionary remedy will inure in his favour. Secondly that such an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury and thirdly where the court is in doubt it will decide the application on a balance of convenience. There conditions are sequential so that the second condition can only be addressed if the 1<sup>st</sup> one is satisfied and when the court is in doubt then the third condition can be addressed”.***

I have considered the submissions herein by both sides and I am convinced that the court is not in doubt in the first two principles for grant of injunctive orders. There is no need of addressing the 3<sup>rd</sup> condition. But even if the court was to deal with the issue, I find that the balance of convenience does not tilt in favour of the applicant herein.

The applicant has sought for mandatory injunction. He ought to have established existence of special circumstances. This special circumstances has not been established and the case is also not so clear which the court ought to decide at once. Refer to case of Locabail International Finance Ltd vs Agro-Export and another (1986) IALL ER 901 which sets out the principles applicable in cases of mandatory injunction. It states as follows; -

***“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in 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 march on the plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and high standard than was required for a prohibitory injunction.”***

I will also rely on the cited authority by 2<sup>nd</sup> respondent: Reliable Electrical Engineers (K) Ltd vs Mantrac Kenya Ltd (2006) eKLR, where justice Maranga stated that ***“... a mandatory injunction as opposed to prohibitory or restrictions injunctive which requires abstention from acting, requires the taking of positive steps that may in some cases requires the dismantling or destruction of something already affected or constructed. As this may result in waste of time, money and or materials, if it is ultimately established that the plaintiff was after all not entitled to such an order, the court should not grant a mandatory injunction at the interlocutory stage which may not be granted at the final hearing”***

The court finds that mandatory injunction should be granted in the clearest of cases.

In the instant case, the applicant has a Grant which has a special condition No. 11. The 2<sup>nd</sup> respondent is responsible for the construction of the Nairobi - Thika Highway. The said road is a ‘Highway’ with the given characteristics. The court finds that thought the 2<sup>nd</sup> respondent has constructed pedestrian kerb, it has given reasons for that. The court cannot fault the 2<sup>nd</sup> respondent but has to hear the main suit and decide the issues on merit.

The second question for determination is whether the 2<sup>nd</sup> respondent has discriminated or the applicant herein. The applicant stated that respondents herein especially 2<sup>nd</sup> respondent have discriminated on him

by putting up a pedestrian kerb on the access and exit points to his Petrol Station whereas it has allowed other properties stated in paragraph 14 of his supporting affidavit to have direct access to the Muranga Road. The 2<sup>nd</sup> Respondent denied committing such discrimination and explained why the situation is as it is. 2<sup>nd</sup> respondent further submitted rehabilitation of Nairobi – Thika Highway was essential to alleviate the traffic congestion along Thika Highway. That like any project undertaken, there are negative impacts. It was further contended that all the negative impacts had been identified, mitigated and continue to be mitigated with appropriate measures.

I have considered the applicant's main petition. It hinges on the issue of discrimination and he has particularized the instances of discrimination. The 2<sup>nd</sup> respondent has vehemently denied exercising such discrimination. This is an issue that will have to be adequately addressed after evidence has been called and tested through cross-examination. It is not an issue that can be decided through affidavits. I find that at this stage I would find it very difficult to hold that the applicant herein has been discriminated by the respondents, especially by the 2<sup>nd</sup> respondent.

Having now carefully considered the pleadings herein, the written submissions and the annexures thereto, the cited authorities and the relevant law, the court finds that the applicant has not established the laid down principles for the grant of injunctive orders as was held in the case of Giella vs Cassman Brown. The upshot therefore is that the applicant Chamber Summons application dated 6/12/2012 is not merited. The same is dismissed entirely. Costs in the cause.

The Applicant to set the main suit for trial on priority basis so that the issues at hand can be decided expeditiously.

It is so ordered.

Dated this 20<sup>th</sup> day of August, 2013.

**L.N GACHERU**