



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
LAND AND ENVIRONMENT CASE NO. 264 OF 2010

PAUL WACHIRA MUYA 1ST PLAINTIFF/APPLICANT

JAMES GITHOGO KIBERA 2ND PLAINTIFF/APPLICANT

VERSUS

GODFREY NJENGA MUNGAI 1ST DEFENDANT/RESPONDENT

PETER NDUATI NJOROGE 2ND DEFENDANT/RESPONDENT

R U L I N G

When the Chamber Summons dated 7th December 2010 came for highlighting submissions before me, the Applicants and their counsel were not present. The application sought interlocutory injunction orders against the Defendants GODFREY NJENGA MUNGAI and PETER NDUATI NJOROGE.

The Applicants however filed submissions through their Advocates Masore Nyangau & Company Advocates on 30th June 2011. I have to consider their submissions. The Defendants on the other hand, filed written submissions through their Advocates Gichuru Njugi Advocate on 29th August 2011. The Respondents'/Defendants' Advocates Mr Gichuru also addressed the court to highlight submissions filed. Counsel stated that the court had no jurisdiction to entertain the application and give the orders sought. Counsel sought to rely on Section 25 and 26 of the Registered Land Act (Cap 300), as well as Sections 150 and 151 of the same Act. Counsel maintained that this court has jurisdiction only on appeal when the Registrar refuses to grant the reliefs sought by the Applicants.

The main prayer in the application on which both parties' Counsel submitted was prayer 2 which I will produce hereunder verbatim. It is as follows:-

2. THAT the Honourable Court be pleased to issue an interlocutory injunction restraining the Defendants, either by themselves or through any of their agents, servants or howsoever, from closing, blocking, developing, fencing, constructing on land Reference Number Ngong/Ngong 47759, or using the said land to the prejudice of the Plaintiffs or preventing the Plaintiffs from using the said parcel of land as a road of access to the Plaintiffs, respective parcels of land, pending the hearing and determination of the suit.

From the evidence and facts placed before me, the above prayer arises out of subdivisions being carried

out of land which borders that of the Plaintiffs. It is the Plaintiffs' contention that plot Ngong/Ngong/47759 constitutes of the access road to the plots of the Plaintiffs. The Defendants deny that there was any access road. They state that the Plaintiffs' application is premature as Section 150 of the Registered Land Act (Cap 300), provides that such a complaint as that of the Plaintiffs can only come to the High Court on appeal, after having been dealt with by the Land Registrar. The Plaintiffs have prematurely come to this court without filing their complaint with the Land Registrar. It does not appear to be in dispute however, that the Plaintiffs are adjoining land owners.

The Plaintiffs' claim that recently Plot Ngong/Ngong/47759, which was the access road, was grabbed and the road of access unlawfully shifted to behind Ngong/Ngong/262508, and that the Defendants were now fencing or constructing on plot Ngong/Ngong/47759 thus irreparably affecting the rights of access of the Plaintiffs.

In my view, whether or not the access road was recently grabbed and shifted to another place is a question of fact which can only be determined after hearing of parties. Whether or not the Defendants are constructing on or blocking the lawful access road, can only be determined after hearing. Whether or not the Plaintiffs should have first gone to the Registrar can also only be determined when the facts surrounding the case are placed before the judge.

The considerations to be taken by the court in an application for interlocutory injunction have been settled since the decision in GEILLA -vs- CASSMAN BROWN (1973) EA 358 relied upon by both the Plaintiffs and the Defendants. An Applicant is required to demonstrate a *prima facie* case with probability of success. Secondly, an injunction will not be granted unless the Applicant will suffer irreparable loss which will not be adequately compensated in damages. Thirdly, if the court is in doubt, it will determine the application on the balance of convenience.

With the facts and evidence placed before me, I am of the view that the Plaintiffs have satisfied the first two requirements under the case of GEILLA (above). If I am wrong on that, this being a land case in which it is obvious that subdivisions are taking place in the affected area, the balance of convenience will still be in favour of the Plaintiffs to grant the injunction, to enable the court to go into the depth of the facts and make a final determination on the merits, after substantive hearing. I will therefore allow the application.

For the above reasons, I allow the application and grant prayer 2. Costs in the cause.

Dated this 23rd day of February 2012.

George Dulu

Judge

In the presence of:

N/a for Plaintiff/applicants

Mr Gichuru for the Defendants/Respondents

Nyalo – Court clerk.