



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 137 OF 2011

“FAST TRACK”

MAHESH KANTILAL SANGRAJKA.....PLAINTIFF

**VERSUS**

KENYA NATIONAL HIGHWAY AUTHORITY.....DEFENDANT

**RULING**

The plaintiff has sued the defendant seeking permanent injunction to restrain the defendant from damaging, destroying, pulling down and/or doing anything detrimental to the plaintiff’s wall erected on parcel 1720/V/M.N (suit property). The plaintiff filed a notice of motion dated 25<sup>th</sup> May 2011 which is the subject of this ruling. The plaintiff’s claim is that he is the registered owner of a lease over the suit property having had the lease registered in his name in the year 2006 which lease had been granted in 1995. He constructed a perimeter wall around the suit property but stated that before doing so he obtained the approval from the Municipal council Mombasa which approval was brought to the attention of the Director of Physical planning, commissioner of lands, director of survey and the land registrar. The plaintiff stated that none of those offices objected to the construction of the perimeter wall. The wall according to the plaintiff was constructed 4.5 meters inside the beacon marking of the suit property and of the road reserve. He added that the construction of the wall was approved by the National Environment Management Authority after he had fulfilled certain conditions. On 19<sup>th</sup> May 2011, the plaintiff stated that he was served by the defendant with a 7 days notice to demolish the perimeter wall. The plaintiff averred that the notice was defective because it was not a 60 days notice as required under the Kenya Roads Act No. 2 of 2007.

Further the plaintiff averred that such notice should have been given by the Kenya Urban Roads Authority which authority has the responsibility of managing the urban roads. The defendant has denied the plaintiff’s claim. The deponent of the defendant’s replying affidavit set out the history of the suit property and in so doing acknowledged that the plaintiff was indeed issued with a lease over the suit property. It was stated in that affidavit that the suit property was one of the plots that were acquired from several persons and those parcels were designated as road reserve. The deponent further deponed as follows:

***“(iv) Over the years, all the acquired parcels were consolidated and the area near the road left as road reserve but around 1995, the suit premises was carved from the road side and granted as LR Number MN/V/1720***

(v) *That I verily belief that the said grant was unlawful as the reason for acquisition was not for subsequent grant to private individuals and this issue will be raised elsewhere in the course of the trial.*

(4) *That my department has also undertaken a survey of the suit premises vis a vis the road and came up with the finding that whoever put the beacons planted them right to the edge of the existing road thus encroaching even on the subsisting road reserve. Annexed hereto please find a copy of the survey map showing the encroachment marked RLM 2.*

(5) *That the perimeter wall subject matter of these proceedings even when done inside the beacon is still on the existing road reserve by a total of 624m<sup>2</sup>. Annexed hereto please find an illustration map of the encroachment with the affected area shaded in orange marked RLM3.*

(6) *That the allegation in the applicants affidavit about approvals from various authorities do not justify encroachment on the road reserve as the concerned Highway Authority was Kenya National Highway Authority which was not consulted at any stage of the alleged approval.*

(7) *That the allegation that the road is within the jurisdiction of Mombasa Municipal Authority could only have been made in ignorance of classification of roads as Road A 109 is actually a class A Road within the Authority of respondent herein.*

(8) *That the duty given to the respondent to safeguard road reserves among other things does not involve giving a 60 day notice as alleged in the Applicants Affidavit.”*

The plaintiff seeks an interlocutory injunction to stop the defendant from demolishing his perimeter wall. The parties pleadings are divergent to each other. The issues raised by the parties in the interlocutory application are the very same issues raised in the plaint and the defence which issues shall be determined at the conclusion of this case. Bearing that in mind, I am guided by the holding of the Court of Appeal case **MBUTHIA VS JIMBA CREDIT FINANCE CORPORATION & ANOTHER [1988] KLR 1**

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

Having in mind the holding in that case and considering the principles of writing an interlocutory injunction set out in the case of **GIELLA VS CASSMAN BROWN CO. LTD [1973] E. A. 358** copy the citation I find that I entertain doubt in respect of the 1<sup>st</sup> and the 2<sup>nd</sup> principles. Those principles are as follows:

(i) *That an applicant must show prima facie case with probability of success;*

(ii) *An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury;*

(iii) *when the court is in doubt, it will decide the application on the balance of convenience.*

I find that the 3<sup>rd</sup> principle is applicable in this matter. The 3<sup>rd</sup> principle as it would be seen above provides that where the court has doubt on the 1<sup>st</sup> and 2<sup>nd</sup> principle, the court will decide an injunction application on the balance of convenience. Although I find that the convenience favours the plaintiff, in that if an injunction is not granted, the defendant may demolish the wall before trial, it should however be recalled that the defendant represents the interests of all the citizens of Kenya who use the Kenya Road Network. For the plaintiff to impede the defendant in its operation by having a perimeter wall on a road reserve, if at all, would be inconvenient to all road users. Bearing that in mind, I find that the plaintiff ought only to get an injunction for a limited period. Within that period, the plaintiff must ensure that all the pre-trial process has been undertaken and should ensure to fix the case for hearing on priority

basis. With that in mind, I make the following orders:

1. *A temporary injunction is hereby issued for four (4) months from this date hereof (that is up to 16<sup>th</sup> July, 2012) restraining the defendant by itself, or its agents, servants or employees or any persons acting on its instruction from damaging, removing, demolishing, surveying or destroying the plaintiff's perimeter wall at Miritini erected on plot 1720/V/M.N.*
2. *Directions are hereby given that a date be given for the full hearing of this case on priority basis.*
3. *The costs of the Notice of Motion dated 25<sup>th</sup> May, 2011 shall be in the cause.*

**DATED and DELIVERED at MOMBASA this 15<sup>th</sup> day of March, 2012.**

**MARY KASANGO**

**JUDGE**