



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)**

**Environmental & Land Case 677 of 2011**

**GEORGE MUNGE ..... PLAINTIFF**

**VERSUS**

**SANJEEV PANCHO SHARMA .....  
.....1<sup>ST</sup> DEFENDANT**

**SHABIR BHATTI .....  
.....2<sup>ND</sup> DEFENDANT**

**KITHAKA WAMBERIA .....  
...3<sup>RD</sup> DEFENDANT**

**THE RUNDA ASSOCIATION .....  
4<sup>TH</sup> DEFENDANT**

**RULING**

1. This is the plaintiff's notice of motion dated 25<sup>th</sup> November 2011. The plaintiff prays for an injunction to restrain the defendants from blocking two public roads known as Ruaka road and U.N. avenue within Runda Estate Nairobi. The application is expressed to be brought under order 40 of the Civil Procedure Rules 2010 and sections 1A, 1B and 3A of the Civil Procedure Act. There are two affidavits in support sworn by George Munge on 25<sup>th</sup> November 2011 and 17<sup>th</sup> February 2012.

2. The plaintiff is the owner of LR 7785/1267 (original number LR 7785/736) situated in an estate known as Runda in Nairobi. In order to access his property, the plaintiff avers that he has to use either U.N avenue or Ruaka road. The plaintiff's case is that the two are public thoroughfares. The 1<sup>st</sup> to 3<sup>rd</sup> defendants are officials of the Runda Association, the 4<sup>th</sup> defendant. The plaintiff avers that membership to the association is optional. The plaintiff alleges that the defendants, purporting to enforce their rules on security, environment or land use, have blocked the two roads and prevented the plaintiff's workers from accessing his land. The defendant's guards have arrested his workers, detained vehicles and construction equipment or even demanded bribes. The plaintiff challenges these actions as illegal, arbitrary and unreasonable. He has made complaints, the latest one being on 27<sup>th</sup> October 2011 through his lawyers as per exhibit "GM 6" but the defendants have persisted in commission of the offending acts. As a result, the plaintiff avers that he has had to spend monies to bail out his workers, his developments on his land have stalled and he continues to suffer great hardship and inconvenience.

3. The motion is contested by the defendants. There is, first, a notice of preliminary objection dated 30<sup>th</sup> November 2011. On 14<sup>th</sup> November 2011, directions were granted that the preliminary objection be canvassed as part of the reply to the motion. There is also filed a replying affidavit of Sanjeev Sharma sworn on 1<sup>st</sup> February 2012. He avers that Runda association is the “largest gated community in Kenya and the region” charged with ensuring the security of residents, infrastructural development and water supply. He says that water is supplied by an independent entity, Runda Water Limited. He does not dispute the plaintiff owns the subject property LR 7785/1267 as well as two other properties in the estate. The defendants’ case is that the plaintiff has been a beneficiary of the association’s policies which have improved the welfare of members and raised the profile of the estate. This in turn has attracted good tenants for the plaintiff. In particular, the defendants deny arbitrarily blocking the two roads. The defendants state that they have prevented, as per rules of the association, construction work or entry of lorries after 6.00 pm, a rule that the plaintiff should know having stayed in Runda for 14 years. The claims of bribery or detention of the plaintiff’s workers are contested. The defendant’s case is that the present motion is a smear campaign; is selfish and inimical to the wider community interest; and, is defective and an abuse of court process.

4. The defendants also submit that there is misjoinder and that the application, by failing to enjoin the Nairobi City Council is irregular. The claims and reliefs sought are also of a public nature. The defendants contend that the plaintiff cannot maintain the suit or seek constitutional remedies. It was also submitted that there is no evidence before the court that the two roads are public roads.

5. I have heard the rival arguments. It is common ground that the plaintiff has lived in Runda estate for about 14 years. He owns the suit property LR 7785/1267 which is under construction. I have seen the copy of title marked “GM 1” and the approval of building plans “GM 2”. It is also common ground that the plaintiff owns two other properties being LR 7785/796 and LR 7785/1268 in the estate. One of the properties is under rent to a diplomat. The 4<sup>th</sup> defendant asserts that it “formulates policies for properties failing between LR No 7785 and Nairobi Block 112 on matters security, infrastructural development and water supply” for over 1000 households including the plaintiff.

6. The defendants do not deny that the association’s membership is voluntary. I accept the defendant’s assertion that there is no cogent evidence before the court of bribery or illegal confinement of the plaintiff’s workers. There is a demand letter by the plaintiff’s lawyers dated 28<sup>th</sup> October 2011 and the claims by the plaintiff deponed to at paragraph 15 of the supporting affidavit. Those allegations are not fully substantiated at this stage. They will perhaps become evident at the trial on tested evidence.

7. The plaintiff has however demonstrated that the defendants have erected a barrier along the two roads. Annexure “GM 5” is a picture of the metallic barriers. It looks permanent with a guard house on either side of a dual carriage road. I have also looked at the Google map annexed marked “GM 3” showing Ruaka road and United Nations avenue that cut through the estate. The defendants have not rebutted the evidence of erection of barriers. What the defendants contend is that they bar the movement of lorries and construction materials after 6.00 p.m for security concerns. They also contend that the City council of Nairobi is aware of the barriers. But I have also seen a letter from the City council dated 26<sup>th</sup> July 2007 to the association annexed to the replying affidavit of the 1<sup>st</sup> defendant. That letter required the association to give particulars of barriers on “City Roads”. The association replied on 25<sup>th</sup> September 2007. It confirms it has 6 barriers including a barrier on Limuru/Ruaka roads. They also sought in a letter dated 27<sup>th</sup> June 2008 to erect a barrier along U.N avenue, Gigiri.

8. I thus find that the defendants have erected barriers across the U.N avenue and Ruaka roads. The defendants concede that from 6.00 p.m they do not allow lorries or construction material to pass through the barricades for security concerns. The defendants concede the Runda association is a voluntary association. Although the defendants say there is no evidence that the roads are public, the plaintiff insists they are. And the city council has referred to those roads as “city roads” under their jurisdiction. The defendants have not submitted evidence to controvert that those two city roads are not public roads. I am alive to the cardinal precept of the law of evidence that he who alleges must prove. Certainly, the defendants do not claim they are their private roads. The only credit, as disclosed in their letter of 25<sup>th</sup>

September 2007, is that the residents in the estate “maintain the roads using their meager resources”. The security concerns disclosed there are that they are “surrounded by coffee estates and Githogoro slum”. The defendants may have paid the City Council of Nairobi as per the receipts at page 25 and 26 of the replying affidavit. But that cannot convert a public road or a city road into a private road. I take judicial notice that resident associations in various parts of the city have evolved as necessary partners to fill in the void left by the city council or security agents. But in carrying out their mandate they should not infringe upon private property rights or the right of the public to access or use public or city roads. Voluntary associations like the 4<sup>th</sup> defendant cannot enforce a local rule in an arbitrary, capricious, oppressive or unreasonable manner.

9. The defendants had contended that this is a public interest suit. Reliance there has been placed on Kenya Guards Allied Workers Union Vs Security Guards Services & 38 others High court miscellaneous case 1159 of 2003 (unreported) [2006] e KLR for the proposition that the present plaintiff cannot maintain this suit. I disagree. The plaintiff here has a narrow property matter. He is the owner of the subject property. He is not making a general complaint or seeking reliefs for a wide body of persons. I do concede that the prayers in the motion and plaint are crafted in a wide language by requiring the defendant to remove the barriers. That may be a pointer to poor draftsmanship by the plaintiff’s advisers. In my view, it is curable by amendment. And I am guided there by the *dicta* of Madan, J.A as he then was in D.T. Dobie & Company Vs Muchina [1982] KLR 1. The plaintiff only prays that the defendants be restrained from blocking his way or access to his property. And the barriers are not on the defendant’s road but city or public roads. The preliminary objection raised earlier dated 30<sup>th</sup> November 2011 does not then rise to the threshold of a pure point of law. Mukisa Biscuit Manufacturing Company Vs West End Distributors Ltd [1969] E.A 696. True, the plaintiff makes reference to numerous complaints by other residents. Those have not been proved. He has not pleaded that he brings the suit for the benefit of other persons as contemplated by order 1 rule 8. And the court would not be prepared to grant a remedy outside the confines of the plaintiff’s private interests. Reference was also made to the Local Government Act at section 2 and 182 on the role and mandate of the City Council of Nairobi. True the barriers have been sanctioned by the council but I do not see the authority by the council to bar any member of the public or at any rate the plaintiff from using the roads at any time to access his private property. There I see an overreaching arm of the defendants. It is not the City council who have barricaded the city roads. It is the defendants and failure to enjoin the city council does not, in my view, become fatal.

10. When the plaintiff approaches the court for injunction, he must rise to the threshold for grant of interlocutory relief set clearly in Giella Vs Cassman Brown and Company Limited [1973] E.A 358. Those principles are first, that the applicant must show a *prima facie* case with a probability of success; secondly that he stands to suffer irreparable harm not compensable in damages; and thirdly, if in doubt, the court must assess the balance of convenience. Being a discretionary remedy, there is also ample authority that a party, who has misconducted himself in a manner not acceptable to a court of equity, will be denied the remedy. See Kenya Hotels Limited Vs Kenya Commercial Bank and another [2004] 1 KLR.

11. The court’s discretion is at play here. I am also persuaded by the views of my brother Justice Maraga, as he then was, in J.M. Gichanga Vs Co-operative Bank [2005] e KLR applying the finding in the Court of Appeal in Aikman Vs Muchoki [1984] KLR 353 as follows;

*“My understanding of the Court of Appeal decision in Giella case is that the court proceeds to consider the second condition of irreparable harm which cannot be adequately compensated for an award of damages only if it entertains some doubt on the first condition of the probability of success, like when the court thinks that the plaintiff has a fifty/fifty chance of success. However, where going by the material placed before it at an interpartes hearing of an application for injunction it appears to the court that the plaintiff has a strong case, like where it is clear that the defendant’s act complained of is or may very be unlawful, the issue of whether or not damages can be an adequate remedy for the plaintiff does not fall into consideration. A party should not be allowed to maintain an advantageous position he has gained by flouting the law simply because he is able to pay for it”.*

12. From my analysis of the law and evidence before me, I am of the view that the plaintiff has

established the conduct of the defendant of blocking a public thoroughfare arbitrarily and unreasonably may be unlawful. But that will be a matter for the trial court and the less I say about it the better. The plaintiff is seeking relief to access his private property registered in his name. I think the plaintiff, in those circumstances, has established a prima facie case with a probability of success.

13. For all of the above reasons I order that the defendants jointly and severally and whether by themselves or their agents or howsoever be and are hereby restrained by injunction from blocking the plaintiff or his workers or employees or barricading the plaintiff's access or that of his workers and employees or construction materials and equipment through the roads known as Ruaka road and U.N avenue situated within Runda estate Nairobi until the hearing of this suit.

14. As the defendants do not claim ownership of those roads, I shall not order any undertaking on damages. But I do direct that the main suit be fixed for hearing and be concluded within one year in default of which the injunction shall lapse. As the defendants are officials of the 4<sup>th</sup> defendant association, and in the interest of justice, I shall not make any order on costs.

It is so ordered.

**DATED and DELIVERED at NAIROBI** this 24<sup>th</sup> day of May 2012.

**G.K. KIMONDO**  
**JUDGE**

**Ruling read in open court in the presence of**

No appearance for the Plaintiff.

Mr. Mwindi for the Defendant.