



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

LAND AND ENVIROMENTAL LAW DIVISION

CIVIL SUIT NO. 82 of 2011

FREDERICK MBURU NDEGWAPLAINTIFF

VERSUS

GODFREY KINYA WARUHIUDEFENDANT

RULING

1. The Plaintiff/applicant hereinafter referred as the applicant filed a Notice of Motion dated 28/2/20 under Order 40 rules 1, 2, &3 of the Civil Procedure Rules and section 1A, 2A & 3A of the Civil Procedure Act and all other enabling provisions of law seeking the following orders;

a) An injunction to restrain the defendant, his servants or agents jointly and/or severally from interfering, blocking and/or alienating, erecting structures and/or remaining on the reserve road serving the rear side of L.R. No. Nairobi/Block 83/14/79 – Umoja Innercore and others until the suit is heard and determined.

b) The Honourable Court do issue any further order and/or other orders as it may deem just and expedient in the circumstance.

c) Costs of this application be provided for.

The application is based on the following grounds

a. The defendant has unlawfully blocked the reserve and/or access road thereby blocking the plaintiff's access to his property.

b. The defendant's actions are unlawful and prejudicial to the plaintiff's right of way and quiet and peaceful possession of the suit premises as construction on his premises is not paralyzed.

c. The plaintiff will suffer damage irreparably unless the defendant is restrained from the said unlawful acts.

d. That it is in the interest of substantive justice that orders sought herein be granted

2. The plaintiff applicant filed two affidavits, a supporting affidavit dated the 25/2/11 and a further affidavit dated the 18th April 2011. The respondent filed a replying affidavit dated the 8th March 2011. Each of these affidavits had annexures.

This is the applicant's case. On the 16/3/09 he bought plot No. A-10 Umoja Innercore Sector II from one Andrew Mwangi Chui who was the lawful allottee. He later obtained the certificate of lease no. Nairobi /Block 83/14 79 Umoja innercore and commenced developments on the suit property. As the building reached its completion the defendant/respondent blocked the road reserve which he used to transport materials to the plot by depositing materials. He wrote to the City Council of Nairobi complaining of the encroachment and seeking the Council's intervention. City Council on the 16/2/11 issued an enforcement notice directing the defendant to cease interfering with the suit property. He also wrote to the Director of investigations department at City Council seeking clarification on whether the obstruction was permitted and the action to be taken. He did not receive any response and he has now come to Court seeking to protect his property right and interests. That he continues to suffer as the construction cannot go on due to inaccessibility owing to the defendants unlawful actions which continue.

3. The respondent opposed the plaintiff's application. The respondent stated as follows in his replying affidavit in brief; that he is the owner of plot A23/1 Umoja Innercore., that the said plot is not on a reserve road, that he deposited building materials in the said plot, that he was not served with the enforcement notices by the City Council of Nairobi nor the applicant, that he has obtained authority from the City Council of Nairobi to commence fencing the plot with iron sheets on the 17th February 2011 (GKW2), that his plot A23/1 Umoja Innercore borders the applicant's plot A10 Umoja Innercore section II and it is not on a road reserve, that the applicant's complaint of interference of his easement rights are untrue as his premises faces a major road and he cannot be able to interfere with the same.

4. The applicant filed a further affidavit in response to the respondent's replying affidavit. In brief his response was that the defendant needs to clarify which plot belongs to him between A23/1 and A23.1 Umoja Innercore as the two numbers cannot refer to the same plot, that the defendant's plot is an illegal interference with the original part development plan already submitted by the City Council of Nairobi to the survey of Kenya way back in 1990, survey map F/R 205/69, that from record the defendant's alleged plot if at all was hived off from the road reserve serving his plot and others sometimes in the year 2011 as in the original survey map no such plot was provided for. That he was advised by his counsel that once a road reserve is provided for it becomes a public utility no public utility land can be transferred to an individual but can only go back to public. That there is inconsistency in the defendant's documents on fencing as they refer to plot No. A23.1 and not A23/1 whilst the receipt shows that the plot owner is Mr. E. N. Maina who happens to be the originator of the defendant's beacon certificate as the surveyor and that the receipt date is blotted out and not visible and is therefore indivisible.

5. I have considered the contents of the affidavits together with the submission made by counsels in this matter and I find as follows; the applicant's claim against the defendant is that the defendant has unlawfully blocked the reserve and/or access road thereby blocking the applicant's access to his property, the defendant's actions are unlawful and prejudicial to the applicant's right of way and quiet and peaceful possession of the suit premises as construction on his premises is paralyzed and that the applicant will suffer damage irreparably unless the defendant is restrained from the said unlawful acts. The issue here is not who owns which plot. The issue is whether the defendant has blocked the reserve access road blocking the applicant's access to his property. This Court did not have the benefit of visiting the two plots to establish the contents of the photographs attached so as to rule that they are a true picture of what is on the ground. In the applicant's further affidavit he mentions survey map F/R 205/69 which he states shows that the defendant's alleged plot if at all was unlawfully hived off from the road reserve serving his plot sometimes in the year 2011. This map was not attached to the further affidavit for this Court to establish what the applicant alleges. The sketch attached in the "index of contents", as a document is not legible, it does not help the Court in making a finding as to whether the plot the respondent occupies is on a reserve road. Further there is no affidavit from an officer of this department to support the applicant's claims. The applicant also refers to an enforcement notice served on the respondent "FMN 8". This enforcement notice refers to plot No. A23/1 Umoja Innercore sector 2. The notice was to stop construction without authority and not constructing on reserve road. Mr. Mugambi for the respondent did raise an important issue that if the alleged plot is public property and the applicant is aggrieved then the applicant should petition the Attorney General who will then take action. I agree with counsel on this submission as the applicant does state that this is public land even though I find that he has not proved that for lack of attaching the survey map or an affidavit from the relevant department confirming the same. I further agree with Mr. Mugambi's submissions that City Council Nairobi ought to be a party in this suit to clarify the issue of the plots. It is apparent that the respondent obtained authority to construct on the 17th February 2011. This authority has not been challenged. The respondent denies that he was served with enforcement notice. Even if the applicant has sued for a specific tort easement right it was important that he shows that the respondent did block a road reserve which I find he has failed to do so. I therefore find that the applicant has failed to establish a prima facie case with probability of success in line with the principles set out in the case of Geilla Vs. Cassman Brown. The applicant has also failed to sufficiently show the irreparable damage he will suffer as it appears he has another access way to his property neither does the balance of convenience tilt in favour of the applicant. I therefore decline to grant the orders sought in the application dated 28th February 2011 and I dismiss it with costs to the respondent.

Dated and delivered this 16th Day of May 2012

R. OUGO

JUDGE

In the Presence of:-

..... For the Applicant

..... For the Respondent

..... Court Clerk