



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
LAND AND ENVIRONMENTAL LAW DIVISION
CIVIL SUIT (ELC) NO.354 OF 2010

MARY GATHIRU GITAGIAPLAINTIFF

VERSUS

TOWN COUNCIL OF KIKUYU.....DEFENDANT

R U L I N G

1. By a chamber summons dated 23rd July, 2010, Mary Gathiru Gitagia suing as the administrator of the estate of James Gitagia Mbutia (deceased), came to this court seeking various orders of interlocutory injunction pending the hearing of a suit which she has filed against the Town Council of Kikuyu (hereinafter referred to as the defendant). Most of the prayers have been resolved except for the following prayer:

- That an interlocutory order of injunction do issue restraining the defendant/respondent whether by itself, its servants, employees or agents or otherwise howsoever from evicting, demolishing, trespassing, harassing, or in any other way whatsoever interfering with the plaintiff's quiet enjoyment and use of the suit land/premises.
- That the costs of the application be awarded to the plaintiff.

2. The applicant contends that the deceased is the registered owner of parcel title No. Kabete/Mwimuto/T11 (hereinafter referred to as the suit property), pursuant to a title issued to him in year 1974. The deceased had constructed a permanent house on the suit property. This is where his family has lived for the last 36 years. The defendant has now trespassed onto the suit property explaining that they intend to use the land for expansion of a road leading to the market. The applicant maintains that the defendant has irregularly rerouted the intended expansion of the road into the suit property. The plaintiff prays for an interlocutory order maintaining that the deceased's family is likely to suffer irreparable loss if the house is demolished or if they are evicted from the suit property.

3. The defendant denies the plaintiff's claim. Jackson Mwangi Njathi the Town Clerk of the defendant Council has sworn a replying affidavit. He denies that the plaintiff's house is to be demolished contending that it is not on the road reserve. The defendant explains that the defendant has indeed been engaged in demolishing structures which were on the road reserve, and that the plaintiff has refused to remove a live hedge to the suit property which is encroaching on the road reserve.

4. Following an order given on 29th October, 2010 by this court, the District Surveyor visited the suit property to confirm the demarcation of the suit property and the adjoining road. The report of the District Surveyor filed in court on 18th November, 2010, confirmed that the suit property is in its rightful position except for the perimeter wall which has slightly encroached on the road by a distance of one meter. The District Surveyor further noted that the marks put by the Town Council which are meant to show the road extent, have encroached into the suit property on both sides which front the road by various distances ranging from 2.5 meters to 5 meters.

5. Counsel for the applicant has urged the court to adopt the report of the surveyor, while counsel for the respondent urged the court not to grant the injunction maintaining that the applicant is misleading the court.

6. I have carefully considered the application, the affidavit in support and in reply, the report of the surveyor as well as the submissions made by counsel. I find it evident that there has been some element of encroachment on both sides. In particular, the intended expansion of the road has been confirmed by the surveyor to extend on to the suit property.

7. I find that in the circumstances of this case, it would be prudent to grant the prayer of interlocutory injunction sought by the applicant, subject to the applicant removing her perimeter wall which as per the report of the surveyor is encroaching on the road reserve, within 90 days from today. If the applicant fails to comply, the order of interlocutory injunction shall lapse. Costs of the application shall be in the cause. Orders accordingly.

Dated and delivered this 22nd day of July, 2011

H. M. OKWENGU
JUDGE

In the presence of: -
Ogudo H/B for Mbidyo for the plaintiff/applicant
Advocate for the defendant absent
B. Kosgei - Court clerk