



REPUBLIC OF KENYA

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

Civil Case 626 of 2006

PETER TIRAS KANYAGO.....PLAINTIFF

VERSUS

NAZARETH SISTERS OF ANNUNCIATION GENERALATE REGISTERED

TRUSTESS.....DEFENDANT

RULING

This is an application by way chamber summons stated to be brought under Order 39 Rules 2 2A and 9 of the Civil Procedure Rules and Sections 3A and 63 of the Civil Procedure Act seeking orders that:

- (1) A temporary injunction restraining the Defendant by itself or its servants agents or otherwise from interfering with the plaintiff's enjoyment of the easement in the form of a right of way over LR No. 10194/4 for the benefit of ingress or egress in LR No 10194/1 pending the hearing and determination of the suit.
- (2) And in the alternative an order for the maintenance of status quo pending the hearing and determination of this suit.
- (3) An order that the Defendant do abide with the terms and conditions of the grant of easement dated 17th September 1980.

In support of the application Peter Tiras Kanyago has sworn an affidavit giving grounds. The application is opposed by the Defendant who has filed a replying affidavit sworn by sister Julia Tirindi one of the Trustee of the Defendant.

The facts which gave rise to this suit briefly may be stated. In the year 1979 the applicant Peter Tiras Kanyago purchased LR No. 10194/1 while 10194/2 was owned by one William Henry Albert Botto. The two entered into easement dated 4th September 1980 under which Botto granted Kanyago the right of way through his property. The easement deed was begged on the following conditions.

“Provided that at any time after the permanent road of access along the northern boundary of the land belonging to the Grantee has been constructed the Grantor may give the Grantee twelve months notice of his intention to close the right of way herein granted and shall cease and determine.

Subsequently Botto subdivided his said land and sold part of the subdivision being LR No. 10194/4 to one Justus Kariuki who later sold the same to the Defendants.

When carrying out further subdivision of Botto's land the surveyors concerned did not factor in the easement. This is conceded by the Plaintiff's Advocates NDUNGU NJOROGÉ & KWACH in their letter addressed to the Principal Registrar of Titles dated 16th February 2006 which read in part:-

“It seems to us that when carrying out further subdivision of Botto's land the surveyors concerned failed to factor in the easement. In approving the survey plans the Director of Surveys also appears to have omitted to take the easement into account.”

When Justus Kariuki received the final payment from the Defendant for LR No. 10194/4 he wrote the Defendant the following letter:-

Dear Sisters

RE: LR No. 10194/4

This is to confirm that I have received payment amounting to 600,000/= being final payment of the two acres as per the purchase agreement dated 1st May 2002.

ROAD

There is no road through your land. I confirm that I have given notice to the neighbours so that you can complete fencing your land.

Mr. Kibanga learned counsel for the plaintiff submitted that the easement created by deed dated 4th September 1980 over LR No 10194/2 and registered on 17th October 1980 could only be terminated subject to two conditions namely:

(1) After a permanent road of access along the northern boundary had been constructed and (2) The grantor to give 12 months notice. He admits that further subdivision was carried out on LR No. 10194/2 creating two titles named LR No. 10194/3 and LR No. 10194/4, but there was no requirement that the easement created over LR No. 10194/2 on 4th September 1980 be indicated and or enforced in the subsequent title. While Mr. Mwaura learned counsel for the Defendant in opposing the application submitted that the respondent was not a party to the easement as the same was created between the applicant and one William Henry Albert Botto over LR No 10194/2. The said William Henry Albert Botto subsequently having carried further subdivision over LR No. 1019/2 resulting into LR No. 10194/3 and LR No. 10194/4 and having transferred LR No. 10194/4 to the 3rd party without endorsement of the easement over the subsequent title the 3rd party cannot be bound by the easement which was entered into by the applicant and Botto over LR No. 10194/2. He urged the court to dismiss the applicant's application with costs.

I have carefully considered the application in light of the affidavits on record and the arguments by both counsel for the plaintiff and the defendant bearing in mind that an injunction is a great equitable remedy for the protection of those legal rights of parties to litigation which have been or are threatened by violation. The necessary conditions for the grant of an interlocutory injunction are well established. They were laid by the East African Court of Appeal in GUELLA V. CASSMAN BROWN & co. ltd [1973] EA 358. First the Applicant must make out a prime facie case with a probability of success at the trial.

Secondly an injunction will not normally issue if the injury feared may adequately be compensated in damages; and thirdly, if the court is in doubt, it should decide the application on a balance of convenience.

Looking at the matter from the above perspective, the first question to answer is whether the plaintiff has made out a prima facie case with a probability of success at the trial and that he has legal rights which are threatened by unlawful acts of the defendant.

The case at hand is that one William H. A. Botto entered into an easement dated 4th September 1980 under which Botto granted the plaintiff a right of way through LT No. 10194/2 until the northern road of the plaintiff's land was constructed. Subsequently Botto carried out a further subdivision creating new title deeds namely LR No. 10194/3 and LR No. 10194/4. He sold LR No. 10194/4 to one Henry Kariuki who subsequently sold the same to the defendant but by either omission or design the easement was not factored in the subsequent title. This omission was detected by the plaintiff. Realizing the legal consequences of such omission the plaintiff through its lawyers wrote a letter to the Principal Registrar of Titles on 16th February 2006 and sought his intervention to rectify the error and endorse the said easement in the title LR No. 10194/4 which is now registered in the name of the defendant but from the affidavit evidence no action was taken. That being the position the question that arises is whether having failed to factor the deed of easement created by Botto and Kanyango over LR No. 10194/4 the said easement could bind the defendant. The answer is in the negative because the defendant is not party to the said agreement. The only way that easement could bind the defendant is by factoring the same in the subsequent title.

That being the position and being guided by the well known principles in *GUELLA V CASSMAN BROWN & CO LTD* stated above this application must fail. Accordingly the plaintiff's Chamber Summons dated 16th June 2006 is dismissed with costs.

Dated and delivered at Nairobi this 27th day of February 2008.

J. L. A. OSIEMO

JUDGE