



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

**Civil Case 53 of 2005**

**FRANCIS GITHINJI KAROBIA.....PLAINTIFF**

**VERSUS**

**STEPHEN KAGENI GITAU.....DEFENDANT**

**R U L I N G**

Stephen Kageni Gitau the defendant herein has moved this court under order XXXIX Rules 1 and 2 and Order L Rule 1 of the Civil Procedure Rules, and section 3A of the Civil Procedure Act. The substantive order sought by the defendant is an order of injunction, restraining the plaintiff Francis Githinji Karobia and his servants, or agents from interfering with the defendant's quiet enjoyment of occupation of land ref. No.8110/R and/or interfering with any construction works thereof, including the access road until the hearing and final determination of the plaintiff's suit.

The application is supported by grounds stated on the body of the application, as well as an affidavit sworn by the defendant on the 8<sup>th</sup> of November, 2007, a further affidavit sworn by the defendant on the 10<sup>th</sup> of December, 2007 and another further affidavit also sworn by the defendant, on 27<sup>th</sup> February, 2008. The defendant who is the owner of Plot No.8110/R contends that he has obtained approval from the City Council of Nairobi for realignment and construction of a new access road leading to his aforementioned property. The access road also leads to plot No. 8110/5 and 8110/6. The plaintiff is the registered owner of Plot No.8110/6 and also claims ownership of Plot NO.8110/5. The defendant has engaged the services of a contractor for the construction of the new access road and the contractor has deposited some construction material at the site in readiness for the work. However, the plaintiff is interfering with the construction work and has forcefully evicted the defendant's agents from the site. The defendant maintains that the plaintiff is not likely to be prejudiced in any way by the changing of the access road. The defendant therefore urges the court to restrain the plaintiff from interfering with the construction of the new access road.

In response to the application the plaintiff has filed grounds of opposition and has also sworn a replying affidavit. The plaintiff contends that the defendant has not obtained any authority for construction of the new access road as no plans and specifications for the access road have been approved by the City Engineer. The plaintiff objects to the plans annexed to the defendant's further affidavit for the purported approval of the road, contending that the same were not in existence by 9<sup>th</sup> November, 2007 when the plaintiff's application was filed and therefore the construction of the access road as at that time was an

illegal activity.

The plaintiff contends that the defendant is not constructing any new access road but is simply interfering with the existing access road by dumping waste on the road thereby blocking it. The plaintiff further contended that the defendant has consistently blocked and interfered with the existing access road by restricting its width from 12 metres to 3 metres and by planting trees and Napier grass on that road. The plaintiff exhibited correspondences between the defendant, plaintiff's lawyers and the City Council regarding the restriction of the access road and the surrender of the road reserve to the government for public use. The plaintiff stated that the defendant has ignored the notices and letters and has continued to restrict and interfere with the plaintiff's use of the access road.

The plaintiff maintained that the defendant attempts to realign the access road is a dishonest attempt to alter the nature and character of plot no. 8110/5 by increasing the size of that plot from half an acre to a much bigger plot, with the intention of creating a new defence against the plaintiff's claim for specific performance of a contract for the transfer of that plot to the plaintiff. The plaintiff further contended that the defendant's application was yet another attempt to deliberately delay the hearing of the plaintiff's suit.

Finally it was maintained that the defendant has no claim or any right which he has come to enforce or which the court can preserve.

The plaintiff's claim as is evident from the plaint filed on 31<sup>st</sup> of January, 2005 includes inter alia, an order for specific performance of the supplementary agreement for the sale and transfer of LRNo.8110/5. The defendant has denied the existence of any supplementary agreement in respect of LRNo.8110/5. There is therefore a dispute regarding the beneficial ownership of that plot. Although the defendant has contended that he only intends to change the access road for the convenience of access to plots Nos. 8110/5, 8110/6 and 8110/R, it is evident from the map showing the amendment to the approved subdivision resulting in the change of the access road, that the realignment of the access road will change the character of plot No.8110/5 as the plot will become bigger the area of the former access road being amalgamated to that plot. Given that there is a dispute regarding the ownership of this plot, it is desirable that this ownership dispute be resolved before that plot can be interfered with. An order of interlocutory injunction as requested by the defendant, will allow the defendant to continue with the construction of the new access road before finalization of the ownership dispute. This is likely to prejudice the plaintiff.

For the defendant to be entitled to an order of interlocutory injunction he must satisfy this court that he has a prima facie case with a probability of success. In this case, the plaintiff is the one who has shown that his rights are likely to be contravened if the order of interlocutory injunction is granted.

The defendant has not therefore satisfied the primary condition upon which an order of injunction can be granted. I therefore decline to grant the prayer sought and do dismiss the defendant's motion dated 9<sup>th</sup> November, 2006.

Costs of the application shall abide the cost of the suit.

**Dated this 21<sup>st</sup> day of April, 2008**

**H.M. OKWENGU**

**JUDGE**

Delivered this .....day of .....2008

**JUDGE**

In the Presence of: