



Nyonje v Kenya National Highways Authority & 2 others (Environment & Land Case E015 of 2022) [2022] KEELC 14987 (KLR) (24 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14987 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE E015 OF 2022
A OMBWAYO, J
NOVEMBER 24, 2022**

BETWEEN

THOMAS ODHIAMBO NYONJE PLAINTIFF

AND

KENYA NATIONAL HIGHWAYS AUTHORITY 1ST DEFENDANT

**M/S CHINA RAILWAY NO. 10 ENGINEERING GROUP CO.
LTD 2ND DEFENDANT**

ATTORNEY GENERAL 3RD DEFENDANT

RULING

Brief Facts

1 Thomas Adhiambo Nyonje, the Plaintiff herein filed a Notice of Motion Application dated 11th April 2022 under section 3, 3A of the *Civil Procedure Act*, Orders 40 Rule 1,2 and 4, Order 50 Rule 1 of the *Civil Procedure Rules* seeking the following orders:

1. That this Application be certified urgent and heard ex parte in the 1st instance.
2. That pending the hearing and determination of this Application inter-parties, there be a temporary order of injunction restraining the 1st and 2nd Defendants/Respondents either by themselves, their agents, employees, servants, representatives and or any other person authorized by them from trespassing, encroaching, carrying out road construction and or working on land parcel numbers LR No. 20348/9 measuring approximately 0.0700 Ha, LR No. 20348/10 measuring approximately 0.1097 Ha, LR No. 20348/11 measuring approximately 0.0883 Ha, LR No. 20348/12 measuring approximately 0.0937 Ha, LR No. 20348/13 measuring approximately 0.0950 Ha, LR No. 20348/15 measuring approximately



0.0796 Ha and LR No. 20348/16 measuring approximately 0.1160 Ha or in any other way interfering with the said land parcels.

3. That pending the hearing and determination of this suit, there be a temporary order of injunction restraining the 1st and 2nd Defendants/Respondents either by themselves, their agents, employees, servants, representatives and or any other person authorized by them from trespassing , encroaching, carrying out road construction and or working on land parcel numbers LR No. 20348/9 measuring approximately 0.0700 Ha, LR No. 20348/10 measuring approximately 0.1097 Ha, LR No. 20348/11 measuring approximately 0.0883 Ha, LR No. 20348/12 measuring approximately 0.0937 Ha ,LR No. 20348/13 measuring approximately 0.0950 Ha, LR No. 20348/15 measuring approximately 0.0796 Ha and LR No. 20348/16 measuring approximately 0.1160 Ha or in any other way interfering with the said land parcels.
4. That cost of this Application be borne by the Respondents.
- 2 The Application was based on grounds that the Plaintiff is the owner of the suit parcels and the Respondents have encroached on the suit parcels and are carrying out road construction. It was averred that the suit parcels are not on the road reserve and the Plaintiff stands to suffer irreparable loss and damages in the event the orders are not granted.
- 3 The Application was supported by the Affidavit of the Plaintiff who stated that the suit parcels were as a result of subdivision of land parcel number LR No. 20348 which was measuring approximately 2.752 Ha and the suit parcels have clear demarcations and do not encroach on the road reserve.
- 4 It was stated that in March 2022, the 1st and 2nd Respondents encroached on the suit parcels and started constructing a road which construction work is ongoing. That the Surveyor's report indicates that the Defendants have encroached the suit parcels .It is the Plaintiff's case that the road construction work being done by the Defendants on the suit parcels is causing permanent damage on the said properties and it has restricted him from developing the encroached area hence infringing on his right to absolute possession, occupation and or use of his own land and the portions which have not been encroached on have been rendered useless since the road has traversed deep inside the suit parcels .
- 5 It was alleged that if the road construction goes on, it will lead to permanent change of the structure and the usage of the encroached land parcels which loss is irreparable and cannot be compensated by way of damages and the Plaintiff stands to loose land whose market value as at 2018 was Kshs. 68,000,000/=.
- 6 This matter came up for inter parties hearing on 18th May 2022 and the court directed that the Defendants should file their response within 20 days and parties to file and exchange written submissions.
- 7 The Defendants herein have failed to file their response together with their submissions.

Plaintiff's Submissions

- 8 The Plaintiff filed his submissions on 8th July 2022 and stated that since the Application is unopposed, the same should be allowed as prayed. The Plaintiff in his submissions relied on the contents of the Supporting Affidavit and prayed that the court should grant the orders sought since the Plaintiff had met the threshold set out in the case of *Giella vs Cassman Brown* (1973) EA 358 , *Nguruman Limited vs Jan Bonde Nielsen & 2 Others* CA N. 77 of 2012 (2014) eKLR.
- 9 It was stated that the Plaintiff has established a prima facie case with probability of success based on the evidence adduced and that the balance of convenience tilts in his favour. The Plaintiff also placed



reliance in the case of *Kenya Electricity Transmission Company Limited vs Kibotu Limited* (2019) eKLR

Analysis and Determination

10 I have considered the Application and the Affidavit in Support and I am of the view that this court needs to establish whether the Plaintiff has met the threshold for grant of temporary injunction. I am therefore guided by the following case laws :

11 In the case of *Airland Tours and Travel Ltd...Vs...National Industrial Credit Bank*, Milimani HCCC No.1234 of 2003, where the Court held that: -

“In an Interlocutory application, the Court is not required to make any conclusive or definitive findings of facts or law, most certainly not on the basis of contradictory affidavit evidence or disputed proposition of law”.

12 In determining whether to grant or not to grant the Orders sought, the Court will be guided by the principles set out in the case of *Giella ...Vs... Cassman Brown Co Ltd (1973)EA 358* which are:-

“The conditions for granting a temporary injunction in East Africa are well known and these are: First, the Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which might not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience. See also *E.A Industries ..Vs...Trufoods (1972) EA 420.*”

13 It is very clear that a prima-facie case was described in the case of *Mrao Ltd... Vs...First American Bank of Kenya Ltd & Others (2003)KLR*, to mean:-

“A case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.

14 I have seen the titles to the suit properties and do confirm that the same are registered in the name of the Plaintiff. The Surveyor’s report shows that the 1st Defendant has encroached on the suit parcels and this court has also established that if the orders sought are not granted, the Plaintiff is likely to suffer irreparable injury since the extent of encroachment hinders the Plaintiff from developing the suit properties.

15 I do find that the Plaintiff has established a prima facie case with a likelihood of success and that the balance of convenience tilts towards granting the orders sought and therefore I do order as follows:

1. That there be a temporary order of injunction pending the hearing and determination of this suit restraining the 1st and 2nd Defendants/Respondents either by themselves, their agents, employees, servants, representatives and or any other person authorized by them from trespassing , encroaching, carrying out road construction and or working on land parcel numbers LR No. 20348/9 measuring approximately 0.0700 Ha, LR No. 20348/10 measuring approximately 0.1097 Ha, LR No. 20348/11 measuring approximately 0.0883 Ha, LR No. 20348/12 measuring approximately 0.0937 Ha ,LR No. 20348/13 measuring approximately 0.0950 Ha, LR No. 20348/15 measuring approximately 0.0796 Ha and LR No. 20348/16 measuring approximately 0.1160 Ha or in any other way interfering with the said land parcels.



2. That cost of this Application be borne by the Respondents.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 24TH DAY OF NOVEMBER 2022.

A.O OMBWAYO

JUDGE

