



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Civil Case 60 of 2006

JOHN NGUMO MURERE.....PLAINTIFF

VERSUS

HON. MURIUKI KARUE.....1ST DEFENDANT

CLLR. KINYANJUI UNO.....2ND DEFENDANT

JOSPHAT KIMANI KARIUKI.....3RD DEFENDANT

DAVID WACHIRA MACHARIA.....4TH DEFENDANT

JOSEPH WANJOHI.....5TH DEFENDANT

FRANCIS KANGOROTI GITAU.....6TH DEFENDANT

P. N. WAMATU.....7TH DEFENDANT

ELIUD MATHU GATHEE *alias* KAGIRI.....8TH DEFENDANT

RULING

The plaintiff filed suit against eight defendants who include the area Member of Parliament, the District Engineer, the Headmaster of a Local School, the area chief and the owner of a parcel of land next to his parcel number *Nyandarua/Ol Joro Orok Salient/1713 (hereinafter referred to as the suit land)* seeking permanent orders of this court to restrain the defendants from trespassing into, demolishing fences, grading or excavating roads of access or in any other manner interfering with the plaintiff's possession of the suit land. Contemporaneous with filing the suit, the plaintiff filed an application under **Order XXXIX rule 1(a), 3(1) and 9 of the Civil Procedure Rules** seeking the order of this court to restrain the defendants by themselves or their servants or agents from trespassing into, demolishing fences, grading or excavating roads of access or in any other manner interfering with the plaintiff's possession of the suit land. The grounds in support of the application are set out on the face of the application. The application is supported by the annexed affidavit of the plaintiff.

The application is opposed. The 1st, 3rd, 5th and 6th defendants have sworn replying affidavits in opposition to the plaintiff's application. Chege Muturu Tharimu, a surveyor based at the District Survey Office, Nyandarua District has also sworn an affidavit in opposition to the application. At the hearing of the application, I heard submissions made by Mr. Chege, learned counsel for the plaintiff, Mr. Njiru learned counsel for the 1st and 8th defendants, Mr. Kamanga, learned counsel for the 3rd defendant, Mr.

Karanja learned counsel for the 4th and 6th defendants and Mr. Nderitu, learned counsel for the 5th and 7th defendants. I have carefully considered the rival arguments made by the parties to this application. I have also read the pleadings filed by the parties in support of their respective cases in this application.

The issue for determination by this court is whether the plaintiff has established a case to enable this court grant him the order of temporary injunction sought. The principles to be considered by this court in considering whether or not to grant the said order of injunction are well settled. The Court of Appeal held in Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society [2001]1E.A. 86 at page 89:

“the sequence of granting interlocutory injunction is firstly that an applicant must show a prima facie case with a probability of success if this discretionary remedy will inure in his favour. Secondly that such an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury; and thirdly where the court is in doubt it will decide the application on a balance of convenience. See Giella –vs- Cassman Brown and Co. Ltd 1973 E.A. 358 at page 360 letter E. These conditions are sequential so that the second condition can only be addressed if the 1st one is satisfied and when the court is in doubt then the third condition can be addressed.”

In the instant application, certain facts are not in dispute. The plaintiff is the owner of the suit land whereas the 3rd defendant is the owner of an adjoining parcel of land known as *Nyandarua/Ol Joro Orok Salient/1712*. The plaintiff and 3rd defendant have had a long running dispute in respect of the boundaries of the two parcels of land. Several suits are pending before the Nyahururu Principal Magistrate’s Court concerning the said dispute. It appears that the plaintiff and the 3rd defendant have even referred the dispute to the District Land Registrar for determination but no decision has been made that appears to have resolved the said dispute.

The matters have however been complicated by the fact that between the two parcels of land there is a road which leads to a local primary school called Kibathi. From affidavit evidence, it is clear that the dispute between the plaintiff and 3rd defendant has impacted on the pupils who attend Kibathi Primary School because the said road had been blocked as the plaintiff and the 3rd defendant could not agree where the said road was to pass. Whereas the plaintiff was of the view that the road passed through a portion of land which is claimed by the 3rd defendant, the 3rd defendant is adamant that the road passed through the portion of land which the plaintiff had allegedly illegally fenced off.

The problems encountered by the pupils of the primary school, naturally attracted the attention of the local leaders including the area Member of Parliament. Without putting into consideration that there were suits pending in court, they mobilised the local officials of the Ministry of Public Works, obtain a grader, got a surveyor from the District Survey Office, Nyandarua who went to the disputed parcel of land and allegedly identified beacons on the ground allegedly marking the road boundary, and graded the road as per the direction of the area Member of Parliament and the Provincial Administration. The creating of the road between the parcels of land owned by the plaintiff and the 3rd defendant was undertaken on the 24th and the 28th of February 2006. The plaintiff protested the move by the defendants in vain. There is anecdotal evidence that the 3rd defendant, being aware of the existing suits, nevertheless encouraged the other defendants to continue with the task that they had embarked on.

This court takes exception to the conduct of the Provincial Administration and the area Member of Parliament in ignoring the fact that there were pending suits before a court of competent jurisdiction between the plaintiff and the 3rd defendant. If the said administrators were aggrieved that the plaintiff had blocked the access road to Kibathi Primary School, they were at liberty to file a suit in court to seek the opening of the said road. Instead, they took the law into their own hands and decided to determine the position of the road between the parcels of land owned by the plaintiff and the 3rd defendant. That is the law of the jungle and this court will not countenance it.

This court does not buy the defendants’ argument that it is the government which had made the decision to create the said road. No decision made by the government in writing was annexed in any of the

defendants' affidavits that approved the creation of the said road. In my view, the story peddled by the defendants that it was the government's decision was meant to bring the unlawful actions of the defendants within the ambit of the **Government Proceedings Act**. I do hold that the action of the defendants did not have the sanction of the government. The defendants, who are civil servants acted *ultra vires* their mandates.

However coming back to the issue at hand, the said unlawful act by the defendants has already taken place. This court cannot restrain what has already taken place. The purpose of an injunction is to maintain the *status quo* pending the hearing and determination of the suit filed by the applicant. In this case, the horse has already bolted out of the stable. The appropriate application that the plaintiff could have made was an application for mandatory injunction and not an application for temporary injunction. Although I have reached a determination that the plaintiff has established a prima facie case that his parcel of land was illegally encroached by the illegal actions of the defendants, the application before me does not allow me to grant the orders as prayed by the plaintiff. I will dismiss the application but decline to make any orders as to costs.

DATED at NAKURU this 19th day of May 2006.

L. KIMARU

JUDGE