



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERICHO**

**ELC NO. 15 OF 2020**

**MATTHEW KIPKIRUI RONO.....PLAINTIFF/ APPLICANT**

**VERSUS**

**JEPCOM VENTURES CO. LIMITED.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**COUNTY GOVERNMENT OF KERICHO.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. Vide an Application by way of Notice of Motion dated 8<sup>th</sup> June 2020 brought under the provisions of Order 40 Rule 1, 4 and 8 of the Civil Procedure Rules, Sections 3 and 3A, of the Civil Procedure Act and all enabling provisions of the Law, the Applicant seeks interim injunctive orders against the Respondents by themselves, agents, representatives and/or other persons acting in their name from further demolishing, digging on or in any way dealing with the Applicant's property situated on PLOT No. 2A KAPKUGERWET MARKET, pending the hearing and determination of the Suit.

2. The said Application is supported by the grounds set on its face as well as on the Applicant's supporting and supplement affidavits dated the 8<sup>th</sup> June 2020 and 16<sup>th</sup> September 2020 respectively.

3. The Application is opposed by both the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents' replying affidavits dated the 22<sup>nd</sup> June 2020 and 29<sup>th</sup> June 2020 respectively.

4. The Application was disposed of by way of written submissions in which after giving a brief facts of the matter in question the Applicant framed his issues for determination as follows;

- i. Whether the Applicant is the lawful owner of parcel of land PLOT No. 2A KAPKUGERWET MARKET.
- ii. Whether the road being constructed by the Respondents exists on the official survey map.
- iii. Whether the Applicant is entitled to injunctive orders sought by him.

5. On the first issue for determination, it was the Applicant's submission that pursuant to a sale agreement dated 13<sup>th</sup> January 2007 between himself and the original owner of the suit premises and further vide a letter dated 29<sup>th</sup> October 2012 requesting the town clerk to transfer the property to his name, he had acquired ownership of the said property whereby he had continued to make payments and has been issued with the receipts in respect of the suit property which he claims is in existence and as such has been recognized by the 2<sup>nd</sup> Respondent and/or their agents.

6. On the second issue for determination, it is the Applicants submission that the maps marked by the Respondents as CJ-3 and SK-1 do not emanate from the District Surveyor's office and neither have they been certified by the District Surveyor. To the contrary, his own map herein annexed as MKR-1 which clearly shows that the road intended to be constructed by the Respondents does not exist and further that there are power lines running along the middle of the intended road.

7. The last issue for determination and while relying on the principles provided for under Order 40 Rule 1 of the Civil Procedure Rules, the Applicant submitted that he had met the required standards for issuance of a temporary injunction against the Respondents.

8. That the Respondents had destroyed part of his property and if not prevented, they would proceed to cause even more serious destruction to which he would suffer substantial loss.

9. That if the orders were not granted the entire suit would be a futility given that his property would have been destroyed and a road

constructed and should he get judgment in his favour, the same would have been overtaken by events. That the Respondents did not stand to suffer any loss or damage as there would only be a mere delay in carrying out of the intended works. The Applicant sought for his application to be allowed.

10. The application was opposed by the 1<sup>st</sup> Respondent's submission through their issues for determination framed as follows:

- i. Whether there was notice issued
- ii. Whether the Applicant had encroached on a road reserve area.
- iii. Whether the Applicant is entitled to an order of injunction as understood in the **Giella vs. Cassman Brown & Co.** (sic) case
- iv. Who bears the costs of the application?

11. On the first issue for determination, it was the 1<sup>st</sup> Respondent's submission that they had erected a notice of the project, which served as notice upon the Applicant, pursuant to making markings on the Applicant's perimeter wall, on the intent to demolish the area that had encroached on the road reserve. To this effect, it was the 1<sup>st</sup> Respondent's submission that the notice erected on the perimeter wall and markings thereto amounted to notice upon the Applicant.

12. On the second issue for determination, the 1<sup>st</sup> Respondent submitted that they had sought the services and advice of the land surveyor and further in accordance to their map herein annexed as JC-3, it had been clear that the Applicant and other persons had encroached on the road reserve area to which their walls had been marked for demolition with the marking 'X'. That the Applicant's contention that there was no road reserve and that he had been paying rates for the said suit land held no substance as it did not give him a right to build on a road reserve.

13. On the third issue as to whether the Applicant was entitled to an order of injunction as understood in the **Giella vs. Cassman Brown & Co.** (sic) the 1<sup>st</sup> Respondent submitted that the Applicant had not established a prima facie case with a possibility of success because by him having built a wall in disregard of a boundary that existed between the road and land known as LR KAPKUGERWET Plot 2A was not demonstrative enough that his rights had been infringed. The fact that he did not provide a map to demonstrate the measurements of the alleged plot 2A and the fact that he had constructed his wall within the dimensions of the said plot which was not clear whether it was plot 2 or 2A in itself was proof enough that there had not been established a prima facie case.

14. That further the fact that he had encroached by about 1.6 meters into the road was also proof enough that he had no proprietary interest in the road reserve and was therefore a trespasser. That equity called to the Applicant to come to court with clean hands. Reliance was placed on the decided case in **Daniel Kamau Mugambi vs Housing Finance Company of Kenya Limited [2006] eKLR.**

15. The 1<sup>st</sup> Respondent further submitted that the Applicant would not suffer irreparable harm incapable of being compensated in damages as they had demonstrated that he had encroached on the road reserve and therefore he could not lose what was not his. That in the alternative, if the court found that the Applicant would suffer damages, then such injury could be compensated by way of costs. Reference was made to the case of **Joseph Waininia Kinyanjui & Another vs Kenya National Highways Authority [2018] eKLR.**

16. Lastly the 1<sup>st</sup> Respondent submitted that the balance of convenience tilted in their favour as construction of the impugned route was a project meant to benefit the public. Reference was made to the case of **Paul Gitonga Wanjau vs gathuthis Tea Factory Company Ltd & 2 Others [2016] eKLR.** That if the injunction was granted it would inflict greater hardship on the public.

17. The 1<sup>st</sup> Respondent sought for costs of the application as the Applicant had dragged them to court on an application that was unmerited having known that he had encroached on the road reserve.

18. The 2<sup>nd</sup> Respondent's submission also in opposition of the application was to the effect that pursuant to an Enforcement Notice having been issued to the Applicant to remove the illegal structures that had encroached on the road reserve, and further pursuant to a personal visit by the Kericho County Land Surveyor's assistant one Sylvester Kipngetich to the Applicant informing him that the notice was founded and demolition would proceed if he did not remove the perimeter wall, the Applicant ignored the notice and/or advice.

19. Subsequently the Applicant's perimeter wall and other illegal structures within the road reserve that had been ear-marked for demolition were demolished.

20. The 2<sup>nd</sup> Respondent framed their issues for determination as follows;

- i. Whether the Applicant is the lawful owner of parcel of land known as Plot No. 2A Kapkugerwet Market.
- ii. Whether the Applicant encroached on the road reserve
- iii. Whether the Applicant is entitled to injunctive orders sought.

21. The 2<sup>nd</sup> Respondent submitted that it was not very clear from the documents annexed by the Applicant in his application as to whether he was the proprietor of the suit parcel of land herein as Plot No. 2A Kapkugerwet Market did not reflect on the original map and neither had the subdivision and the mutation of Plot 2A been officially registered. That if indeed the said mutations had been registered, than the Applicant would have known the correct position of the beacons.

22. On the second issue for determination, the 2<sup>nd</sup> Respondent's submission was in the affirmative to the effect that according to an official Map and Government report commissioned by their Department of Lands Housing and Physical Planning as well as the Department of Public Works, Roads and Transport herein annexed as SK-2, the same was to the effect that indeed the Applicant had encroached on the reserve road by 1.6 meters wherein he had constructed an illegal wall.

23. That the Applicant was not entitled to the orders sought as he had not demonstrated that he had an arguable case with a high chance of success. That he had not demonstrated his likelihood to suffer irreparable loss as the wall had already been brought down and damages could be remedied to compensation. The 2<sup>nd</sup> Respondent, like the 1<sup>st</sup> Respondent submitted that the Applicant had come to court with dirty hands and therefore the equitable remedies sought were not obtainable.

24. Similarly, the 2<sup>nd</sup> Respondent submitted that the Applicant had not demonstrated that he had obtained the requisite approvals from themselves before constructing the said perimeter wall. Reference was made to the decided case in **Parkside Medical Centre Limited vs. Nairobi City County Civil Appeal No. 54 of 2016**. He sought for the Applicant's application to be dismissed with costs as it had no merit and the ex-parte interim orders issued to be vacated.

#### **Determination.**

25. I have considered the Application, the annexures filed herein and the submissions by the parties to the suit. Consequently the pending issue for determination is whether this Court should grant the Applicant an interim injunction pending the hearing of the suit.

26. The celebrated case of **GIELLA versus CASSMAN BROWN (1973) EA 358** set out conditions for the grant of an interlocutory injunction which principles were authoritatively captured in the famous Canadian **case of R. J. R. Macdonald vs. Canada (Attorney General) [1994] 1 S.C.R. 311** where the three part test of granting an injunction were established as follows:-

- i. Is there a serious issue to be tried( prima facie case)
- ii. Will the Applicant suffer irreparable harm if the injunction is not granted;
- iii. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (Often called "balance of convenience").

27. On the first issue as to whether the Plaintiff/Applicant in this matter had made out a prima facie case with a probability of success. I am guided by the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, where a prima facie case was described as follows:

*“A prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case 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.”*

28. Looking at the facts of this case as submitted, the Court has been moved under a Certificate of Urgency, by the Applicant, to issue temporary injunction against the Respondent. At this stage, the Court is only required to determine whether the Applicant is deserving of the Orders sought. The Court is not required to determine the merit of the case.

29. Has the Applicant herein demonstrated that he has a genuine and arguable case? The Respondent has argued and asserted that the Applicant's proprietorship to the suit land is questionable and therefore he cannot be deserving of protection under the law. The Applicant on the other hand in asserting his ownership rights over the suit property has submitted that pursuant to a sale agreement dated 13<sup>th</sup> January 2007 between himself and the original owner of the suit premises and further vide a letter dated 29<sup>th</sup> October 2012 requesting the town clerk to transfer the property to his name, he had acquired ownership of the said property whereby he had continued to make payments of rates and has been issued with the receipts in respect of the suit property indicating that he has been recognized as its owner.

30. I note however that there was neither an allotment letter, title deed nor any registerable documents within the law presented to court as prima facie evidence that the Applicant had proprietary ownership and /or interest of either Plot No. 2A Kapkugerwet Market or the impugned road reserve. To this effect, I find that no prima facie evidence has been established to warrant interlocutory orders.

31. The Court of Appeal in the case of **Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society (2001) IEA 86** cited by **Gitumbi, J** with approval in the case of **Joseph Wambua Mulusya –vs- David Kitu & Another (2014) eKLR** observed as follows:-

*“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied”.*

32. On this ground only, the Applicant's application is destined to fail, however if I am wrong then I shall consider the other two grounds as set out in the **Giella case** supra.

33. On the second limb as to whether the Applicant has demonstrated that he stands to suffer irreparable damage that cannot be compensated in damages in case the injunction is not granted, the court has to consider the rival arguments by the parties. The Applicant argues that the Respondents had destroyed part of his property and if not prevented, they would proceed to cause even more serious distraction to which he would suffer substantial loss.

34. That if the orders were not granted the entire suit would be a futility given that his property would have been destroyed and a road constructed and therefore should he get judgment in his favour, the same would have been overtaken by events. That the Respondents did not stand to suffer any loss or damage as there would only be a mere delay in carrying out of the intended works.

35. For their part the Respondents argue that the Applicant would not suffer irreparable harm incapable of being compensated in damages as they had demonstrated that he had encroached on the road reserve and therefore he could not lose what was not his. That in the alternative, if the court found that the Applicant would suffer damages, then such injury could be compensated by way of costs. That the demolitions of constructions that had encroached on the road reserve was necessary in order to construct the road for benefit of the public. The Respondent's position therefore I find represented the greater public interest while the Applicant's interest is private.

36. I further find that since the wider public would suffer more if construction of the road was stalled by reason of an injunction having been granted barring its construction, that the wider and greater public good and interest would militate against the court granting an injunction in favor of the Applicant.

37. It is my consideration that the Applicant can be adequately compensated in damages after valuation of his property, if at the conclusion of the trial he is found to be the proprietor of the suit land and/or if he has not encroached on the road reserve see the case of **Joseph Waininia Kinyanjui** (supra)

38. Taking into account all the circumstances of this matter the balance of convenience would be against hindering the completion of the construction of the road hence it tilts against granting an injunction.

39. Consequently, I dismiss the application dated 8<sup>th</sup> June 2020

Each party to bear their own costs.

**Dated and delivered at Kericho this 25<sup>th</sup> day of February 2021.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**