



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 176 OF 2019

SIMON KAMAU GITAU.....1ST PLAINTIFF/APPLICANT

WILSON WAITHAKA GITAU.....2ND PLAINTIFF/APPLICANT

JOSEPH KANGETHE KABOGO(Suing as the personal
representative of Kangethe Kabogo).....3rd PLAINTIFF/ APPLICANT

REBECCA NYAKERI NYONGO(Suing as the personal
Representative of Stephen Nyongo Mutinda).....4th PLAINTIFF/ APPLICANT

HANNAH WANJIRU NYONGO(Suing as the personal
representative of Stephen Nyongo mutinda).....5th PLAINTIFF/APPLICANT

MONICAH MURUGI NYONGO (Suing as the personal
representative of Stephen Nyongo Mutinda).....6th PLAINTIFF/APPLICANT

VERSUS

KENYA NATIONAL HIGHWAY AUTHORITY.....DEFENDANT/RESPONDENT

RULING

By a **Notice of Motion Application** dated 27th November 2019, the Plaintiffs/Applicants sought for the following orders:-

1. THAT an order of Injunction be granted herein restraining the Defendant/Respondent whether by itself , through its employees, servants and or agents from executing the Notice of intended demolition dated 2nd July 2019, from demolishing the timber yard and/ or removing the structures , timber and Plaintiff's goods and machinery or in any way interfering with the Plaintiffs properties and developments erected on Title Number Ruiru Town 265 pending the hearing and determination of the suit herein.

2. THAT an injunction be granted to restrain the Defendant/ Respondent, whether by itself , through its employees, servants and or agents or in any way howsoever from removing demolishing, encroaching or in any way interfering with the 1st Plaintiff/s/ Applicant's Timber yard business that he operates on his share of the parcel of land known as Title No. Ruiru Town / 265 pending the hearing and determination of this suit.

The Application is premised on the grounds that the Plaintiffs/ Applicants are the registered owners of the suit property. That they have developed the suit property with the 1st Plaintiff/ Applicant setting up a timber yard business on his share of the property. Further that the Plaintiffs/ Applicants were issued with a title deed to the suit property and have been enjoying continuous quiet and an uninterrupted possession of the suit property for the last **20 years**. That the suit property is valued at **Kshs.100,000,000/=** and the Plaintiffs/ Applicants are in current occupation.

Further that on **2nd August 2019**, without any colour of right, the Defendant/ Respondent unlawfully served the 1st Plaintiff/ Applicant with a **Notice** of intended demolition dated **2nd July 2019**. In the Notice, the Defendant/ Respondent unlawfully claims that the 1st Plaintiff/ Applicant has encroached on a road reserve on **Ruiru-Thika A2S Gwa-Kairu Road** by setting up **timber yard**, without written authority of the Director General of the Defendant/Respondent. Further that the Defendant/ Respondent has in the **Notice** threatened to demolish and/or remove the **timber yard** business that is run by the 1st plaintiff/ Applicant **within 30 days** from the date of the issuance of the **Notice** at the 1st Plaintiff/ Applicant expense. That the suit property is a private property and not a road reserve and therefore the Defendant has no statutory mandate to issue a **Notice** pursuant to **Section 49(4)** of the **Kenya Roads Act**. Further the Defendant/Applicant Notice of intended demolition is **null and void** and contrary to **Section 27 of the Registered Land Act** and contrary to **Article 40 of the Constitution** as the Plaintiffs/ Applicant hold an indefeasible title over the suit property. That unless restrained by an order of this Court, the Defendant/ Respondent will proceed to enforce and execute the impugned **Notice** of intended demolition dated **2nd July 2019**, and the Plaintiffs/Applicants stand to suffer irreparable loss and damage.

In his Supporting Affidavit, **Simon Kamau Gitau**, the 1st Plaintiff/ Applicant herein averred that together with the 2nd to 6th Plaintiffs/ Applicants, they are the rightful owners of the suit property herein and have an indefeasible title. That his Advocates have advised him that the subject matter herein touches on the ownership of land, and in the event they are unlawfully evicted, the Defendant/Respondent will be at liberty to utilize the suit property to the applicants' detriment. Therefore, it will be just and in the interest of justice that the Court grants the orders sought.

The Application is opposed and the Defendant / Respondent through **Daniel Mbuteti**, its Senior Surveyor, swore a Replying Affidavit on **27th January 2020**, and averred that the suit property is situated in **Ruiru** along the **Thika Super Highway**. That during the expansion of the **Nairobi-Thika Road in 1972**, the old road corridor was expanded from **36.58m (120feet)** to a minimum width of **80 meters** and realigned on some sections to accommodate the new road design at that time. That the realignments affected privately owned parcels of land and the said parcels of land were legally acquired by the Defendant/Respondent under the **Land Acquisition Act**.

Further that one of the parcels of land affected by the improvement of the road in **1972** was plot **No. 7418/2**, registered in the name of **S.K Gitau & 3 others** and the area affected from the said parcel was **12.09 acres**. That the acquisition by the Government was effected through negotiation and although it was not gazetted in the Kenya Gazette, the same was confirmed through a letter dated **27th January 1972**, signed by Valuer **G.Hollis**. Further that the letter shows a list of **19** properties, plot numbers, list of registered areas, acquired areas and remarks on the acquisition. That the letter confirms that full compensation has been paid in final settlement of all claims and also suggested lodging caveats against the affected titles. It was his contention that the owners of **L.R 7418/2**, were fully compensated and the government took possession of the affected portion of land measuring **12.09 acres** and proceeded to construct the **Thika Dual Carriage Way** on the subject land in the year **1972**.

That in **1986, L.R 741/2**, was subdivided into **five (5)** subplots and one of the subplots was **L.R Ruiru Town/ 265**, which was to be surrendered as a public road, since it had already been acquired and paid for in **1972**. That both the new and old roads at the section were in use until **2008**, when the Government embarked on improving the **Nairobi - Thika Road**, by constructing additional lanes, new interchanges and footbridges among other road amenities. That the acquisition of the said parcel was for public good and the creation of the suit property in the name of private individuals was illegal. Further that the allegations that the Applicants have any form of business structure on the suit property are untrue as the road occupies the whole of the suit property. He further averred that from the records in possession of the Defendant/Respondent, there is a discrepancy between the land acquired by the government which was **12.09 acres**, and the areas actually excised/ surrendered was **10.8674**, and that an area of about **1.23 acres** still remain to be surrendered and the Plaintiffs/ Applicants should claim their land from the subplot. He urged the Court to dismiss the Application.

The Plaintiffs/Applicants filed a further Affidavit sworn by **Simon Kamau Gitau** sworn on **20th July 2020**, and denied that the negotiations referred to culminated into compulsory acquisition. That the same were not gazetted and no compensation was awarded pursuant to **Section 8 of the Land Acquisition Act**. Further that the Defendant/Respondent did not take possession of the suit property by serving a **Notice** and consequently the title to the land did not vest in the Defendant/ Respondent pursuant to **Section 19(1) of the Land Acquisition Act**. That the Plaintiffs/Applicants have been enjoying peaceful possession for **20 years**. That had the property been vested in the Defendant/ Respondent, the Government would not have issued the title deed to the Plaintiffs/ Applicants. That the Plaintiffs/ Applicants are protected by **Article 40 of the Constitution** and if the Defendant/ Respondent wishes to compulsorily acquire the suit property, it should abide by the Constitution and follow the due process of the Law as laid down in **part VII of the Land Act 2012** on **Compulsory Acquisition**.

The parties filed their written submissions which this Court has carefully read and considered. The issue for determination is **whether the Plaintiffs/ Applicants are entitled to the orders sought**.

The Plaintiffs/ Applicants have sought for injunctive orders which this Court can either grant or deny after consideration of the available evidence. There are interim orders in place which were issued at the first instance and which have been extended severally. In determination herein, the Court will be guided by the principles set out in the locus classicus case of **Giella ... Vs... Cassman Brown Co Ltd (1973)EA 358**, which states as follows:-

“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.”

Further at this stage, the Court is not required to deal with disputed facts and will therefore not deal with the merits and or demerits of the case. See 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.”

The three principles set out above are sequential in nature and the Plaintiffs/Applicants must be able to satisfy all the three. Have the Applicants established a *prima-facie* case with probability of success at the trial?

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”.

The Plaintiffs/ Applicants have annexed a copy of a title deed which indicates that they are the registered owners of the suit property. The said title deed is dated **9th June 1989**. Though the Defendant/ Respondent has claimed that the suit property was compulsorily acquired by the government, this contention has been controverted by the Plaintiffs/ Applicant. As held earlier, at this juncture the Court is not called upon to deal with disputed facts, as the same cannot be determined at an interlocutory stage through competing affidavits evidence.

The Plaintiffs/ Applicants have produced a copy of the title deed that shows that they are the registered owners. Further the Plaintiffs/Applicants have produced photographs that confirm that there is a **timber yard** on the suit property which has been earmarked for demolition. Therefore, the Plaintiffs/Applicants being the registered owners of the suit property and the fact that a timber yard on their property is on the verge of being demolished, then they have established a *prima facie* case, with a probability of success at the trial. The Plaintiffs/Applicants have shown that they have a right over the suit property and the said right has been breached. The interference of the Plaintiffs/applicants use and enjoyment of the suit property by the Defendant/ Respondent amounts to breach of their rights.

The 2nd Principle is whether Plaintiffs/Applicants will suffer irreparable harm and/or loss which cannot be compensated by an award of damages.

‘Irreparable loss’ was described in the case of **Paul Gitonga Wanjau...Vs...Gathuthi Tea Factory Co. Ltd & 2 Others, Nyeri HCC No.28 of 2015**, as ***simply injury or harm that cannot be compensated by damages and would be continuous.***

*The Defendant/ Respondent has acknowledged that the Plaintiffs/ Applicants have been asked to leave the suit property. Though the Defendant/ Respondent averred that there is no business located on the suit property and that only a road exists thereon, the Court has seen evidence to the effect that a **timber yard** has been marked for demolition.*

*The 1st Plaintiff/ Applicant has averred that he has been in possession of the suit property for over **20 years**. There is a business on the suit property and it is not in doubt that if the said **timber yard** is demolished and the Plaintiffs/ Applicants are the successful parties, they will suffer irreparable harm and/or loss that cannot be compensated by way of Damages. Be that as it may, there is no reason why the Court should let the Applicants take damages while it can prevent the demolition by way of an Injunction. See the case of **Niaz Mohammed Janmohammed ...Vs... Commissioner for Lands & 4 Others (1996) eKLR**, where the Court held that:-*

“It is no answer to the prayer sought, that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such right or atone for transgression against the law, if this turns out to have been the case. These considerations alone would entitle the Applicant to the grant of the orders sought.”

The third Principle is that if the Court is in doubt to determine the matter on a balance of convenience. The Court herein is not in doubt and further more the balance of convenience would tilt in favour of leaving matter as it is by maintaining the status quo. The status quo herein mean that there is a timberyard on the suit property and the same should not be demolished the main suit is heard and determined on merit. See the case of **Virginia Edith Wambui...Vs....Joash Ochieng Ougo, Civil Appeal No.3 of 1987 (1987) eKLR**, where the Court of Appeal held that:-

“The general principle which has been applied by this court is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided on a trial.”

*Having now carefully considered the **Notice of Motion Application** dated **27th November 2019**, brought by the Plaintiffs/ Applicants herein, the Court finds it merited and the same is allowed entirely in terms of prayers **no. 3 and 4** with costs to the Plaintiffs/Applicants.*

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 11TH DAY OF MARCH, 2021

L. GACHERU

JUDGE

11/3/2021

Lucy - Court Assistant

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic and in light of the directions issued by the Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

By Consent of:

M/s Lipow holding brief for Mr. Issa for the 1st Plaintiff/Applicant

No appearance for the 2nd Plaintiff/Applicant

No appearance for the 3rd Plaintiff/Applicant

No appearance for the 4th Plaintiff/Applicant

No appearance for the 5th Plaintiff/Applicant

No appearance for the 6th Plaintiff/Applicant

Mr Omondi holding brief for Mr. Achachi for the Defendant/Respondent

L. GACHERU

JUDGE

11/3/2021