



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT MOMBASA

ELC NUMBER 198 OF 2020

JAMAL AGIL SAID.....1ST PLAINTIFF/APPLICANT

NOORU MUHSIN SALEH.....2ND PLAINTIFF/APPLICANT

ABDULRAHMAN ABDALLA AGIL.....3RD PLAINTIFF/APPLICANT

AMIRA ABDULLA SIHAG.....4TH PLAINTIFF/APPLICANT

VERSUS

KENYA RURAL ROADS AUTHORITY.....DEFENDANT/RESPONDENT

RULING

1. Before me is the plaintiffs/applicants application dated 3rd November 2020 brought under Section 1A, 3A and 63 (e) of the Civil Procedure Act, Order 40 rule 1 and Order 51 rule 1 of the Civil Procedure Rules and Article 159 (2) of the Constitution of Kenya 2010. . The application seeks the following orders:-

a) Spent

b) Abandoned

c) Abandoned

d) That in the alternative to prayer 3 above, and in the inherent power of the court, pending the hearing and determination of the suit herein, an order of temporary mandatory injunction to issue, directing the defendant to remove at their own cost, the cabro paving blocks since illegally laid on the plaintiffs' suit property, to wit, MOMBASA/BLOCK XII/243 and MOMBASA/BLOCK X11/244 MI respectively.

e) That the costs of this application be borne by the defendant.

2. The application is supported by the affidavit of the 1st applicant/plaintiff which inter alia states that the plaintiffs are the registered owners of the suit property and attached title documents. That the applicants became aware of the defendant's trespass of the suit property sometime in October 2019. That the respondent/defendant has constructed a road of cabro paving unto the suit premises. That the road covers almost two thirds of the suit property.

3. The affidavit further alleges that the applicants wrote to the respondents in protest on 20th October 2019. That the applicants demanded the respondent to immediately stop construction of the road and remove the already laid blocks. That the respondent is yet to respond to the said letter.

4. That the respondent instead wrote to the Mombasa county government that confirmed the construction on the suit premises. The letter was a proposition to remove the said cabro, however no action was taken as the status quo remains the same. That the said construction has inhibited the applicants from developing the suit property leading to economic damage.

5. An affidavit of service dated 18th November is on record that confirms the applicants served the respondent with the application. On 15th December 2020, the advocate on record for the applicants informed court that the applicants would be abandoning prayer two and three and would only pursue prayer three of the application.

6. The court has considered the application and is satisfied that the respondent was duly served and has not filed a response. The issue before this court for determination is whether a temporary mandatory injunction should be issued against the defendant to remove the cabro paving blocks.

7. The applicants have sought a temporary mandatory injunction pending hearing and determination of the suit under Order 40 Rule 1 of the Civil Procedure Rules which provides as follows:-

“Where in any suit it is proved by affidavit or otherwise—

a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

8. The applicants are seeking a temporary mandatory injunction to compel the defendant to remove the cabro paving blocks laid on the suit property at their own cost. The considerations for granting interlocutory mandatory injunctions were well stated in the case of **Kenya Breweries Ltd & Another vs Washington O. Okeyo [2002] eKLR** where the Court of Appeal said:-

“The test whether to grant a mandatory injunction or not is correctly stated in Vol.24 Halsbury’s Laws of England 4th Edition paragraph 948 which read:- ‘A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiffs ... a mandatory injunction will be granted on an interlocutory application.”

The Court of Appeal quoted with approval an English decision in the case of **Locabail International Finance Ltd vs Agroexport and others (1986) 1 ALLER 901** where it was stated:-

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

9. In the case of **Nation Media Group & 2 others vs John Harun Mwau [2014] eKLR** the Court of Appeal said:-

“It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances ... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrated as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases.”

10. The applicants must satisfy court that there are not only special and exceptional circumstances, but also that the case is clear. The applicants state that two thirds of the suit property has been covered by cabro blocks that have been laid by the defendant to their detriment. The applicants have attached titles that prove the suit property belongs to them as well as letters to show the respondents supposedly admitting to laying cabro and requesting the Mombasa County Government for them to be removed.

11. The respondent as a state corporation is mandated by the Roads Act 2007 to construct, upgrade, rehabilitate and maintain rural roads. In this case the respondent has used public resources to construct the road since October 2019 and it would be against public interest for court to order for destruction of the same road nearly two years later without going to full trial.

12. The applicants should have approached court for the prayers sought herein to stop the construction before the respondent went ahead to construct the road. The prayers herein have been sought one year later, therefore the applicants have failed to prove to court the special circumstances that exist for issuance of mandatory temporary injunction.

13. Moreover the orders sought herein are also in the sought in the plaint and amount to final orders. .The damages that the applicants have suffered can be equated to an economic loss and can be compensated by monetary value. The applicants are seeking orders that if granted, full trial will be of no use as there will be no issue to determine. The applicants should await trial for the full determination of the case after hearing or earlier determination.

14. The upshot is that the application dated 3rd November 2020 is dismissed. No orders as to costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 8TH DAY OF MARCH, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE