



Ayieko v Regional Surveyor, Kisumu & 4 others (Environment & Land Case E017 of 2023) [2024] KEELC 3973 (KLR) (2 May 2024) (Ruling)

Neutral citation: [2024] KEELC 3973 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE E017 OF 2023**

SO OKONG'O, J

MAY 2, 2024

BETWEEN

DAVID OTIENO AYIEKO PLAINTIFF

AND

REGIONAL SURVEYOR, KISUMU 1ST DEFENDANT

LAND REGISTRAR, KISUMU 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

CHARLES ODHIAMBO 4TH DEFENDANT

DANIEL ODHIAMBO NYANG'IEN 5TH DEFENDANT

RULING

1. The Plaintiff brought this suit against the Defendants on 1st November 2023. In his plaint dated 4th September 2023, the Plaintiff averred that together with George Fred Owino and Erick Ouma Ayieko they were the registered proprietors of all that parcel of land known as Title No. Kisumu/Korando/3117 (hereinafter referred to only as “the suit property”. The Plaintiff averred that at all material times, the suit property shared a common boundary with all that parcel of land known as Title No. Kisumu/Korando/3150 (hereinafter referred to only as “Plot No. 3150”). The Plaintiff averred that there had never been an access road between the suit property and Plot No. 3150 and that even during the land adjudication at Kisumu Korando Adjudication Section, no such road was created.
2. The Plaintiff averred that Plot No. 3150 was subsequently subdivided into three portions namely; Title Nos. Kisumu/Korando/4256, 4257 and 4258 (Plot Nos. 4256, 4257 and 4258). The Plaintiff submitted that Plot No. 4256 was also subdivided which subdivision gave rise to Title Nos. Kisumu/Korando/ 4610 and 4611(Plot Nos. 4610 and 4511). The Plaintiff averred that the subdivision of Plot No. 4256 was carried out fraudulently in that a road that had never existed was created over the



suit property to serve one of the portions of Plot No. 4256 namely, Plot No. 4610 owned by the 4th Defendant. The Plaintiff averred that if any access road was to be created during the subdivision of Plot No. 4256, the same ought to have been created within the said plot. The Plaintiff averred that the access road could only be created through the suit property with the consent of the registered owners thereof which was not sought. The Plaintiff averred that the creation of the said access road was arbitrary, illegal and fraudulent.

3. The Plaintiff averred that during the determination of the boundary dispute between the Plaintiff, the 4th Defendant who owned Plot No. 4610 and the 5th Defendant who owned Plot No. 4257, the 1st and 2nd Defendants purported to confirm the validity of the said illegal and fraudulent access road. The Plaintiff averred that the 1st and 2nd Defendants also purported to approve the encroachment by the 5th Defendant on the suit property and, illegally and arbitrarily moved the long existing boundary between the suit property and the original parcel of land, Plot No. 3150 thereby increasing the size of Plot No. 4257. The Plaintiff averred that the 5th Defendant cut down the trees that had been planted on the lawful boundary between the suit property and Plot No. 4257 and had fenced the extended portion of his Plot No. 4257 using euphorbia plants and iron sheets.
4. The Plaintiff averred that the 4th Defendant filed a suit in the lower court against him namely, Kisumu CMCELC No. 345 of 2018 (hereinafter referred to only as “the lower court suit”) in which an order was made directing the 1st and 2nd Defendants to fix the boundaries of the suit property and the other plots mentioned above. The Plaintiff averred that when the said suit was filed against him, he did not have the full facts concerning the said illegal access road particularly whether it was created during the land adjudication exercise. The Plaintiff averred further that the 1st, 2nd and 3rd Defendants were not parties to the said suit. The Plaintiff sought judgment against the Defendants for;
 1. A permanent injunction restraining the Defendants from creating an illegal and fraudulent access road on the suit property;
 2. An order of a permanent injunction restraining the 4th Defendant from using the suit property as an access road;
 3. An order directing the 1st, 2nd, and 4th Defendants to remove the beacons placed on the suit property by the 4th Defendant;
 4. An order compelling the 1st and 2nd Defendants to rectify the survey map of Kisumu/Korando Map Sheet No. 15 by cancelling the access road fraudulently created and inserted on the suit property;
 5. An order compelling the 1st, 2nd and 5th Defendants to restore the ancestral boundary between the suit property and Plot no. 4257 in accordance with the 1st Edition of the Survey Map for Kisumu/Korando and the Mutation of November 1990;
 6. An order compelling the 5th Defendant to adjust his fence line to accord with the said ancestral boundary;
 7. An order compelling the 1st and 2nd Defendants to file a copy of the amended Survey Map in court for record purposes;
 8. General damages; and
 9. Costs and interest.



5. What is before the court is a Notice of Motion application dated 4th September 2023 brought by the Plaintiff seeking the following orders;
 1. Spent.
 2. Spent.
 3. That the court be pleased to order the rectification of the survey map of Kisumu/Korando, Map Sheet No. 15 by the cancellation of the access road fraudulently created and inserted on the suit property;
 4. That the court be pleased to order the removal of the beacons placed on the suit property by the 4th Defendant;
 5. That the court be pleased to order the restoration of the ancestral boundary between the suit property and Plot No. 4257 in accordance with the 1st Edition of the Survey Map for Kisumu/Korando and the Mutation of November 1990;
 6. That the court be pleased to compel the 1st and 2nd Defendants to file a copy of the amended Survey Map in court for record purposes;
 7. That the Officer in Charge of Kisumu Police Station, Riat Police Station or any other Police Station having jurisdiction over the area to ensure compliance with the orders;
 8. That the court be pleased to order costs and compensation to the Plaintiff for the loss suffered from the date of creation of the illegal access road;
 9. That the orders sought do apply to CMCELC No. 345 of 2018(the lower court suit).
 10. The costs of the application.
6. The application that was supported by the affidavit of the Plaintiff was brought on grounds similar to the ones set out in the plaint which I have highlighted above. It is not necessary to repeat the same here. The 4th and 5th Defendants opposed the application. The 5th Defendant filed a replying affidavit sworn on 26th February 2024. The 5th Defendant admitted that he was the registered owner of Plot No. 4257. The 5th Defendant averred that before he purchased the Plot, he engaged a surveyor who confirmed to him the boundaries of the plot and the positions of the beacons. He stated that he put up a house on the Plot which he had occupied since 2008 without any problem. The 5th Defendant denied that Plot No. 4257 was created illegally or fraudulently. The 5th Defendant averred that the issue of the access road was raised in the lower court suit and the same was heard and determined conclusively. The 5th Defendant averred that the issue was res judicata. The 5th Defendant averred that the Plaintiff's suit was frivolous and vexatious and amounted to an abuse of the process of the court.
7. The 4th Defendant opposed the application through a Notice of Preliminary Objection and a replying affidavit. In his Notice of Preliminary Objection dated 4th December 2023, the 4th Defendant contended that the Plaintiff had no locus standi to bring the suit since he had not obtained a Grant of Letters of Administration in respect of the estate of his grandmother who owned the suit property. The 4th Defendant contended further that the suit was res judicata in that the issues raised in the suit were raised in the lower court suit and the same were heard and determined in favour of the 4th Defendant. The 4th Defendant averred that the Plaintiff appealed against the decision of the lower court which appeal was pending determination.



8. In his replying affidavit dated 19th February 2024, the 4th Defendant averred that the injunction sought by the Plaintiff concerning the access road could not be granted since the said access road was not on the suit property owned by the Plaintiff. The 4th Defendant averred that the said access road was the subject of the lower court suit which determined its status. The 4th Defendant averred that the said access road was supposed to serve Plot No. 4610 owned by the 4th Defendant and that the Plaintiff had blocked it and refused to open the same necessitating a court order for the demolition of the structure the Plaintiff had put up thereon. The 4th Defendant averred that the Plaintiff was using delaying tactics to avoid complying with the orders made by the lower court. The 4th Defendant averred that the Plaintiff's suit was an abuse of the process of the court.

The submissions

9. The application was argued orally on 6th March 2024. The Plaintiff submitted that the Defendants created an access road on the suit property without his consent. The Plaintiff submitted that the Defendants had not rebutted his contention that the said access road was created fraudulently and illegally. On the Defendants' contention that the suit was res judicata, the Plaintiff submitted that the issues raised before this court were not raised in the lower court suit. The Plaintiff submitted further that some of the parties in the present suit were also not parties to the previous suit. The Plaintiff submitted that in the circumstances, this suit was not res judicata. The Plaintiff relied on two decisions in support of his submissions.
10. In his submissions in reply, the 4th Defendant argued that this suit was a continuation of the lower court suit. The 4th Defendant submitted that he won the lower court suit and that the Plaintiff had not brought anything new before this court. The 4th Defendant urged the court to dismiss the application. The 1st, 2nd, 3rd and 5th Defendants did not appear at the hearing of the application and did not make submissions.

Analysis and determination

11. I have considered the Plaintiff's application together with the affidavit filed in support thereof. I have also considered the 4th and 5th Defendant's affidavits filed in reply to the application. Finally, I have considered the submissions by the parties. The Plaintiff's application was brought under Article 50 of *the Constitution*, Sections 1A, 1B and 3A of the *Civil Procedure Act*, Chapter 21 Laws of Kenya and all other provisions of the law. I have set out earlier in this ruling the prayers sought by the Plaintiff in the plaint and in the application before me. I have noted that prayers 1 and 2 of the application are spent. Prayer 1 sought the certification of the application as urgent while prayer 2 sought an interim order of injunction pending the hearing of the application which the court declined to grant. I am of the view that all the remaining prayers in the Plaintiff's application are seeking final orders which the court cannot grant on an interlocutory application. The orders sought in the application are the same orders sought in the plaint. The court cannot grant final orders before hearing the suit.
12. Even if it were to be assumed that the orders sought are for a temporary injunction against the Defendants pending the hearing and determination of the suit, I would still not have granted the same. The principles upon which this court exercises its discretion in applications for a temporary injunction are well settled. As was stated in *Giella v. Cassman Brown & Co. Ltd* [1973] EA 358, an applicant for a temporary injunction must show a prima facie case with a probability of success, and such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience. In



Nguruman Limited v. Jan Bonde Nielsen & 2 Others[2014]eKLR, the Court of Appeal adopted the definition of a prima facie case given in Mrao Limited v. First American Bank of Kenya Limited & 2 Others[2003]eKLR and went further to state as follows:

The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. ...All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bonafide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed.”

13. The Plaintiff has not persuaded me that he has satisfied the conditions for granting a temporary injunction. The Plaintiff has attempted to demonstrate that the access road in dispute did not exist in the 1st Edition of the Registry Index Map (RIM) for Kisumu/Korando Registration Section and in the initial subdivision of Title No. Kisumu/Korando/3150. There is however a finding by the lower court that the road existed. That finding has neither been set aside nor reviewed. The court was informed that there is a pending appeal before this court against the lower court decision. Even if the Plaintiff had succeeded in convincing this court that the said access road was unlawfully and fraudulently created, the Plaintiff still had to demonstrate that he stood to suffer irreparable harm if the orders sought were not granted. The Plaintiff did not establish this condition for granting a temporary injunction. The Plaintiff did not convince me that the existing status quo would cause him irreparable harm.

Conclusion

14. In conclusion, I find no merit in the Notice of Motion application dated 4th September 2023. The application is dismissed with costs to the 4th and 5th Defendants.

DELIVERED AND DATED AT KISUMU ON THIS 2ND DAY OF MAY OF 2024.

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

The Plaintiff in person

The 4th Defendant in person

Mr. Kowinoh for the 5th Defendant

Ms. J. Omondi-Court Assistant

