



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT KAJIADO

ELC CASE NO.1 OF 2019

STEPHEN NJUGUNA.....1ST APPLICANT

JOHN MUTURIA M'MWENDA.....2ND APPLICANT

SAMUEL MWANGI KIRUKI.....3RD APPLICANT

VERSUS

COUNTY GOVERNMENT OF KAJIADO.....1ST RESPONDENT

THE NATIONAL LAND COMMISSION.....2ND RESPONDENT

KENYA RURAL ROADS AUTHORITY (KERRA).....3RD RESPONDENT

RULING

What is before me for determination is the Plaintiffs' Notice of Motion application dated the 8th June, 2019 brought pursuant to Article 50, 159 (2) of the Constitution; Section 26 of the Land Registration Act; Sections 107 – 115, 125, 126, 128 & 131 of the Land Act; Section 13 and 14 of the Environment and Land Court Act; and Section 58 of the Environmental Management and Coordination Act 1999.

The Plaintiffs' are seeking orders of temporary injunction in respect of land parcel numbers NGONG/ NGONG/ 13359; 9708; 13355; 9702; 69683; 33939; 9700; 29965; 13350; 14212; 14211; 60338; 29964; 42529; 9716; 32786; 32785; 29966; 16687; and 19664 hereinafter referred to as the suit lands. Further, that the court do make a declaration that the 1st Respondent breached the law by encroaching on private properties in order to expand a public road without following the laid down legal procedures of acquiring private land for compulsory acquisition.

The application is premised on the grounds that on the 4th December, 2018, the 1st Respondent's agents unlawfully trespassed into the suit lands along Kanisani, Ole Kisio as well as Sinai Roads by surveying the same and placing markings on the walls as well as gates and putting notices of their intention to illegally annex including demolishing some portion of the suit lands measuring approximately 2 metres or thereabouts. On 5th December, 2018, the 1st Respondent unlawfully issued a notice dated the 30th November, 2018 informing the affected land owners to realign their fences and/or developments within 30 days failure to which it would demolish the developments on the road. The 1st Respondent has not adhered to the laid down procedures of compulsory acquisition. The Registered owners of the suit lands are the absolute and indefeasible owners. The 1st Respondent deliberately neglected to initiate a public participation process in order to involve the rightful registered owners of the suit lands.

The application is supported by the affidavit of the 1st Plaintiff STEPHEN NJUGUNA where he reiterates their claim above and deposes that demolitions are normally undertaken by the 3rd Respondent on behalf of the 1st Respondent. He contends that the 2nd Respondent has never made a decision on whether or not it accepted any request by the 1st Respondent to undertake acquisition of the suit lands on its behalf. He claims the 1st Respondent unlawfully marked electricity distribution poles and street lights for demolition purposes which will seriously disrupt essential services to Applicants and residents living alongside the affected roads. He states that the 1st Respondent unlawfully intends to disconnect water by demolishing water supply infrastructure without involving the residents, owners of houses and properties alongside the affected roads. He insists the 2nd Respondent has not published in the Kenya Gazette any notice of houses and properties situated along the affected Roads. Further, the said notice has never been delivered to the Registrar of Lands as well as every person who appears to have an interest in the suit lands. He reiterates that the 2nd Respondent has never authenticated the suit lands by the survey department to identify the registered owners. Further, the 2nd Respondent has never inspected nor caused a Government Valuer to undertake valuation of the exact amount of monetary value of the properties affected by the demolitions. He further states that the demolitions would affect houses and

structures and by issuing the said notice, they have already caused a scare in the area, with many tenants vacating.

The application is opposed by the 1st Respondent whose County Surveyor WESLEY SANKUYAN RISANCHO filed a replying affidavit where he avers that the application is misconceived, misnomer and an attempt to take a short cut in the proceedings and avoid the due process of the law. He denies that the 1st Respondent's agents have trespassed on the suit lands. He insists it is the 2nd Respondent who can undertake compulsory acquisition of the suit lands while the 3rd Respondent's mandate is for maintenance and management of rural roads. He claims if the properties were surveyed and marked, then the Plaintiffs were trespassers who have invaded a road reserve. He reiterates that the residents approached the 1st Respondent with a view to having the said road widened to 9 metres and thus a notice was issued to those on the road reserves to align their boundaries. Further, a majority of the residents complied with the said notice except the Applicants. The 1st Respondent further filed Groups of Opposition claiming the application does not disclose facts material to the case and intends to interfere with the mandate of the Respondents. Further, that it lacks merit and sufficient notice was issued to the Plaintiffs.

The 2nd and 3rd Respondents did not file a response to the application.

Both the Applicants and 1st Respondent filed their respective submissions that I have considered.

Analysis and Determination

Upon consideration of the instant Notice of Motion, Supporting and Replying affidavits, Grounds of Opposition including submissions the only issue for determination at this juncture is whether the Plaintiffs are entitled to orders of temporary injunction pending the outcome of the suit.

The principles for consideration in determining whether temporary injunction can be granted or not is well settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358**.

In line with this principle, the Court will proceed to interrogate whether the Applicants have made out a prima facie case with a probability of success at the trial.

In the first instance as to whether the Applicants have demonstrated a prima facie case with probability of success, I wish to refer to the case of **Mrao V First American Bank of Kenya Ltd & 2 others (2003)KLR 125** where the Court defined what a prima facie case is. It is not in dispute that the Plaintiffs are owners of the suit lands. They claim that the 1st Respondent's agents unlawfully trespassed into the suit lands along Kanisani, Ole Kisio as well as Sinai Roads by surveying the same and placing markings on the walls as well as gates and putting notices of their intention to illegally annex including demolishing some portion of the suit lands measuring approximately 2 metres or thereabouts. Further, that the 1st Respondent issued an unlawful notice informing the affected land owners to realign their fences and/or developments within 30 days failure to which it would demolish the developments on the road. They insist the 1st Respondent has not adhered to the laid down procedures of compulsory acquisition and deliberately neglected to initiate a public participation process in order to involve the rightful registered owners of the suit lands.

The 1st Respondent on the other hand denied trespassing on the suit lands and insists it is the 2nd Respondent who can undertake compulsory acquisition of the suit lands while the 3rd Respondent's mandate is for maintenance and management of rural roads. It explains that if the properties were surveyed and marked, then the Plaintiffs were trespassers who have invaded a road reserve. Further, that it is the residents who approached the 1st Respondent to widen the 9 metres culminating in its issuing a notice. It contends that after issuance of the notice, to those on the road reserves to align their boundaries, majority of the residents complied with the said notice except the Applicants.

I note both the Applicants and 1st Respondent admit there is a road aligned to the suit lands. Except for a map which is an annexure, none of the parties have furnished court with a surveyor's report to confirm the measurement of the road vis a vis levels of encroachment on the suit lands. I am of the considered view that the averments raised by both the Plaintiffs and 1st Defendant cannot be determined at this juncture but once viva voce evidence has been adduced.

In the case of **Case of Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, the Court of Appeal held that in an application seeking injunctive relief, speculative injury cannot suffice and there must be more than unfounded fear and the injury should be actual as well demonstrable that cannot be compensated by damages. Since both parties admit the presence of a road in the area but with the facts as presented it is not possible to make injunctive orders as well as a declaration that the 1st Respondent breached the law by encroaching on private properties in order to expand a public road without following the laid down legal procedures of acquiring private land for compulsory acquisition. I opine that these orders can only issue once viva voce evidence is adduced and report presented by a government surveyor on the level of alleged encroachment.

It is against the foregoing and based on the evidence before me that I direct that the obtaining status quo be maintained pending the outcome of the suit. I further direct that this matter be set down for hearing on a priority basis.

Costs will be in the cause.

Dated, signed and delivered in open court at Kajiado this 10th July, 2019.

CHRISTINE OCHIENG

JUDGE