



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 413 OF 2016**

**DAVID KINYUA WAWERU.....1ST PLAINTIFF**

**BEATRICE NZALA.....2ND PLAINTIFF**

**=VERSUS=**

**JUSTIN NYAGAH KARIONJI.....DEFENDANT**

**RULING**

1. On 23/12/2019, the plaintiffs in this suit, David Kinyua Waweru and Beatrice Nzala, took out an originating summons dated 23/12/2019 under **Sections 32 and 38** of the **Limitation of Actions Act** seeking this court's determination of the following questions:

*a) Whether there exists an easement or right of way over Land Reference Number 5982/2 as the servient tenement enjoyed by the proprietors and those beneficially entitled to Land Reference Nos 5982/3, 5982/4, 5982/5, 5982/6, 5982/7, 5982/8, 5982/9, 5982/10, 5982/11, 5982/12, 5982/13, 5982/14, 5982/15, 5982/16, 5982/17, 5982/18, 5982/19, 5982/20, 5982/21, 5982/22, 5982/23, 5982/24, 5982/25, 5982/26, 5982/27, 5982/28, 5982/29, 5982/30 and 5982/71 (jointly known as Tembo Court) as the dominant tenements measuring 6 metres in width and running longitudinal to the border of the servient tenement and Land Reference No 5982/6;*

*b) Whether the easement or right of way has been enjoyed peaceably, openly as of right and without interruption for a period of more than 20 years and hence has become absolute and indefeasible under Section 32 of the Limitation of Actions Act;*

*c) Whether an order should be made Section 38(3) of the Limitation of Actions Act vesting the easement in the proprietors of Land Reference Nos 5982/3, 5982/4, 5982/5, 5982/6, 5982/7, 5982/8, 5982/9, 5982/10, 5982/11, 5982/12, 5982/13, 5982/14, 5982/15, 5982/16, 5982/17, 5982/18, 5982/19, 5982/20, 5982/21, 5982/22, 5982/23, 5982/24, 5982/25, 5982/26, 5982/27, 5982/28, 5982/29, 5982/30 and 5982/71 (jointly known as Tembo Court);*

*d) Whether the Defendant should bear the costs of this suit*

2. They simultaneously brought a notice of motion of even date seeking the following verbatim interlocutory injunctive orders:

**1. Spent**

**2. Spent**

**3. Spent**

**4. An interim injunction be and is hereby issued to compel the defendant to immediately pull down and remove the iron sheet partial barricade erected on the access road to Tembo Court and in default the plaintiffs be at liberty to remove the barricade.**

**5. The Registrar of Lands, Inland Register, be and is hereby to issue the applicants with an official search certificate of LR No. 5982/2 as provided under Section 34 of the Land Registration Act and to without requiring the applicants to provide a copy of the title to the property (sic).**

**6. An temporary injunction be and is hereby issued to restrain the defendant whether by himself, his agents, servants and / or employees from fencing off, cordoning, blocking, barricading, closing the access road to LR No.s 5982/3, 5982/4, 5982/5, 5982/6, 5982/7, 5982/8, 5982/9, 5982/10, 5982/11, 5982/12, 5982/13, 5982/14, 5982/15, 5982/16, 5982/17, 5982/18, 5982/19, 5982/20,**

**5982/21, 5982/22, 5982/23, 5982/24, 5982/25, 5982/26, 5982/27, 5982/28, 5982/29, 5982/30 and 5982/71 (jointly known as Tembo Court) or in any other manner whatsoever interfering with the plaintiffs' right of way over a portion of Land Reference No. 5982/2 measuring 6 metres in width and running longitudinal to the border of the said Land Reference No. 5982/2 and 5982/6 pending the hearing and determination of this suit.**

**7. The costs of this application be borne by the defendant.**

3. The said notice of motion dated 23/12/2019 is the subject of this ruling.

It was supported by two affidavits sworn on 23/12/2019 by the two plaintiffs. The 1st plaintiff deposed that he was the proprietor of Land Reference Number 5982/4, a subdivision out of Land Reference Number 5982. The defendant owns Land Reference Number 5982/2, also a sub-division within the same Scheme. He added that there were 30 sub-divisions out of Land Reference Number 5982, identified as Land Reference Numbers **5982/2 to 5982/30** and Land Reference Number **5982/71**. The estate created out of the sub-division scheme is called Tembo Court Estate. Land Reference Number 5982 was owned by M/s Solar Property Developers Limited who upon sub-division sold the sub-divisions to the current owners. The approved sub-division scheme was not followed and as a result, the sub-divisions on the ground were created without an access road. Consequently, the plot owners filed a case in court in 1989 against Solar Property Developers Limited and the defendant herein, seeking an access road. Subsequently, a tripartite meeting was held on 16/1/1990 between Solar Property Developers Limited, the defendant herein, and the Scheme Plot Owners. It was agreed in the meeting that Solar Property Developers Limited would compensate the defendant and the defendant would surrender part of his land to create a road of access for Tembo Court Plot Owners. The defendant was to stop charging the fee of Kshs 400 per month which he was charging and the case was to be withdrawn. The 1st plaintiff added that he had never heard anything about the case since then.

4. The 1st plaintiff further deposed that on 5/12/2019, the defendant erected an iron sheet barricade over the access road that completely sealed off the access road. Since then, the defendant would only partially open the access road to allow one small vehicle at a time. The 1st plaintiff further deposed that Plot Owners of Tembo Court had been using part of the plaintiff's land as an access road for over 20 years. Lastly, he deposed that efforts to obtain copy of title documents relating to the defendant's property were futile because the Lands Registry needed a copy of the title. He urged the court to grant the orders.

5. The 2nd plaintiff deposed that she was a tenant occupying Land Reference Number 5982/71. She ran a school on the said piece of Land. She exhibited a tenancy agreement dated 13/2/2019 and a Certificate of Registration of School relating to Tembo Court Beadom School, indicating that the School was registered on 7/11/2008.

6. The defendant opposed the application through a replying affidavit sworn on 18/6/2020. He deposed that the applicants had not come to equity with clean hands because they approached the court with "lies and falsehoods" made to hoodwink the court into granting them orders. He denied the plaintiffs' contention that they had been enjoying an easement over his land since the year 1989 without any objection. He stated that the 1st plaintiff's land is the one that was used as an access road and when the 1st plaintiff closed the access, plot owners in the scheme initiated dialogue with the original owner, Solar Property Developers Ltd. A tripartite arrangement was reached to the effect that the original owner was to give the defendant additional land and the defendant was in turn to surrender part of his land to create a road of access. The said tripartite agreement had, however, not been honoured. He added that the 2nd plaintiff had grabbed part of the road reserve set aside by the developer of Land Reference Number 5982 for surrender to the Government as a road reserve. The defendant further deposed that there was a public road available for use by the plot owners of Tembo Court.

7. I have considered the application together with the response thereto. I have also considered the parties' respective submissions. Further, I have considered the relevant law and jurisprudence. The key question falling for determination in this application is whether the applicants have satisfied the criteria upon which our courts exercise jurisdiction to grant interlocutory injunctive reliefs.

8. The said criteria was articulated in **Giella v Cassman Brown (1973) E.A. 358**. First, the applicant is required to demonstrate a *prima facie* case with a probability of success. Second, the applicant is required to demonstrate that if the injunction is denied, he would stand to suffer injury that may not be indemnified through an award of damages. Third, should the court have doubt on both or either of the above two limbs, the application is to be decided on a balance of convenience. Lastly, at this interlocutory stage, the court does not make conclusive or definitive findings on the key issues in the suit. Definitive and conclusive findings are reserved for judgment after trial.

9. The plaintiffs have come to court contending that all the Plot Owners of Tembo Court have a common easement over the defendant's property. The other plot owners are, however, not parties to this suit. Secondly, and most importantly, what emerges from the evidence placed before the court at this interlocutory stage is that use of the defendant's land was pursuant to a tripartite agreement involving the sub-division scheme promoter (Solar Property Developers Limited), plot owners of Tembo Court, and the defendant herein. There was to be a consideration for the use of the defendant's land, to be followed by a surrender of part of the defendant's land. The 1st plaintiff who was privy to the agreement has not told the court whether the terms of the tripartite agreement were met or not. Further, he has not told the court the exact time when use of the defendant's land ceased to be a mutual tripartite arrangement in pursuance of the tripartite agreement and became an easement.

10. Thirdly, it does emerge from the evidence placed before court at this interlocutory stage that there was a preceding litigation over the same subject matter, culminating into the above tripartite agreement. The applicants have not disclosed to the court the case number and the status of the preceding litigation as at this moment. They nonetheless want the court to proceed and issue injunctive orders without being appraised on the status of the preceding litigation and the exact date when time started running for the purpose of an easement.

11. Fourthly, the plaintiffs seek a joint interlocutory relief. The 2nd plaintiff deposes that she is not a land owner in Tembo Court. She is a tenant running a school on Land Reference Number 5982/71. She has exhibited a tenancy agreement dated 17/2/2019 and a school registration certificate dated 7/11/2008. The present originating summons was taken out on 23/12/2019. Considering that easements are now specifically provided for under Part X of the Land Act and accrue to the registered owner or lessee of the dominant land, the 2nd plaintiff was required to bring evidence to demonstrate that she has had a registered lease over the dominant land for the mandatory period of 20 years

prescribed under the **Limitation of Actions** Act. She has not placed that evidence before this court at this interlocutory stage.

**12.** The totality of the foregoing is that the applicants have not demonstrated at this interlocutory stage that they have a legitimate right over the defendant's land within the context of **Sections 32 and 38** of the **Limitation of Actions** Act, requiring protection by the court through an interlocutory injunctive order against the defendant. Put differently, they have not satisfied the first limb of **Giella v Cassman Brown (1973) E.A. 358**.

**13.** The court is alive to the fact that Parliament has under Section 140 of the Land Act provided a forum of redress for any owner of a land-locked land. The plaintiffs elected not to use that forum. Other plot owners in Tembo Court have not joined them in this originating summons. The evidence placed before court at this interlocutory stage is that although the promoter of the relevant sub-division scheme did not provide an access road within the scheme, there is a public road created out of Land Reference Number 13560 and is available to serve Tembo Court residents. It is also alleged that the 2nd plaintiff and another resident of Tembo Court have grabbed part of the available public access road for their individual use. In the circumstances, the balance of convenience would tilt towards declining to grant the applicants the injunctive relief which they seek against the defendant under **Sections 32 and 38** of the **Limitation of Actions Act**.

**14.** Lastly, the applicants prayed for a mandatory interlocutory order compelling the Land Registrar to give them an official search. This is a relief which should be sought in proceedings brought against the Land Registrar. The Land Registrar is not a party to the originating summons herein. In the circumstances, much as the court would have no hesitation in directing the Land Registrar to discharge his statutory duty, this can only be done on an appropriate platform where the Land Registrar is properly called upon to respond.

**15.** In the end, the plaintiff's application dated 23/12/2019 is dismissed for lack of merit.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9<sup>TH</sup> DAY OF JUNE 2021.**

**B M EBOSO**

**JUDGE**

**In the Presence of: -**

Mr Muigai for the Plaintiffs/Applicants

Court Assistant: June Nafula