



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 124 OF 2020 (OS)

**ERIC KIPROTICH SOI & OSCAR KIBET SOI (suing as the personal  
representative of the late LINAH CHELANGAT KIRUL...APPLICANTS**

**- VERSUS -**

**JOHN MATERE KERIRI.....1<sup>ST</sup> RESPONDENT**

**MARGARET WAMBUI LINDIJER.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. There are two applications. The Notice of Motion dated 8<sup>th</sup> April 2020 is brought under order 37 rule 7(1) and 2 of the Civil Procedure Rules, section 3A of the Civil Procedure Act and all enabling provisions of the law.

2. It seeks orders:-

**1. Spent.**

**2. Spent.**

**3. That this honourable court be pleased to grant a temporary injunction restraining the respondents whether by themselves, their agents and/or servants from offering for sale, receiving monies or transferring or dealing with the applicant's property known as LR No 2327/28/155, original No 2327/28/2 pending the hearing and determination of this suit.**

**4. That the costs of this application be provided for.**

3. The grounds are on the face of the application and are set out in paragraphs (a) and (f).

4. The application is supported by the affidavit Eric Kiplangat Soi, the Applicant herein, sworn on the 8<sup>th</sup> April 2020 and a further affidavit sworn on the 28<sup>th</sup> May 2021.

5. The application is opposed. There are grounds of opposition filed by the Respondents, dated 27<sup>th</sup> October 2020. There is also a replying affidavit sworn by Margaret Wambui Lindijer, the 2<sup>nd</sup> respondent sworn on the 27<sup>th</sup> October 2020.

6. There is also the Notice of Motion dated 13<sup>th</sup> November 2020 brought under order 40 rule 7 of the Civil Procedure Rules and order 51 rule 1 of the Civil Procedure Rules and all enabling provisions of law.

7. It seeks orders:-

**1. Spent.**

**2. That the honourable court be pleased to set aside and/or vacate the ex parte interim order number 2 granted to the applicant on 14<sup>th</sup> April 2020 in this matter pending the hearing of the application interpartes.**

**3. That the O.C.S Hardy Police Station do ensure compliance of this order.**

**4. That cost of this application be in the cause.**

8. The grounds are on the face of the application and are set out in paragraphs (i) to (viii). The application is supported by the affidavit of Margaret Wambui Lindijer the 2<sup>nd</sup> respondent herein sworn on the 13<sup>th</sup> November 2020.

9. It appears this application is not opposed.

10. On the 12<sup>th</sup> April 2021, the court with the consent of the parties directed that the two applications be heard together. The court also directed that the two applications be canvassed by way of written submissions.

### **The Applicant's Submissions**

11. They are dated 31<sup>st</sup> May 2021. They have raised three issues for determination;

**i. Whether the suit property is a public road or a road of access.**

**ii. Whether the defendant is a trespasser on the suit property.**

**iii. Whether the orders sought by the applicant are merited.**

12. The suit property is a road access. He has put forward the case of **Dellian Langata Ltd vs Symon Thuo Muhia & 4 Others [2018] eKLR**. There is no recognized public road of access through the suit property. The Respondents in the circumstances are not entitled to use the disputed strip of land which was hived off the applicant's suit property. The applicants have testified that the intention was to create access to their property in the event that they would want to subdivide their property further. They have put forward the case of **Kipkirui Arap Koske vs Philemon Kipsigei Tangus & Another [2015] eKLR**.

13. For a public property to be classified as a public road for use by the public, an application ought to be made to the relevant authorities pursuant to section 8 and 9 of the Public Roads and Roads Access Act, Cap 399 Laws of Kenya for consideration on creation of a public road. No such application under section 8 and 9 of the Act has been made to create a public road access on the applicant's property. In the absence of such application the disputed strip of road cannot be deemed to be a public road in terms of Section 13 of the Act.

14. In their pleadings the Respondents have not denied that they have been attempting to use the disputed strip of land to access their property and that indeed the applicants have developed the suit property for their own use.

15. The applicants reiterate that there is no recognized public road of access through the suit property and the respondents are not entitled to use the disputed strip of land which forms part of the applicant's property. They pray that the orders sought in the notice of motion dated 8<sup>th</sup> April 2020 be allowed.

### **The Respondent's submissions**

16. They are dated 2<sup>nd</sup> June 2021. The applicants aver at paragraph 5-7 of the affidavit in support of the application that he has acquired good title of the said parcel of land by way of adverse possession. The only way one can acquire rights over any property by adverse possession is pursuant to an order of the court under section 38 of the Limitation of Actions Act. There being no order to that effect the applicant has no *locus standi* to move the court regarding the suit property being LR NO 2327/28/1.

17. The property is an access road that is meant to serve LR NO 2327/151 and LR NO 2327/152. The property was surrendered at the time of subdivision for use as access road to serve LR Nos 2327/151 and 2327/152 and upon surrender the proprietor ceased to have any proprietary rights thereon.

18. By virtue of being an access road, the suit premises acquired the nature of public land governed under Article 62(m) of the constitution. For the application to convert it to a private road, he had to have made the requisite application under the relevant laws. They have put forward the case of **Mary Njeri Gatuha & 3 Others vs George Munui Mungai & 5 Others [2017] eKLR**. The applicants have not established a prima facie case with high chances of success at the trial.

19. The applicants have not demonstrated what loss they stand to suffer should the injunction not be granted. The alleged investment has been quantified at KShs.12,000,000/- hence there is already a liquidated figure for the said damages. And as such the applicants loss cannot be deemed to be irreparable.

20. The balance of convenience tilts in favour of the application being dismissed with costs. The applicants are not the registered and/or beneficial owners of the property they seeks to assert rights over.

21. The applicants are attempting to hoodwink this court into granting them exclusive rights to an access road that is meant for the benefit of the owners of LR NOS 2327/151 and 2327/152. They pray that the notice of motion dated 8<sup>th</sup> April 2020 be dismissed with costs.

22. I have considered the notice of motion dated 8<sup>th</sup> April 2020, the affidavit in support, the replying affidavit and the grounds of opposition.

I have also considered the written submissions filed on behalf of the parties and the authorities cited. The issue for determination are:-

**i. Whether the applicants' application meets the threshold for grant of temporary injunction.**

**ii. Whether an access road passes through the applicants' parcel of land.**

**iii. Who should bear costs of this application?**

23. At this juncture, it is necessary to briefly examine the legal principles governing the applications of this nature. In an application for injunction the onus is on the applicants to satisfy the court that it should grant an injunction. The principles were laid down in the precedent setting case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358**. In the case of **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**, the Court of Appeal stated what amounts to a prima facie case. I am guided by the above authorities.

24. It is the applicants' case is that they have for over twelve years been in continuous, uninterrupted possession of the said parcel known as LR NO 2327/155 (original No 2327/28/2) which they have used as a bush garden and later a guard house and access road onto the premises. Further that in the year 2014, they developed the said parcel by construction a 120 meter paved road, gate and guard house and access control security system into LR NO 2327/150.

25. The respondents on the other hand state that the suit property is an access road meant to serve LR NO 2327/151 and LR NO 2327/152. The respondents have however not controverted the applicant's averments that they have done some developments on the suit property since 2014. This is more than seven (7) years ago. The respondents have not told the court what steps they took since they claim it was an access road.

26. There is need to place evidence before the court to show that an application was made under section 8 and 9 of the Public Roads and Roads Access Act, Cap 399 Laws of Kenya for consideration of creation of a public road. In my opinion this is the evidence expected at the trial.

27. I agree with the applicants' counsel's submissions that there is no recognized public road of access through the suit property. The evidence so far presented is in favour of the status quo being maintained pending hearing and determination of the suit herein. In the case of **Dellian Langata Limited vs Symon Thuo Muhia & 4 others [2018] eKLR** the Court of Appeal made a distinction between a public road and a road of access as follows:-

**“...having regard to the above provisions we are persuaded that there is a distinction between a public road and a road of access. A public road is set apart and designated as such and once set aside is available for use by all members of the public without limitation or restriction save as may be determined by the relevant authorities. On the other hand, road of access has connotation of private usage and is characterized by a party having made an application to have an access road constructed to connect or link such party to utilities such as a public road, railway station or a halt. As correctly observed by the respondents the provisions do not apply where there is already a public road or road of access as in the instant case”.**

28. All in all, I find that the applicants have made out a case to warrant the orders sought. In essence the notice of motion dated 13<sup>th</sup> November 2020 fails. The same is dismissed with no orders as to costs. There is need for this court to hear evidence as to whether there is an access road through the suit property.

29. Accordingly, I find merit in the notice of motion dated 8<sup>th</sup> April 2020 and I grant the orders sought namely:-

**a. That a temporary injunction is hereby issued restraining the respondents whether by themselves, their agents and/or servants from offering for sale, receiving monies or transferring or dealing with the applicant's parcel of land known as LR No 2327/28/155, (original) LR No 2327/28/2 pending the hearing and determination of this suit.**

**b. That the costs of this application do abide the outcome of the main suit.**

It is so ordered.

**DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 22<sup>ND</sup> DAY OF JULY 2021**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Mr. Odengo for Mr. Mingo for the Applicants

Mr. Mwangi for Mrs. Mwadumbo for the Respondents

