



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 106 OF 2020

CHARLES NJENGA GATIMU..... PLAINTIFF/APPLICANT

-VERSUS-

KENYA NATIONAL HIGHWAY AUTHORITY.....DEFENDANT/RESPONDENT

RULING

The matter for determination is the Notice of Motion Application dated **13th November 2020**, bought under **Order 40, Order 51 Rule 1, Sections 1A, 3A and 3B** of the **Civil Procedure Act**, by the Plaintiff/ Applicant for Orders that;-

a) A Temporary Injunction do issue restraining the Defendant/Respondent by itself, its agents, servants, employees and or otherwise from demolishing and or interfering with the Applicant's building erected upon Land Reference Number Kiambaa/Ruaka/5260, pending hearing and determination of the Suit herein.

b) Any other relief that may be just to meet the ends of justice in this case.

c) That costs of this Application be in the Cause.

The Application is supported by the Affidavit of **Charles Njenga Gatimu** who averred that he purchased the subdivided plot being **LR Kiambaa/Ruaka/5260**, from **Nelson Gachiri Wanguku**. That on **3rd October 2013**, he wrote to the Defendant enquiring as to whether the proposed plot encroached on a road Reserve designate **C62** for the proposed Western bypass. That he was issued with a Certificate of title dated **29th October 2013**.

He contended that prior to the approval by the relevant authorities of the said change of user, the Respondent's Surveyor and the Applicant visited the suit property and established that it had 2 access roads. That on **5th August 2014**, Kiambu District Land Administrator approved the change of user to Commercial.

It was his further contention that before commencing construction, he sought the services of **Geomacks Survey Consultants**, who confirmed that he did not encroach on road Reserve designate **C62** and upon approval of the building, he constructed the said building. That he sought approval for the construction of the building from relevant authorities who approved the construction of the building. The said authorities are; Kiambu County Government, Sub County Government of Kiambu, District Land office, Sub County Physical Planning Department, NEMA and the National Construction Authority.

That on or about the month of **March 2019**, the Respondent's Surveyors, agents and employees trespassed upon the suit property and proceeded to place a mark on the building on allegations that the building had encroached on the proposed road reserve. Further, when he started construction, he backfilled the steep slopes in order to facilitate easy and efficient access from the main road to his building.

The Application is opposed and the Defedant/Respondent filed a Replying Affidavit dated **2nd December 2020**, by **Eliud Munene** who deponed that the Authority is responsible for the management, development, rehabilitation and maintenance of National Roads classified under **Class A, B, and C**. He further deponed that the Plaintiff/Applicant has not demonstrated that he will suffer any irreparable harm which would not be adequately compensated by an award of damages, and that the Plaintiff/Applicant has not demonstrated that the balance of convenience tilts in his favor as against the public.

It was his further contention that the Plaintiff/Applicant has failed to enjoin **Land Registrar, Kiambu County** to resolve the present dispute which is a boundaries dispute. That the Authority conducted a survey in the year **2013**, to confirm whether Land Reference Number **Kiambaa/ Ruaka/4079**, encroached onto the road reserve and at that time, the parcel of land was undergoing subdivision and upon conducting survey to ascertain boundaries, the Authority concluded that **LR Kiambaa/Ruaka/4079**, did not encroach into the road reserve.

The Defendant/Respondent also filed Notice of Preliminary Objection

dated 1st December 2020, and based it on the following;

1. The Court lacks Jurisdiction to entertain this matter. The Applicant's Application and suit is one whose subject matter is the boundary dispute of plot no. Kiambaa/Ruaka/5260, and encroached on the road reserve. The Plaintiff's Application is premature as it offends Section 18(2) of the Land Registration Act, which mandatorily reserves boundaries disputes for determination by the Land Registrar in the first instance prior to moving to this Honorable Court.

Parties were directed to file written submissions on the Plaintiff's/ Applicant's Application and the Defendant/Respondent's **Preliminary Objection**. The Plaintiff/Applicant filed his Written Submissions on 14th January 2021, through the Law Firm of A. G. N Kamau Advocates, while the Respondent filed its submissions on 24th February 2021, through Ian Mudavadi, Advocate

The Court having laid down the background of this case and considered the Application, the Replying Affidavit, Notice of Preliminary Objection, the rival written Submissions and Authorities relied upon, finds the main issues for determination are;

i. Whether the Applicant deserves the Orders sought in his Application dated 13th November 2020.

ii. Whether the Preliminary Objection dated 1st December 2020 is merited.

I. Whether the Applicant deserves the Orders sought in his Application dated 13th November 2020.

The Applicant having sought for Injunctive Orders is only entitled to either grant or denial of the same at this stage. The Court is not supposed to deal with the merit of the case at this stage. See the case of **Airland Tours and Travel Ltd...Vs...National Industrial Credit Bank, Milimani HCCC No.1234 of 2003**, where the Court held that:-

"In an Interlocutory application, the Court is not required to make any conclusive or definitive findings of facts or law, most certainly not on the basis of contradictory affidavit evidence or disputed proposition of law".

In determining whether to grant or not to grant the Orders sought, the Court will be guided by the principles set out in the case of **Giella ... Vs... Cassman Brown Co Ltd (1973)EA 358** which are:-

"The conditions for granting a temporary injunction in East Africa are well known and these are: First, the Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which might not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience. See also E.A Industries ..Vs...Trufoods (1972) EA 420."

Firstly, the Applicant needed to establish that he has a *prima-facie* case with probability of success. It is very clear that a *prima-facie* case was described in the case of **Mrao Ltd...Vs...First American Bank of Kenya Ltd & Others (2003)KLR**, to mean:-

"A case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter".

It is the duty of the Applicant's herein to establish that he has a *prima-facie* case. In the instant suit, there is no doubt that the Plaintiff/Applicant herein is the registered owner of the suit land **LR Kiambaa/Ruaka/5260**, as is evident from the Certificate of Ownership dated 29th October 2013. The Applicant's contention is that the Defendant/Respondent without any justification has forcefully trespassed and marked the Applicant's building for demolition. On its part, the Defendant/Respondent has denied the said allegations and averred that the Plaintiff/Applicant has failed to enjoin **Land Registrar, Kiambu County** to resolve the present dispute which is a boundaries dispute. However, the Plaintiff/Applicant has attached annexures showing approval by various government bodies. Therefore, from the above documents, unless contrary evidence is produced, the court finds and holds that the Plaintiff/Applicant has beneficial interest over the suit property.

Though the Court would require evidence to confirm whether the Plaintiff's parcels of land known as **Kiambaa/Ruaka/5260**, has encroached on the road reserve, the court finds that the evidence of attempted demolition by the Defendant/Respondent is *prima facie* proof that the substratum of the suit property would be interfered with. Thus this Court finds and holds that the Plaintiff/Applicant has established that he has a *prima facie* case with probability of success at the trial.

Secondly, If the Defendant/Respondent is allowed to proceed and interfere with the Plaintiff/Applicant's building by demarcating and establishing extent of encroachment, the same would change the land scape of the area and in the event the Plaintiff/Applicant is a successful litigant at the end of the main trial, then he would have suffered an irreparable loss or damages which might not sufficiently be compensated by an award of damages. See the case of **Olympic Sports House Ltd...Vs...School Equipment Centre Ltd (2012) eKLR**, where the Court held that:-

"a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction".

On the balance of convenience, the court finds that it tilts in favor of maintaining the **status quo** and the **status quo** herein is not to allow any demolition until the suit is heard and determined. See the case of **Virginia Edith Wambui...Vs...Joash Ochieng Ougo, Civil Appeal No.3 of 1987 (1987) eKLR**, where the Court of Appeal held that:-

“The general principle which has been applied by this court is where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided on a trial.”

1. Whether the Preliminary Objection dated 1st December 2020 is merited

A **Preliminary Objection** as envisaged in the case of **Mukisa Biscuits & Co. Ltd....Vs...West End Distributors Ltd (1969) EA 696** means:-

“...So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

The Defendant/Respondent has questioned jurisdiction of this Court. Jurisdiction is everything and if the court lacks the requisite Jurisdiction, it has no option but to down its tools. See the case of **Owners of Motor Vessel ‘Lilian S’...Vs...Caltex Oil (Kenya) LTD (1989) 1 KLR**,

where the Court held that:-

“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no Jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it at the moment it holds the opinion that it is without Jurisdiction”.

Therefore, the Court finds that the **Notice of Preliminary Objection** as filed by the Defendant/Respondent falls under the category of what amounts to a **Preliminary Objection** as described in the **Mukisa Biscuits Case (Supra)**.

The next question is whether the **Preliminary Objection** herein is merited?

The Defendant/Respondent alleges that the Authority conducted a survey in the **year 2019**, to confirm whether Land Reference Number **Kiambaa/Ruaka/5260**, encroached onto the road reserve and it found that it encroached by approximately **2 meters** on one side and **3.2 meters** on the other side. Further, that the road reserve measures **22 meters** on one side and **39 meters** on the opposite side from Ruaka to Limuru. While the Plaintiff/Applicant on the other hand through his appointed surveyors’ claim that he has not encroached on the road reserve, the Court at this juncture cannot determine the certainty of different measurements provided on the issue of boundaries.

The main issue herein is whether the Court has jurisdiction to determine this matter given that the Defendant/Respondent claims that this is a boundary dispute. It was not clear whether there was encroachment or the Plaintiff/Applicant interfered with boundaries. Further from the definition of what, a Preliminary Objection is, it is quite clear that the issue on boundaries cannot be raised on disputed facts.

There is clearly a need for ascertainment of facts and probing of the same that must be done. Therefore, the issue of whether or not the Plaintiff /Applicant has encroached on road reserve and the issue of boundaries, will require the Court to probe evidence and the same cannot amount to a Preliminary Objection.

Consequently the Court finds that the suit does not fall within the confines of **Section 18 (2) of the Land Registration Act**. In accordance with **Section 13 of the Environment & land Court Act**, the Court finds that it is well equipped with the necessary jurisdiction to hear and determine the instant suit.

Having now carefully read and considered the Applicant’s **Notice of Motion Application** dated **13th November 2020**, the Court finds it merited in terms of **prayer No. (c)** Further, the Defendant/Respondent **Notice of Preliminary Objection** dated **1st December 2020** is found **not merited** and the same is dismissed entirely with costs to the Plaintiff/Applicant.

However, the Plaintiff’s/Applicant’s Notice of Motion Application herein is allowed in terms of **prayer No. (c)** with Costs being in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 1ST DAY OF JULY 2021.

L. GACHERU

JUDGE

1/7/2021

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting Court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. A.G.N. Kamau for the Plaintiff/Applicant

Mr. Mudavadi for the Defendant/Respondent/objector

L. GACHERU

JUDGE

1/7/2021