



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC. NO. E002 OF 2021

JACKSON KIPNGENY KIPKURERE.....1ST PLAINTIFF

ELIZABETH SOGOME KIPKURERE.....2ND PLAINTIFF

VERSUS

DAVID BUSIENEI.....1ST DEFENDANT

STEPHEN AGUI SINGOEI.....2ND DEFENDANT

RULING

This ruling is in respect of an application by the plaintiff/applicants' dated 8th February 2021 seeking for the following orders;

- a) Spent
- b) That pending inter-parties hearing of this application the Honourable Court be pleased to issue an order of mandatory injunction ordering the defendant/respondents, their servants, agents, employees to remove barbed wire fence and structures enclosing access road separating those parcels of land known as SOY/KIPSOMBA BLOCK 12 (KIPSOMBA) 27,98 & 133 respectively.
- c) That pending hearing and determination of this application and main suit the Honourable Court be pleased to issue an order of mandatory injunction ordering the defendant/respondents, their servants, agents and employees to remove barbed wire fence and structures enclosing access road separating those parcels of land known as SOY/KIPSOMBA BLOCK 12 (KIPSOMBA)/27, 98 & 133 respectively.
- d) That the orders of the Honourable Court be enforced by the OCS Soy Police Station under the supervision of County Surveyor of Uasin Gishu.
- e) Costs of this application be borne by the defendant/respondents.

Counsel agreed to canvas the application by way of written submissions which were duly filed.

PLAINTIFF/APPLICANTS' SUBMISSIONS

Counsel for the applicants relied on the grounds on the face of the application, the supporting affidavit by the applicant and the annexures therein. It was counsel's submission that the applicants are husband and wife and have established their matrimonial home in the suit property known as SOY/KIPSOMBA BLOCK 12(KIPSOMBA)/27 registered in the name of the 1st Plaintiff/Applicant. That the defendants are the registered owners of parcels of land known as SOY/KIPSOMBA BLOCK 12 (KIPSOMBA)/98 117 respectively and are immediate neighbours of the plaintiffs.

Counsel submitted that the plaintiffs and the defendants have peacefully co-existed for some time as their parcels are adjacent to each other but separated by a road reserve which they all used together with the members of the public. That on or about 19th January, 2021 or thereabout the defendants/respondents without any justification moved the boundaries of their parcels and enclosed the entire road reserve into their portions by forcefully fencing it off denying the plaintiff/applicants access to their matrimonial home established in that parcel of land being SOY/KIPSOMBA BLOCK 12 (KIPSOMBA)/27

Mr Kibii further submitted that the plaintiffs reported the matter to County Surveyor, Uasin Gishu County, who moved to the ground and prevailed upon the defendants to remove the illegal fence but the defendants did not adhere to the contents of the report dated 25th January, 2021 necessitating the filing of this suit.

Counsel submitted that the court has jurisdiction to hear and determine this matter as the report dated 25th January 2021 complies with the provisions of Sections 18 and 19 of Land Registration Act No. 3 of 2012., the County Surveyor having visited the suit properties and established the beacons.

Counsel cited the case of **ESTHER WANJIKU MWANGI 3 OTHERS V WAMBUI NGARACHU [2017]eKLR** where the Court held that;

"14. Does the Court have jurisdiction to entertain this application? Jurisdiction is everything and whenever a jurisdictional issue is raised, it is important for the Court to pause and determine the issue before proceeding with the case.

Counsel also relied on the case of **Rahab Mumbi Kimani v Damaris Wanjiku Gachoka [2018]eKLR** where the court held that;

"I, however, hasten to debunk the claim by Mrs. Owessi, the defendant's advocate, that this court has no jurisdiction to deal with the issue of unlawful trespass on the land by the defendant in these proceedings. I assert that the ELC Court has the jurisdiction to handle all matters concerning land and environment and has the jurisdiction to consider suits on a case by case basis and to decide the issue of jurisdiction whenever it arose."

On the second issue as to whether the applicants are entitled to the order of mandatory injunction sought, counsel submitted that in an application for a mandatory injunction, an applicant must prove that it is a clear case that the Court will be assured that the same will succeed after the trial.

Counsel relied on the case of **Kenya Breweries Ltd & Another Vs... Washington O. Okeyo (2002) eKLR**, where the Court of Appeal held that:-

"A mandatory injunction can be granted in an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not usually be granted. However, if the case is clear and one which the court thinks ought to be decided at once or if the act done is a simple and summary one which can be easily remedied or if the Defendant attempted to steal a match on the Plaintiffs a Mandatory injunction will be granted on an interlocutory application".

Counsel further cited the case of **MAGNATE VENTURES LIMITED -VS- ENG. KENYA LIMITED (2009)eKLR** at page 538 where it was held as follows:

"A mandatory injunction need not be given at an interlocutory stage. It could be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it would not normally be granted.

However, it would be granted if the case was;

- (a) Clear and one which the court thought it ought to be decided at once or*
- (b) If the act done was a simple and summary one which could be easily remedied.*
- (c) Or if the defendant attempted to steal a march on the plaintiff.*

the decision to grant a mandatory injunction at the interlocutory stage was a decision dependent on the discretion of a judge and each case had to be decided on the basis of its own peculiar facts and circumstances. "

Mr Kibii therefore submitted that the plaintiff/Applicants have clearly demonstrated existence of an access road between parcels known as SOY/KIPSOMBA BLOCK 12 (KIPSOMBA)/27, 98 &117 which is documented on the annexures which show that the defendants have blocked access road.

Counsel also cited the cases of **KATANGI DEVELOPERS LIMITED V ATTORNEY GENERAL & ANOTHER [2019]eKLR**, **KENYA PIPELINE COMPANY LIMITED V RAIPLY WOOD (K) LIMITED** and **SILIPET PROPERTIES LIMITED & ANOTHER V CHEGE MWAURA & ANOTHER (2017) eKLR** where the court held that:

"It is also not in dispute that the user for which the said lane has been employed by the defendants has interfered with the normal use of the said lane which is supposed to aid free movement in the area. There is also no doubt that the plaintiffs are affected by the defendants' conversion of the said lane from an access road to a shop. There is no evidence before the court that the plaintiffs or other area residents were consulted by the 2nd defendant before it allocated the said lane to the 1st defendant. There is also no evidence that the procedure for allocating public land was followed during the allocation of the said lane to the 1st defendant. The 2nd defendant had argued that the disputed lane is not a road but a road reserve. According to section 2 of the Public Roads and Roads of Access Act, Chapter 399 Laws of Kenya, a road reserve is a public road. The defendants have no right to block or close a public road without following the due process. For the foregoing reasons, I am of the view that the allocation of the said lane to the 1st defendant by the 2nd defendant was wrongful. The 1st defendant's occupation of the said lane is similarly illegal. I don't think that

the situation is helped by the fact that there may be other people blocking the said lane at the opposite end.

The plaintiffs have contended that their access to the suit property is impeded by the container which the 1st defendant has placed on the said lane. I am persuaded that the loss likely to be suffered by the plaintiffs if the injunction sought is not granted is unquantifiable and as such is not capable of being compensated in damages.

In view of the foregoing, I am satisfied that the plaintiffs have met the conditions for granting both prohibitory and mandatory injunction sought. Consequently, I hereby allow the plaintiffs' application dated 11th March 2016 in terms of prayers 3 and 4 thereof. The 1st defendant shall remove the container that he has placed on the lane adjacent to L.R No. 209/ 1954/2 forthwith and in any event not later than thirty (30) days from the date hereof. The plaintiffs shall have the costs of the application. "

Counsel therefore urged the court to allow the application as prayed with costs.

DEFENDANT/RESPONDENTS'SUBMISSIONS

Counsel opposed the application and relied on the case of **Locabail International Finance Ltd v Agroexport and Others, (1986) 1 All ER 901** where the court held that:

"A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had right been granted, that being a different and higher standard than was required for a prohibitory injunction. "

Counsel submitted that the plaintiffs have failed to establish that they have a simple, plain, clear case and that the defendants have attempted to steal a march to warrant the grant of an interlocutory mandatory injunction. Further that the map compiled by the Survey of Kenya in 1996, no road is reserve of a public road or a road of access is indicated to be in existence therefore a map cannot be amended to create a public road or a road of access at the instance of the plaintiffs without compliance with the requirements of section 9 of the **Public Roads and Roads of Access Act**, Cap. 399 without an application being made to the District Roads Board for Uasin - Gishu being the area where the land is situated Counsel relied on ' Section 9 (1) which provides;

"Where any owner or occupier of Land is in respect of his Land so situated in relation to a public road which is passable to Vehicular traffic, or to a railway station or halt that he has not reasonable access to the same, he may make application to the board of the district in which such Land is situated for leave to construct a road or roads (herein after called a road of access) over any lands lying between his land and such public road or railway station or halt, and every such application shall be made in duplicate in the form and contain the particulars required in the first schedule to this Act. "

Mr Mogambi further submitted that the report by the Assistant Director Land Surveys Uasin Gishu dated the 25th January, 2021 cannot be implemented as it is not provided for in the **Public Roads and Roads of Access Act**, 399 in that no application has been made by the plaintiffs to the District Roads Board of Uasin Gishu and the defendants have never been served with the notice to show cause provided for in section 10 of the **Public Roads and Roads of Access Act**, Cap. 399. Section 10 (1) provides;

"On the receipt of such application for leave to construct a road of access, the board shall serve a notice by personal service or by registered post to the last known address of the owner or occupier of Land over which the proposed road of access is to pass, calling upon him to show cause within one month why the proposed road of access should not be granted. "

Counsel relied on the case of **Dellian Langata Limited v Symon Thuo Muhia, Mary Njoki Thuo, Agricultural Finance Corporation, Nairobi City Council & Council of Legal Education, (2018) eKLR** in which Justices Koome,(as she then was) Okwengu and Kiage, JJ.A observed;

"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. "

Mr Mogambi submitted that to implement the report dated the 25th January, 2021 as sought by the plaintiffs will not only be a clear breach of the law as the District Roads Board has never made an order for the creation of an 18 meters' road over the defendant's property and it will be tantamount to depriving the defendants of their property in breach of article 40 of the Constitution of Kenya, 2010.

Counsel cited the case of **Johnbosco Muinde Kamali & 5 others v Stephen Katili & Another, (2019) eKLR** where Justice O. Angote observed;

"If indeed the most convenient road to their properties is parcel number 450, then the procedure for creating a public access road should be followed. That procedure is provided for under the Public Roads and Roads of Access Act or Section 98 of the Land Registration Act. Under section 98 of the Land Registration Act, an owner of the Land can voluntarily grant an easement over his land. The law does not allow the court to compel the owner of the Land to create an easement. If indeed the proposed interested parties are Land locked, which they have admitted they are not, then the court, under the provisions of section 140 of the Land Act, can make an access order in respect of the suit land subject to several conditions including reasonable compensation."

Counsel stated that granting the orders sought in the motion will amount to determining the dispute between the parties at the interlocutory stage on conflicting affidavit evidence while the plaintiffs by prayer (a) in the plaint acknowledge that a declaration of rights has to be made at the hearing of the main suit.

Mr Mogambi urged the court to dismiss the application with costs to the defendants.

ANALYSIS AND DETERMINATION

The issues for determination in an application for mandatory injunction are whether there are any special or exceptional circumstances and only in clear cases either where the court thinks that the matter ought to be decided at once or where the injunction is directed at a simple and summary act which could be easily remedied or where the defendant has attempted to steal a march on the plaintiff. The issue is whether the application for mandatory injunction should be granted in the circumstances.

In the case of **Shariff Abdi Hassan vs. Nadhif Jama Adan [2006] eKLR** the court held that:

“The courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standards spelt out in law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case.”

Similarly, in the case of **Nation Media Group & 2 others vs John Harun Mwau [2014] eKLR** the Court of Appeal held that:-

“It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances ... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrated as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases.”

In the case of **Kenya Breweries Ltd & Another vs Washington O. Okeya [2002] eKLR**, (supra) the Court of Appeal stated that:.

“A mandatory injunction ought not to be granted on an interlocutory application in the absence or special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

In the current application the applicants have not demonstrated any special circumstances that would warrant the court to grant an order of mandatory interlocutory injunction. The mere averment that an access road has been blocked without clear explanation is not enough for the court to grant such a draconian order. Courts are slow at issuing mandatory interlocutory injunctions where the applicant has not shown any special circumstance to deserve the order.

Further in the case of **Shepherd Homes Ltd vs Shadahu (1971) I Ch 34** the court held as follows:-

“It is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action the court will of course grant such injunction as the justice of the case require; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even if it is sought to enforce a contractual obligation.”

This is a case which would require additional evidence to establish the existence of the road reserve and the access thereof. Granting the orders sought will determine the whole suit summarily and the issue of implementation of the Surveyor’s report dated 25th January 2021 is contested by the respondents on the procedure to be adopted. As stated in the above case, the case is not “unusually strong and clear” for the court to grant the order sought.

The applicant should fast track the hearing of this suit so that the issues are determined once and for all.

I find that this is not a suitable case for grant of mandatory interlocutory injunction as no special circumstance has been established to warrant such an order. The same is dismissed with each party bearing their own costs.

DATED and DELIVERED at ELDORET this 18TH DAY OF AUGUST, 2021

M. A. ODENY

JUDGE