



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 109 OF 2019

JIMMY NDAKA MUNDE

NUSHKA MUINDE.....PLAINTIFFS

VERSUS

COUNTY GOVERNMENT OF KILIFI...RESPONDENT

RULING

1. By this Notice of Motion dated 7th December 2019, Jimmy Ndaka Muinde and Nushka Muinde (the Plaintiffs) pray for orders as follows: -

3. That pending the hearing and determination of this suit, this Honourable Court be pleased to issue an order of temporary injunction restraining the Defendant, its agents, servants, employees and or assigns from interfering, trespassing, constructing and or undertaking any form of development including but not limited to construction of access road on the parcels of land known as Plot No. 15 Group XVII and 16 Group XVII Mida Greek; and

4. That (the) costs of this application be borne by the Defendant.

2. The application which is supported by an affidavit sworn by the 1st Plaintiff is premised on the grounds inter alia: -

a. That the Plaintiffs are the lawful registered proprietors of the said parcels of land;

b. That sometime in October 2018, the Defendant embarked on an illegal construction of Access Road cutting through the Plaintiffs' property from the main road all the way to the sea front near the Walk board without the Plaintiffs' consent;

c. That the aforesaid construction is illegal and unlawful because it does not adhere to the original existing plan providing for a pathway in the said area;

d. That to-date the Plaintiffs have never been compensated for the land that is being used for the construction and they have been deprived of their constitutional right to own and enjoy the subject properties; and

e. That unless an order is issued restraining the trespass and continuing illegal construction, the Plaintiffs stand to suffer irreparably as the property continues to depreciate in value.

3. The County Government of Kilifi (the Defendant) is however opposed to the application. Vide a Replying Affidavit sworn by its Legal Counsel Rehema Mwabaya and filed herein on 2nd October 2020, the Defendant avers that the construction, grading and gravelling of the subject road was completed in March 2019 and the orders sought herein can no longer be made or issued as they have been overtaken by events.

4. The Defendant further asserts that the Plaintiffs have failed to demonstrate that the Defendant has trespassed and or encroached on their parcels of land. At any rate, the Defendants assert that whatever loss the Plaintiffs may suffer or have suffered is quantifiable and determinable and hence it is not true that the Plaintiffs stand to suffer irreparable harm to warrant the orders herein sought.

5. In any event, the Defendant avers that the scale of convenience and public interest heavily tilts towards the Defendant County Government being allowed a chance to exercise its constitutional obligation and mandate in the construction of a public road to be used by the wider public. The Defendant therefore urges the Court to hold that public interest supersedes a private individuals' sense of entitlement.

6. I have carefully considered the application by the Plaintiffs and the response thereto by the Defendants. I have similarly perused and considered the submissions and authorities as filed herein by the Learned Advocates for the parties.

7. The traditional principles for the grant of an order of temporary injunction were long set out in the celebrated case of *Giella –vs- Cassman Brown & Company (1973) EA 360*, where the Court observed as follows: -

“First, an 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 would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide the application on the balance of convenience.”

8. As to what would amount to a prima facie case, the Court of Appeal had this to say in *Mrao Ltd –vs- First American Bank Ltd & 2 Others (2003) eKLR*: -

“.....in civil cases, it is 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.”

9. Expounding further on that definition of a prima facie case as stated in the *Mrao Ltd case (supra) in Nguruman Ltd –vs- Jan Bonde Nielsen (2014) eKLR*, the Court of Appeal expressed itself as follows: -

“We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.”

10. The two Plaintiffs herein crave an order of injunction to restrain the Defendant County Government from interfering with, trespassing or constructing an access road on the parcels of land described as Plot No. 15 Group XVII and 16 Group XVII Mida Greek. It is their case that they are the lawful owners of the suit properties and that sometime in October 2018, the Defendant embarked on an illegal construction of an access road on the suit properties without their permission or authority.

11. The Defendant does not dispute that the Plaintiffs are the registered proprietors of the suit properties. It is their case that the orders sought by the Plaintiffs have been overtaken by events as the construction complained of was long completed in March 2019. While denying that they have encroached on the Plaintiffs’ properties the Defendant on the other hand avers that all that it did in constructing, grading and gravelling of the road was in the exercise of its constitutional obligation and mandate to construct a public road for use by the wider public. In this respect, the Defendant asserts that the public interest to have the road supersedes the Plaintiffs’ private sense of entitlement thereto.

12. That argument by the Defendant County Government is as arrogant as it is shocking. The Plaintiffs have produced as annexure “JNM2” a Certificate of Ownership showing clearly that they are the registered owners of the suit properties. That Certificate demonstrates a clear and unmistakable right to own and possess the said properties and to exercise any rights appurtenant to such ownership. They have told the Court and annexed evidence to the effect that the access road constructed by the Defendant does not adhere to the original plans for the area which require the access road to be constructed at the border of the Plaintiffs’ properties.

13. In asserting that it has constructed a public road, the Defendant does not even pretend to demonstrate that the land was public. No attempt has indeed been made to demonstrate on the part of the Defendant that the access road complies with the plans for the area and or that it did acquire the land from the Plaintiffs for a public purpose.

14. As it were, a right to acquire and own property is not absolute. Article 40 (3) (b) of the Constitution gives room for one to be deprived of property or interest in or right over property for a public purpose or in the public interest. There is however a rider that such deprivation must be carried out in accordance with the Constitution and any Act of Parliament that requires prompt payment of just compensation and allows a right of access to a Court of law. There is no evidence that the Defendant has made any effort to acquire the subject properties in the manner provided in law.

15. Having failed to adhere to the process of such acquisition, I am unaware of any law that allows the Defendant to just walk into a private individual’s parcel of land, do anything it wants thereon and claim to have done so in the public interest. Having failed to adhere to the due process, the Plaintiffs private interests over the suit properties must prevail over the so-called public interest.

16. In the circumstances herein, I am satisfied on a prima facie basis that the Defendant’s entry and construction of an access road on the suit properties is illegal and unconstitutional. The Plaintiffs have therefore established a prima facie case against the Defendants with a probability of success. I am equally satisfied that the Plaintiffs stand to suffer irreparable harm. The Defendant has wrongfully entered their properties and created an unplanned access road thereon. This means that the Plaintiffs have been dispossessed of the portions of the land through which the road runs. If the orders of injunction are not granted, the Plaintiffs would be kept off their land as the same would now be turned into a public thoroughfare.

17. The upshot of the foregoing is that I find merit in the Plaintiffs’ Notice of Motion dated 7th December 2019. I allow the same with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF SEPTEMBER, 2021

J.O. OLOLA

JUDGE