



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 217 OF 2019

NGAMAU MUGAI MUNGAI.....1ST PLAINTIFF

NGAMAU LIMITED.....2ND PLAINTIFF

=VERSUS=

J.M KATHENGE.....1ST DEFENDANT

NAIROBI CITY COUNCIL.....2ND DEFENDANT

RULING

1. This is the Notice of motion application dated 27th June 2019 brought under order 40 rule 1, 2 of the Civil Procedure Rules section 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law.

2. The 1st and 2nd Plaintiffs seek the following orders:-

a) Spent.

b) Spent.

c) That a temporary injunction be and is hereby issued restraining the Defendants/Respondents, their servants, agents or anyone else acting on their behalf from entering, trespassing into, demolishing any wall structures, selling, transferring or in any other manner dealing with the suit parcels of land L.R No.81314 and 18316 until hearing of the main suit.

d) Cost of this application be provided for.

3. The application is based on grounds set out on the face of the application. It is supported by the 1st Plaintiff's supporting affidavit sworn on 27th June 2019.

4. He deponed that the 1st and 2nd Plaintiffs are proprietors of the suit properties as they have leases registered in their respective names. He also deponed that they erected a perimeter wall around the suit properties and invested heavily in a slaughter house that over 1000 people depend on to make a living per day.

5. He further deponed that grabbers have been eyeing the suit properties and in 2015, a group called "Vijana Kaa Rada Initiative" demolished part of the wall seeking access in a bid to occupy the land and seek squatter status that the group filed **ELC No. 1100 of 2015** against him over the suit property but it has never prosecuted the said case.

6. He deponed that in April 2015, he applied for approval from the 2nd Defendant to rebuild the perimeter wall and paid all the requisite fees and got approval to repair the demolished wall.

7. He further deponed that he was requested to avail a new elevation site plan for the wall on the area where a small river passes through and the plans were submitted and allowed.

8. He deponed that he then re-built the perimeter wall taking the new plans into consideration but the 2nd Defendant has pulled down the re-

built perimeter wall using bull dozers and also demolished more than 6 meters of the wall the 1st Defendant had advised the Applicants to elevate on the riparian reserve for the rivulet passing through their land and that it also pushed away the demolished materials changing the water path so that the rivulet appears to be near the slaughter house.

Respondent's response

9. The respondents raised grounds of opposition dated 16th April 2021 stating:-

- a) That the orders of injunction sought in the Notice of Motion cannot issue since the Respondents demolished the perimeter wall one month prior to filing of the present application.*
- b) That the Respondents have never granted the Applicants Authority to construct the said perimeter wall over a riparian reserve, neither were the alleged site elevation plans approved.*
- c) That payment of any amount for approval of site elevation plans does not in itself amount to an approval by the 2nd Respondent.*
- d) That the Applicants have not met the legal threshold for grant of the prayers for temporary injunction sought.*
- e) That Section 89 of the Physical and Land Use Planning Act No.13 of 2019 indemnifies the 1st Defendant from any liability for acts done or omitted to be done in exercise of any function conferred under the said Act.*
- f) That the Respondent issued an enforcement notice which the Plaintiff refused to comply with. The same is part of court record in the statement of defence dated 5th March 2021.*
- g) That in the premises, this court cannot entertain or grant the prayers sought by the Applicants in the present suit.*
- h) That the Plaintiff's application herein is a nullity, lacks both legal and factual merit and ought to be dismissed with costs to the Respondent.*

Applicant's written submissions

10. They are dated 15th April 2021. Counsel for the Plaintiffs submitted the Plaintiffs had established through evidence that they are the registered owners of the suit property and they have made developments thereon. He added that that they had also provided evidence of the destruction of property caused by the Respondents. He asked the court to make a finding that the Plaintiffs had established a prima facie case with a high chance of success. They relied on **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others** and the case of **Robert Mugo Wa Karanja vs Eco-Bank (Kenya) Ltd & Another(2019) e KLR**.

11. Counsel for the Plaintiffs also beseeched the court to make a finding that the Applicants would suffer irreparable injury if the orders sought are not granted on the strength of the applicants' evidence that the suit properties house a slaughter house business which has received recognition as a great income generator and where more than 100 families in the community erk a living from. He relied on the case of **Tritex Industries Limited & Another vs National Housing Corporation 7 Another (2014) e KLR**.

12. He also submitted that the balance of convenience lay on the Applicants favour since they have established possession from 1997/1998, developments, a running business and they pay rates, statutory fees and licenses .They relied on the case of **Thomas Mungiria & 9 Others vs Joseph Mutuma & 4 others Meru HCCC No. 12 of 2010**.

13. He submitted that the balance of convenience tilts in favour of the Applicants because they have demonstrated that they have been in occupation of the suit land since 1997/1998 on which they have made several developments and have been running a duly registered and recognized slaughterer house. He added that they have met all requirements as to the statutory fees in licenses, rates and others statutory deductions and have observed all protocols required of them. They relied on **Thomas Mungiria & 9 Others vs Joseph Mutuma & 4 Others Meru HCCC No.12 of 2010**.

Respondent's submissions

14. Counsel for the Respondent submitted that the law on grant of temporary injunctions is Order 40 Rule 1 (a) of the Civil procedure rules and the threshold for grant of temporary injunctions is that an applicant must meet 3 conditions cited in **Giella Cassman Brown [1973] EA** which was quoted in **East African Development Bank vs Hyundai Motors Kenya Limited**.

15. He submitted that the Applicants did not meet the threshold for grant of injunctions since should any injunctory orders be sought as pleaded by the Applicants, they would be negative orders incapable of being enforced as there is no subject matter to be preserved. He relied on the court of appeal's decision in **Eric V.J. Makokha & 4 others v Lawrence Sagini & 2 Others [1994] eKLR**.

16. I have considered the Notice of Motion and the supporting affidavit. I have considered the grounds of opposition, the written submissions filed on behalf of the parties and the authorities cited. the issues for determination are:-

- (i) Whether the Plaintiffs'/Applicants' application meet the threshold for grant of temporary injunction.*

(ii) Who should bear costs of this application?

17. In application for injunction onus is on the applicant 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 Frist 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.

18. It is the Plaintiffs' case that they have erected a perimeter wall over their suit property and that the Defendants/Respondents pulled down the said wall.

19. It is the Defendants/Respondents case that no authority was granted to the Plaintiffs/Applicants to erect the perimeter wall over a riparian reserve. Further that the site elevation plans were not approved.

20. It is clear that there is an issue as to whether the perimeter wall was erected over riparian reserve. Evidence will have to be tendered on this issue.

21. I find that the Plaintiffs/Applicants have failed to establish a prima facie case with probability of success at the trial. They have also failed to demonstrate that they will suffer irreparable loss that cannot be compensated by an award of damages if these orders are not granted.

22. I find no merit in this application and the same is dismissed. The costs do abide the outcome of the main suit.

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 18TH DAY OF NOVEMBER 2021.

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L. KOMINGOI

JUDGE

In the presence of:-

Ms Wanjohi for Ms Muchira for the Plaintiffs

No appearance for the Defendants

Steve - Court Assistant