



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

E.L.C NO.69 OF 2021

JAMES MACHARIA MWANGI.....PLAINTIFF

-VERSUS-

THE KENYA RAILWAY CORPORATION.....1ST DEFENDANT

THE HON.ATTORNEY GENERAL.....2ND DEFENDANT

RULING

1. This ruling is in respect of the application dated 7th September 2021 brought by the plaintiff.
2. This application is brought under Sections 1A, 1B, 3A of the Civil Procedure Act, Order 40 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules. It seeks the principal orders which I set out in verbatim as herein-below:
 - a. (spent)
 - b. (spent)
 - c. That pending hearing and determination of this suit , the defendants/respondents be restrained by way of an injunction by itself itself, its agents, servants and/or any other person or entity claiming authority from the defendant from the continued act of trespass and/or encroachment by way of fencing, demolishing and/or destroying the plaintiff/applicant's properties developed on the area marked for fencing by the defendant /respondent that affect the plaintiff/applicant's PLOT NO.533/678 MOLO TOWNSHIP or in any way whatsoever physically interfering and/ or adversely dealing therewith.
 - d. **THAT IN THE ALTERNATIVE**, pending the hearing and determination of this suit, this Honourable Court be pleased to order that the obtaining *status quo* on the plaintiff/applicant's PLOT NO.533/678 MOLO TOWNSHIP prior to the defendant/respondent's acts of trespass be maintained.
 - e. That the costs of this application be borne by the defendants/respondents.
3. The instant application is supported by the affidavit of the petitioner dated 13th September 2021 which reiterates the grounds at the bottom of the application.
4. The grounds upon which the application is premised are as follows: that the plaintiff is the lawful owner of the suit property; that he acquired it vide an allotment letter dated 2nd June 1995; that the applicant has a decree issued in Nakuru Cmcc No.477 Of 2004; James Macharia Mwangi -Vs- Molo Town Council & 2 Others where the court declared *inter alia* that the suit property is not public land; that the court prohibited any further interference with his land; that the 1st defendant trespassed onto the suit property by approximately 10 meters and unlawfully erected a fence thereon; that the 1st defendant has felled trees and dug holes for the fencing poles thus depriving the applicant of the opportunity to enjoy his land; that the 1st defendant's conduct is well calculated to infringe on the applicant's proprietary rights over his suit property albeit unlawfully, un-procedurally and without the plaintiff/applicant's consent hence it is null and void *ab initio*; that on the account of illegal and unprocedural conduct of the defendant, the plaintiff has been denied quiet and peaceful occupation and use of the land; the defendant cannot justify its acts of trespass; that the plaintiff has enjoyed a quiet stay in the land and even built his matrimonial home there and carrying out farming and domestic husbandry on the remaining portions to date; that despite the notice of intention to sue, the defendant has refused to surrender the portion of land to the plaintiff; that the plaintiff has a *prima facie* case with high chances of success and he that the plaintiff stands to suffer irreparable loss and damage if the orders sought herein are not granted; that the balance of convenience tilts in favour of the plaintiff/applicant; that it is in the interest of justice that this court be pleased to grant the prayers as sought and, finally, that the 1st defendant/respondent will not be prejudiced if the orders herein are granted.

Response

5. The defendants filed a response on **29th September 2021** to oppose the plaintiff's application on the grounds that: the application is fatally defective and does not meet the threshold required for the grant of a temporary injunction; that the applicant has not produced any certificate of title for the suit property and thus cannot prove ownership of the suit property; that the applicant has failed to establish a *prima facie* case against the respondents; that the applicant has failed to demonstrate his legal interest in the suit property; that the photographs produced by the applicant are not enough proof of his alleged ownership; that it is impossible to ascertain that the photographs relate to any building on the suit property; that the property in question is not in danger of any alienation, wastage or damage; that the applicant's residential house is situated on public land; that the applicant is illegally in occupation of the land; that the applicant's allegation of destruction of property is unfounded and unsupported by evidence; that on the balance of convenience, it is the respondent who risks to suffer irreparable loss and damage since granting an injunction without proper justification will halt projects of national importance.

Determination

6. The main issues that arise from this application are:

I. Should a temporary injunction be issued against the defendant/respondent ending the hearing and determination of this suit?

II. Who should bear the costs of this application?

7. The issues are addressed herein under:

a) Should a temporary injunction against the defendant/respondent be issued pending the hearing and determination of this suit?

8. I have perused the evidence and the facts brought forth in the instant application. The applicant seeks an injunction against the defendant barring them from trespassing on his property. The question that arises is whether such orders should be issued. I have considered the grounds upon which this application has been founded.

9. In **Giella -Vs- Cassman Brown 1973 E.A 358**, the criteria for grant of temporary injunctions was well stated. It is first, the applicant must establish a *prima facie* case with a probability of success at trial; secondly, that the temporary injunction would not be granted unless the applicant would suffer irreparable loss and injury which would not be adequately compensated in damages; and third, that if the court is in doubt it will decide the application on a balance of convenience.

10. One of the grounds relied on by the applicant is that the applicant has a decree issued in **Nakuru Cmcc No.477 Of 2004; James Macharia Mwangi -Vs- Molo Town Council & 2 Others** in which the court declared that his plot is not public land and in **Nakuru Miscellaneous Application No.79 Of 2012 (J.R)** in which the court quashed the decision by the Registrar of Titles cancelling the plaintiff/applicant's title deed and prohibited any further interference with his land.

11. The applicant however only produced the decree marked **J.M.M.V.I.I (a) and (b)** that was made by the **Honourable T. Matheka** on **21st April 2008** but has failed to produce before this court a Certificate of Title in support of his claim to the land. In considering the grant of a temporary injunction legal right or beneficial interest are crucial.

12. The question may also arise at the main suit as to whether the land subject matter of the previous litigation is the same suit land in this case. This court is not inclined to address that issue at this stage.

13. Though he does not have a certificate of title to the suit land, the plaintiff has established possession. The bundle of documents he exhibits in his application contain a copy of a letter of allotment in the plaintiff's name as well as photographs of developments in demonstration of his lengthy stay on the land. The decision of the Registrar of Titles to quash the title to the suit land were quashed by a court of law. Also, from previous cases regarding the suit land, judgement appears to have been entered in favour of the applicant citing that the suit land was private property. However that litigation appears not to have included the current 1st defendant as a party. The 1st defendant seems to have woken up to defend what it considers its rightful land.

14. In this court's view, though the applicant has a *prima facie* case with a high probability of success he has not demonstrated that damages would not be an adequate remedy if the orders sought were not granted. I also take cognizance of the fact that the 1st defendant is a public corporation and I believe it when it states that there is no danger that it will dispose of the suit land. Lastly the portion said to have been encroached on by the 1st defendant is about **10 metres** wide by the plaintiffs' admission and it has already been fenced off and is now in the possession of the 1st defendant. Issuance of prayers as sought in **prayers no 3 and 4** of the instant application would result in the granting of a mandatory injunction at an interlocutory stage. This is highly discouraged in practice. I must be mindful that the court's decision in the judicial review case cited may have hinged more on the procedure used in cancelling the title rather than on merit. The issue of the validity of the ownership by the plaintiff was not tried therein and only a substantive suit like the present one is capable of settling on the merits the controversy regarding his title. Again it is also important to note that the 1st defendant was not part of that suit.

b. Who should bear the costs of this application?

15. The costs of this application shall be in the cause.

Conclusion:

16. In the light of the foregoing I see no need for the current *status quo* to be disturbed before the hearing and determination of this suit. I therefore order that both parties in this suit shall preserve the *status quo* prevailing over the suit land as at the date of this order until the final hearing and determination of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU VIDE ELECTRONIC MAIL ON THIS 17TH OF NOVEMBER 2021.

MWANGI NJORGE

JUDGE, ELC, NAKURU.