



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. E50 OF 2020

RENE DALGAARD JORGENSEN.....PLAINTIFF/APPLICANT

VERSUS

ESTHER AKOTH KOKEYO.....DEFENDANT/RESPONDENT

RULING

1. By the Notice of Motion dated 2nd September, 2020 Rene Dalgaard Jorgensen (*the Plaintiff*) prays for a temporary order of injunction restraining Esther Akoth Kokeyo (*the Defendant*) from entering into, trespassing into or interfering with the Plaintiff's quiet possession of all that parcel of land known as Title No. CR 19148 being Plot No. 821/III/MN pending the hearing and determination of this suit.

2. The application which is supported by an affidavit sworn by the Plaintiff is premised on the grounds that:

(a) *The Plaintiff is the registered proprietor of the said Plot No. 821/III/MN (the suit property);*

(b) *In July 2020, the Defendant herein began the reconstruction of part of the perimeter wall separating the Defendant's parcel of land number 820/III/MN from the suit property and in the process encroached upon the suit property despite the existence of beacons clearly showing the boundary;*

(c) *The Plaintiff has since availed to the Defendants a survey Report pointing out the demarcation of the two properties but the Defendant has continued with the said acts of trespass;*

(d) *On 28th August, 2020, the Defendant trespassed further onto the Plaintiff's property when she purported to build an access road on the suit property to allow her access to the beach;*

(e) *Despite a complaint made by the Plaintiff to the Police and the Defendant being asked to stop the construction of the access road, the Defendant continues with the construction of the same; and*

(f) *The Plaintiff stands to suffer irreparable loss unless the Defendant is restrained as per the orders sought herein.*

3. The application is opposed. In her Replying Affidavit filed herein on 22nd September, 2020, Esther Akoth Kokeyo (*the Defendant*) avers that the application and the entire suit is frivolous, vexatious, an abuse of the court process and a waste of precious judicial time and that the same ought to be dismissed.

4. The Defendant avers that she owns Plot No. 820/III/MN jointly with one Yvon Marie Decherf and that she bought the same in the year 2009 from one Mehari Tewolde. At the time of the purchase the Defendant was fully aware that the property she purchased had existing access roads one to the beach and another one on the right from the public main road.

5. The Defendant further avers that she has lived happily with her neighbours. In the year 2019, she travelled to Europe only to come back and realise that the Plaintiff who had purchased the property at that time had on several occasions told her guests and employees not to pass through his property and closed the access to the beach.

6. The Defendant avers that she talked to the Plaintiff on the issue and the plaintiff apologized for the inconvenience and they continued to live in harmony until sometime in March, 2020 when they had an argument over an unrelated issue.

7. The Defendant avers that at the point of obtaining her approval for the development of her parcel of land, she was informed that there

were some boundary walls they needed to rectify as the surveyor informed her that the Plaintiff's original gate had encroached on her land. The Defendant states that she approached the Plaintiff about the issue but the Plaintiff became aggressive and began to claim that the access road excised from the Defendant's parcel of land belonged to himself.

8. The Defendant further avers that in order to create access roads in the area, the County Government of Kilifi had excised from her parcel of land a stretch of 3 meters. Similarly a stretch of 3 meters or thereabout were excised from the Plaintiff's parcel of land to allow the Defendant and others access to the public beach.

9. The Defendant further states that when the dispute arose, she enquired on the position from the County Government of Kilifi who in their response letter dated 16th September, 2020 confirmed that the beach access road along the suit property was approved in the year 1990 by the Director of Surveys and accordingly the Plaintiff has no legal or legitimate claim over the same.

10. The Defendant further avers that when she recently embarked on the development of her parcel of land, the Plaintiff barricaded the access road along her parcel of land that was being used by trucks supplying materials thereto and as a result she has suffered great financial loss.

11. I have carefully perused and considered the Plaintiff's application as well as the response thereto by the Defendant. I have in similar manner perused and considered the submissions and authorities placed before me by the Learned Advocates for the parties.

12. The Plaintiff herein prays for an order of injunction to restrain the Defendant from entering into, trespassing upon or interfering with his quiet possession of all that parcel of land known as Plot No. 821/III/MN. He accuses the Defendant who is his neighbor and the proprietor of the adjacent Plot No. 820/III/MN of proceeding to demolish a wall separating the two parcels of land and subsequently attempting to create an access road through his parcel of land.

13. The Defendant denies the Plaintiff's claims and asserts that before the Plaintiff purchased the suit property, there was already in existence an access road lawfully created through the area that had been in use by herself and others to access their properties as well as the nearby public beach. The Defendant accuses the Plaintiff of unilaterally blocking the access to the detriment of herself and other neighbours.

14. The law on granting interlocutory injunctions is set out under **Order 40 Rule 1 (a) and (b) of the Civil Procedure Rules as follows:**

“Where in any suit it is proved by affidavit or otherwise –

(a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in execution of any decree that may be passed against the defendant in the suit;

the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

15. The conditions for the grant of such an injunction were long settled in the off-cited case of **Giella -vs- Cassman Brown & Company Limited (1973 EA 358**, where the court stated thus:

“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 an application on the balance of convenience.”

16. In the matter before me, the Plaintiff accuses the Defendant of trespass into the suit property. In support of his case, the Plaintiff has annexed to the supporting affidavit the title together with a Deed Plan for the said parcel of land. It is the Plaintiff's case that sometime in July 2020, the Defendant called him to join her on a portion of the suit land. When the Plaintiff got there, he found the Defendant with two (2) employees of the County Government of Kilifi who then told the Plaintiff that there was an access road to the beach passing through the Plaintiff's land.

17. The Plaintiff refuted the claim and told the trio that he would engage the services of a surveyor to confirm the position. Subsequently, the Plaintiff engaged the services of one Phillippe A. Zimmerlin who prepared a survey Report dated 13th July, 2020.

18. Apparently without waiting for the Survey Report, the Defendant proceeded to demolish the wall separating the two adjacent parcels of land. Thereafter, the Defendant commenced construction of an access road on the portion of land claimed by the Plaintiff.

19. The surveyor engaged by the Plaintiff happens to have been the same one who did the original sub-division that resulted into the parcels of land respectively owned by the Plaintiff and the Defendant. A perusal of his Report dated 13th July, 2020 suggests that the Defendant has built outside the boundary beacons which are now enclosed within the Defendant's property. The Report also asserts that there is no existing access road to the beach and that the access road running along the beacons is part and parcel of the Plaintiff's land.

20. On her part, the Defendant avers that she is entitled to access the beach through the said access road as advised by the Acting County

Surveyor Kilifi in a Report dated 16th September, 2020 annexed to her affidavit. That Report recommends that the Cadastral Survey Map be revised by excising the portion through a sub-division with a new Deed Plan and that the area be later consolidated with the Defendant's parcel.

21. In the circumstances herein, it would appear to me that the position that the Defendant relies on is a process that was yet to be completed in full. In the Supplementary Affidavit filed in support of the Plaintiff's application by the Surveyor Phillippe A. Zimmerlin, he offers some explanation as to the current situation. According to the Surveyor, the two parcels of land in contention were once owned by one individual. The said owner had intended to consolidate both Plots 820/III/MN and 821/III/MN and to sub-divide the same into three parcels of land wherein a beach access road would have been curved out of the said sub-division. Apparently that sub-division was never completed and no new Deed Plans were issued for the intended sub-divisions.

22. Arising from the foregoing, there was at this stage no material placed before me from which one could conclude that there was created an access road passing through the Plaintiff's parcel of land. The Plaintiff has produced his certificate of title with the Deed Plan No. 131674. That Deed Plan establishes the extent and layout of the suit property and there is no beach access road thereon.

23. By dint of such registration, I am of the view that the Plaintiff is entitled to protection by this court as provided under **Sections 24 and 25 of the Registration of Titles Act**. The issue of whether a portion of the Plaintiff's land comprised the envisaged public access road was not obvious at this stage and it is my view that the same can only be ascertained upon trial. Given the fact that the Plaintiff is in possession of a certificate of title for the suit property, he is entitled to quiet and peaceful possession thereof unless and until the said title is cancelled by this court.

24. In the premises, I am satisfied that the Plaintiff has demonstrated that he has a *prima facie* case with the probability of success at the trial.

25. Accordingly I am persuaded that there is merit in the Motion dated 8th September, 2020. The same is allowed in terms of prayer No. 3 thereof with costs.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI THIS 16TH DAY OF DECEMBER, 2021 VIA MICROSOFT TEAMS.

IN THE PRESENCE OF:

MR. KIARIE FOR THE PLAINTIFF/APPLICANT

MR. KOMORA FOR THE DEFENDANT/RESPONDENT

COURT ASSISTANT - WARIO

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J. O. OLOLA

JUDGE