



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**E.L.C. CASE NO. 277 OF 2017**

**JULIUS MUSEMBI MATIVO.....PLAINTIFF/APPLICANT**

VERSUS

**1. AMOS MUTINDA KALUNGU**

**2. SAMUEL MUNTUTI MWANGANGI**

**3. STEPHEN MUTHOKI MAKAU**

**4. ELASTO MBUVIMUTETI**

**5. TET WILLIAM DAVID**

**6. THE COUNTY GOVERNMENT OF MACHAKOS.....DEFENDANTS/RESPONDENTS**

AND

**7. JONH KITUKU.....INTERESTED PARTY/RESPONDENT**

**R U L I N G**

- 1) By a notice of motion dated 11<sup>th</sup> June, 2019 and filed in court on the same date, the Plaintiff/Applicant sought for the following orders;
- a) **That the Plaintiff be granted leave to amend his plaint dated 20th June, 2017 in terms of the annexed draft herein and the same be deemed filed upon payment of the requisite fees.**
  - b) **That this honourable court be pleased to grant an order of temporary injunction restraining the 6<sup>th</sup> Respondent, its agents, servants or anyone claiming under it or through it from entering upon demarcation, clearing, excavating, constructing or in any other manner from interfering with the suit property herein being L.R. No. 23302 pending the hearing and determination of this application.**
  - c) **That this honourable court be pleased to grant an order of temporary injunction restraining the 6<sup>th</sup> Respondent, its agents, servants or anyone claiming under it or through it from entering upon demarcation, clearing, excavating, constructing or in any other manner from interfering with the suit property herein being L.R. No. 23302 pending hearing and determination of this suit;**
  - d) **That costs of this application be in the cause.**
- 2) The Application is premised on the grounds appearing on its face together with the supporting affidavit of the applicant sworn on 11<sup>th</sup> June 2019 in which he deposed that the orders issued on 22/2/2002 in Machakos Judicial Review Miscellaneous Application Number 65 of 2010 prohibited any individual from interfering with the boundaries of land parcel No L.R. No. 23302 (*original number 11800/93/9*); that the 6<sup>th</sup> Respondent's predecessor namely Kangundo Town Council, was aware of the above orders as they were party in the said proceedings and that the 6<sup>th</sup> Respondent is also aware of the said orders as it is the successor in title to Kangundo Town Council; that contrary to the said orders, the 6<sup>th</sup> Respondent hired a contractor called Westline Construction Ltd to excavate a road passing through land parcel L.R. No. 23302, hence interfering with the said boundaries.
- 3) It's the applicant's contention that the 6<sup>th</sup> Respondent's actions constitute blatant disregard of the orders issued in Judicial Review

Miscellaneous Application No. 65 of 2010. Further that amendment is necessary to join the 6<sup>th</sup> Respondent as a party in these proceedings to enable this court determine the applicant's proprietary rights and that the court ought to restrain the 6<sup>th</sup> Respondent from constructing the intended road.

4) The application is opposed. The Interested Party filed a replying affidavit dated 29<sup>th</sup> July, 2019 in opposition to the application. He averred that the Notice of Motion herein was bad in law and incompetent, ill-advised, brought in a mistaken belief and an abuse of the court process. He further stated that he has been operating a petrol station in Tala and that in between the plaintiff's land and the petrol station, there is a public road; that the 6<sup>th</sup> Respondent is constructing an already existing road which is a surveyed road by the Ministry of Lands; that Judicial Review No. 65 of 2010 does not relate to the surveyed road; that the application is premised on a mistaken belief that there does not exist a road where the 6<sup>th</sup> Respondent is constructing the road; that the applicant wants to grab a public road and or divert it illegally and that the Ministry of Lands or Director of Surveys Kenya was not a party to the Judicial Review Proceedings.

5) The Applicant filed a supplementary affidavit sworn on 14<sup>th</sup> July, 2020 and filed on the same date where he deposed that the amendment is necessary to enable this court to determine rights regarding Land Parcel L. R. No. 23302 as new evidence has been discovered. The applicant recanted paragraph 10 of his supporting affidavit sworn on 11<sup>th</sup> June, 2019, which referred to a draft amended plaint, and annexed a new draft amended plaint. He stated that the 6<sup>th</sup> Respondent should be compelled by an order of this court to close the road of access passing through the Plaintiffs land.

6) The application was canvassed by written submissions. The Plaintiff/Applicant filed his submissions dated 6<sup>th</sup> July, 2021 and filed in court on the same date. The Respondent's submissions are not on record.

#### **THE PLAINTIFF/APPLICANT'S SUBMISSIONS:**

7) The Plaintiff/Applicant submitted that it is trite law that amendments to pleadings should be freely allowed before delivery of judgment. Counsel referred to the case of **Ochieng and Others vs First National Bank of Chicago Civil Appeal Number 147 of 1991**, where the Court of Appeal set out principles that ought to guide courts in granting leave to amend pleadings, as follows:

- a) **The power of the court to allow amendments is intended to determine the true substantive merits of the case;**
- b) **The amendments should be timeously applied for;**
- c) **Power to amend can be exercised by the court at any stage of the proceedings;**
- d) **That as a general rule however late the amendment is sought it should be allowed if made in good faith provided costs can compensate the other side.**

8) Counsel also relied on the cases of **Eastern Bakery vs Castelino [1958] E.A. 461(1) at P. 462**, **Tildesley vs Harper [1878], 10 Ch. D at P. 296** and **St Patrick's Hill School Ltd Vs Bank of Africa Kenya Limited [20189] eKLR**, all of which have been considered by this court.

9) The Applicant argued that it is imperative that the 6<sup>th</sup> Respondent is compelled by an order of this court to close the road of access passing through the Plaintiff's land and be compelled to remove the tarmac road thereon and all features including drainage system and thereby restore the Plaintiff's land to what it was before construction.

#### **ANALYSIS AND DETERMINATION:**

10. I have considered the application, the affidavits in support, the replying affidavit and the applicant's submissions. The issues that arise for determination are; -

- a) Whether the Applicant should be granted leave to amend his plaint.
- b) Whether the Applicant has met the threshold for grant of temporary injunction.

11. The Law on amendment of pleadings is set out in Order 8 of the Civil Procedure Rules. Order 8 Rule 3 of the Civil Procedure Rules provides as follows: -

1. **"Subject to Order 1, rules 9 and 10, Order 24, rules 3,4,5 and 6 and the following provisions of this rule, the court may at any state of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings,**
2. **Where an application to the court for leave to make an amendment, such as is mentioned in subrule (3), (4) and (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may therefore nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just to do so.**
3. **An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to**

sue or intending to be sued.

**4. An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under subrule (2), if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued,**

**5. An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially in the same facts as a cause of action in respect of which relief has already been claimed in the suit by the parties applying for leave to make the amendment.”**

12. The principles in regard to grant of leave for amendment of pleadings are well settled. The general rule being that amendment of pleadings sought before the hearing of a suit should be allowed freely if granting the same will not lead to an injustice to the other party and, there is no injustice if the other party can be compensated by costs. Where an amendment will cause the other party injury or injustice that cannot be compensated by costs, then an application for amendment will be declined. In the case of **Daniel Ngetich and Another vs KRep Bank Limited [2013] KLR**, the court held as follows: -

**“Normally the court should be liberal in granting leave to amend pleadings, but it must never grant leave if the court is of the opinion that the amendment would cause injustice or irreparable loss to the other side or if it is a device to abuse the process of the court”.**

13. Similarly, in the case of **Eunice Chepkorir Soi vs Bomet Water Company Ltd [2017]**, the court held that amendments ought to be allowed when they do not work injustice to the other side and when they are necessary for the purpose of determining the real questions in controversy between the parties.

14. In the instant case, the Plaintiff intends to introduce the 6<sup>th</sup> Defendant to this suit and make a claim against the said party. The prayer is in respect of the suit land herein. There is no material on record to show that the amendment if allowed shall cause any irreparable injury to the Respondents that cannot be compensated by costs. In the premises, the Plaintiff is entitled to leave to amend his Plaint.

15. On the Issue of temporary injunction, the law on grant of injunctions is clearly set out in Order 40 of the Civil Procedure Rules. Order 40 Rule 1 of the Civil Procedure Rules provides 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 the 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.”**

16. Principles for grant of temporary injunctions are now settled. In the case of **Giella vs Cassman Brown [1973] E.A. 358**, the court set out the three conditions for grant of injunctions as follows:

a) **The Applicant must establish a *prima facie* case with a probability of success.**

b) **If the injunction is not granted, the Applicant will suffer irreparable injury that may not be compensated by an award of damages.**

c) **Where the court is in doubt, it should decide the application on a balance of convenience.**

17. In the case of **Mwao Limited vs first America Bank of Kenya and 2 Others [2003] KLR**, the court described a *prima facie* case in the following terms: -

**“a prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case when on the material presented to court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”**

18. In the Instant case, the Applicant has deponed that the orders issued on 22/2/2012 in Machakos Judicial Review Miscellaneous Application No. 65 of 2010, prohibited any individual from interfering with the boundaries of land parcel L.R. No. 23302 (*original number 11800/93/9*) and that the 6<sup>th</sup> Respondent who are the successor of Kangundo Town Council are aware of the said orders as the latter were a party to the said proceedings. He argued that the 6<sup>th</sup> Respondent was violating the said orders as they had hired a contractor to excavate a road passing through the suit land. On the other hand, the Interested Party has argued that there is a public road where the 6<sup>th</sup> defendant

intends to excavate the road, and therefore the plaintiffs' allegations are mistaken and misleading. Apart from the order in Machakos Judicial Review Misc. Application No. 65 of 2010, the Plaintiff has not attached any document of ownership to the application.

19. I have perused the order of the court in Machakos Judicial Reviews Miscellaneous Application No. 65 of 2010. In those orders, the court quashed the decision of Matungulu District Physical Planning Liaison Committee made on 12/11/2004 and confirmed on 28/1/2010. It also made an order of prohibition against Matungulu District Physical Planning Liaison Committee and the Town Council of Kangundo, prohibiting them from executing the decision dated 12/11/2009 and from continuing to make adverse decision in the applicant's interest in the suit premises or in any way interfering with the applicant's suit premises. The decision of the court in the Judicial Review Proceedings was in respect of the process used to arrive at the decision by Matungulu District Physical Planning Liaison Committee.

20. The interested party maintains that there is indeed a public road where the 6<sup>th</sup> Respondent is excavating. He has annexed a map to his affidavit. He insists that the Plaintiff intends to grab public land which is the road in issue. In view of the contentions of the Plaintiff and the Interested Party, I am not satisfied that the Plaintiff has placed material before this court to show that where the 6<sup>th</sup> Interested Party intends to excavate a public road is his private property. In addition, it appears there is already a tarmac road, as is evidenced in the Plaintiffs draft amended plaint, which he has sought for its removal. If indeed the 6<sup>th</sup> Respondent has already placed a tarmac road in the Plaintiff's land, then he has recourse to seek for compensation for the same as provided for in the Land Act. In the premises, the Applicant has not demonstrated that he has a *prima facie* case.

21. On whether he shall suffer irreparable loss if the injunction is not granted, no material has been placed before this court to demonstrate such irreparable loss. The Applicant states that the 6<sup>th</sup> Respondent has already constructed a tarmac road on his property. In my view, this can be compensated in damages.

22. As regards the question of balance of convenience, I note that there is already a road on the disputed site. The balance of convenience tilts in favour of the 6<sup>th</sup> Respondent. In the premises therefore, I am not satisfied that the Applicant has met the threshold for grant of temporary injunction.

23. The upshot of the above is that the Plaintiff/Applicant's application dated 11<sup>th</sup> June, 2019 is partially allowed in the following terms;

- a) The Plaintiff/Applicant be and is hereby granted leave to file his amended plaint in 14 days.**
- b) The prayer of interlocutory injunction is dismissed.**
- c) The Plaintiff shall bear the costs of this application.**

**RULING DATED, SIGNED and DELIVERED VIRTUALLY at MACHAKOS THIS 15TH DAY OF DECEMBER 2021.**

**A. NYUKURI**

**JUDGE**