REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 62 OF 2019

GEORGE KIRAMANA ABUABA.....APPELLANT/APPLICANT

VERSUS

KENYA NATIONAL HIGHWAY AUTHORITY.....RESPONDENT

RULING

1. This matter relates to a Notice of Motion dated 13.5.2019 brought pursuant to provisions of ***Order 40 Rule 1, 2 & 3 of the Civil Procedure Rules, Section 1A, 1B, 3 & 63 (e) of the Civil Procedure Act CAP 21 Laws of Kenya,*** and ***The Constitution of Kenya 2010***. The applicant seeks orders of a temporary injunction restraining the respondent, whether acting by themselves, their servants, agents, contractors and/or any other persons whatsoever, from demolishing the applicant's perimeter wall or any part of the applicant's property LR NO. ATHING'A/ATHANJA/5400 (hereinafter *the Suit Land*) pending the hearing and determination of the application and the appeal.

2. The grounds upon which the application is premised on are set out in its body and the supporting affidavit of the appliocant, George Kiramana Abuaba sworn on 13/5/2019. It is contended that the applicant is the registered and beneficial owner of the Suit Land where his home, rentals, *posho* mill and boutique/beauty shop are situated and protected by a perimeter wall. In spite of having left the required distance of at least 60 feet from the centre of the tarmac road as the road reserve, the respondent demanded to demolish the wall. His efforts to engage the respondent to ascertain the acceptable allowance was ignored, which prompted him to file the Tigania ELC No. 207 of 2018 where he obtained interim orders. However they were vacated by the lower court on 28/3/2019 while determining a different application other than the one under which the orders were granted and without hearing the said application on its merits. The demolition of the property will occasion immense suffering and inconvenience the applicant, his family and tenants.

3. The application was opposed by the respondent vide the replying affidavit of Brenda Rao sworn on 1/7/2019. She deponed that the respondent's officer on 29/10/2018 visited the Suit Land in the presence of the applicant and determined the extent of the encroachment of the road reserve by the applicant and issued him with a notice. No valid notice was served upon the Director General of the respondent as alleged. That the applicant does not stand to suffer irreparable damages as that can be compensated by way of damages for the perimeter wall can be quantified. That the assertions of the applicant are incorrect as the trial court did consider the applicant's application dated 28/12/2018 in its ruling of 28/3/2019. The respondent has breached no law and is only exercising its statutory mandate to reclaim public road reserve from land owners who have illegally encroached on the same.

4. The respondent has also raised an issue that the matter before the trial court was encumbered with illegalities and irregularities which are mysterious as to how the Tigania matter found its way at Meru court (without an order from a superior court), where the applicant obtained injunctive orders without

5. This matter was canvassed by way of written submissions. The applicant submitted that he has met the principles as laid down on the case of **Giella v Cassman Brown & Co. Ltd [1973] E.A 358.** He also relied on the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR.**

6. The respondent submitted that the applicant's further supporting affidavit ought to be expunged from the record as it was filed after expiry of the giventimelines. What's more the applicant failed to comply with the explicit provisions of the ***Rule 8 of the Oaths and Statutory Declarations Rules***, as the annextures to the affidavit are fatally defective since the commissioner for oaths did not date the same and the deponent is not disclosed. Thus this cannot be cured by provisions of ***Article 159 (2) (d) of the Constitution***. Therefore the annextures ought to be struck out. That in the face of contradicting versions between the applicant and respondent the balance is tilted not in granting injunctive reliefs. They relied on the cases of ***Francis A. Mbalanya v Cecilia N. Waema [2017] Eklr*** and ***Joseph wainana Kinyanjui & another v Kenya National Highways Authority [2018]eKLR***.

7. The issue of determination is ***whether or not to issue the temporary injunction pending appeal.***

8. Before determining the issue at hand, I will deal with some preliminary issues. On 9.7.2019, this court categorically directed that documents filed outside the given timelines shall stand as expunged. The applicant his further supporting affidavit outside the given timelines, hence hat affidavit filed on 24/7/2019 stands as expunged from the record.

9. Secondly, the respondent raised the issue that the applicant's annextures do not comply with ***Rule 8 of the Oaths and Statutory Declarations Rules***, This made the annextures to the applicant's affidavit fatally defective since the commissioner for oaths did not date the same and the deponent is not disclosed. A look at the applicant's annextures, one finds the following "*referred to in the annexed affidavit/declaration of …"*. The part stated declaration of and date is left blank. Should this court expunge the exhibits because of this short coming?.

10. The case referred to by respondent ***Francis A. Mbalanya v Cecilia N. Waema [2017] eKLR*** refers to a plaintiff who had completely failed to seal and mark the annextures. That is not the case in this appeal where the documents have been sealed and marked but have not been dated by the commissioner of oaths. Is it curably by Article 159 (2) (b) of the Constitution? In the case of ***Raila Odinga And Others V Independent Electoral And Boundaries Commission and Others Nairobi Petition No. 5 of 2013 [2013]eKLR***, the Supreme Court explained what was meant by ***Article 159 (2) (b)*** in the following terms;

> ***"The essence of that provision is that a Court of law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast-in-stone and which suits all situations of dispute resolution. On the contrary, the Court as an agency of the processes of justice, is called upon to appreciate all the relevant circumstances and the requirements of a particular case, and conscientiously determine the best course."***

Consequently, I am of the view that the failure to date the annextures by the commissioner of oaths is curable by ***Article 159 (2) of the Constitution.***

11. The primary issue is whether to grant an injuction or not. The issue of illegalities and irregularities on how injuctive orders were issued has been raised by both the trial magistrate and the respondent. In his ruling, Honorable Sogomo decried the fact that his colleague Honorable Mbicha of Meru Court handled the file and issued conservatory orders yet this is a Tigania matter. I have the original file. The record there in confrims that Hon. Mbicha handled the matter on 29.11.2018 and 11.12.20+18. The circumstnaces under which the Judicial Officer handled the matter and issued Injuctive Order is a matter under investigaitions. Needless to say that applicants cannot purport to complain on vacation of the Interim Orders when on the face of it such Interim Orders were issued irregularly by a magistrate who is not based at Tigania.

12. The guiding principles for grant of an injunction were stipulated in the celebrated case of **Giella v Cassman Brown & Co. Ltd [1973] E.A 358** as follows: (1) there must be an establishment of a *prima facie* case with probability of success; (2) the applicant is likely to suffer irreparable damage; and (3) if in doubt on a balance of convenience.

13. The first ingredient, *prima facie* case means that the applicant has to show that he has a genuine and arguable case and that there exists a right which has apparently been infringed. In this case, the applicant stated that the respondent's attempt to demolish his perimeter wall would infringe on his rights as a property owner and the loss cannot be compensable as he would suffer irreparable damage as the invasion is not quantifiable due to the risk.

14. The respondent is a public body vested with the mandate of building and protecting public roads and highways for the benefit of the public. The Court of Appeal in the case of ***Joseph Wainaina Kinyanjui & another v Kenya National Highways Authority [2018] eKLR*** had the following to say with regard to issuing injunctions against the respondent:

> ***"The respondent is a public body and has the mandate to build and protect public roads and highways and should not be hindered through injunction from carrying out public duties through injunctions granted to private citizens. Although the applicants hold a title to the land, the respondent was able to show before the High Court that there was encroachment on to a road reserve by the applicants and such encroachment was hindering expansion of the Nyahururu-Nakuru road, to the detriment of the public. We are satisfied, like the learned judge, that the applicants would adequately be compensated in damages should the intended appeal succeed."***

15. Accordingly, I am guided by the words of the superior court. Public interest tends to supersede private interest especially when the damage is reparable as it is in this case. Furthermore, the court was informed on 9.7.2019 that the wall has since been demolished, which means that the issue of injunction is now spent.

16. From the foregoing, I am of the view that the application is not merited. The same is hereby dismissed. Costs shall abide the out come of the appeal.

DATED SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 12th DAY OF FEBERUARY, 2020.

IN THE PRESENCE OF: -

C.A Kananu

Atheru for applicant/appellant

Kimathi for Respondent – present

Parties absent

HON. LUCY N. MBUGUA

ELC JUDGE