



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C. PETITION NO. 7 OF 2019

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

UNDER ARTICLES 10, 40, 47, 60, 64 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF INTERPRETATION OF SECTIONS 24, 25 OF THE LAND REGISTRATION ACT, 2012

AND

IN THE MATTER OF INTERPRETATION OF SECTION 110 OF THE LAND ACT, 2012

BETWEEN

RUPINGAZI INVESTMENT COMPANY LIMITED.....1ST PETITIONER

RUPINGAZI PARTNERS.....2ND PETITIONER

VERSUS

KENYA URBAN ROADS AUTHORITY.....1ST RESPONDENT

COUNTY GOVERNMENT OF EMBU.....2ND RESPONDENT

SKYLINE ENTERPRISES LIMITED.....3RD RESPONDENT

HON. ATTORNEY GENERAL.....4TH RESPONDENT

RULING

1. By a notice of motion dated 31st July 2019 expressed to be brought under the provisions of **Order 51 Rule 1 of the Civil Procedure Rules**, and **Sections 1A & 1B of the Civil Procedure Act (Cap. 21)** the Petitioners sought the following orders:

a) *Spent*

b) *Spent*

c) *That pending the hearing and determination of this suit, this honourable court be pleased to issue a temporary injunction against the Respondents by themselves, their officers, servants, agents or anyone claiming under them against any further excavation and/or digging of an access road and encroachment over Plot No. Embu/Municipality/1409 and 1410.*

d) *That the costs be in the cause.*

2. The said application was based upon the grounds set out on the face of the motion and supported by an affidavit sworn by Samuel Mwangi Maina who described himself as one of the directors of the 1st Petitioner and a partner in the 2nd Petitioner. It was contended that

the Petitioners were the registered proprietors of *Plot Nos. Embu/Municipality/1410 and Embu/Municipality/1409* (hereafter the *suit properties*) respectively. It was further contended that the Respondents had wrongfully and unlawfully commenced excavation works on the suit properties for the purpose of creating an access road through them. It was further contended that the 3rd Respondent was in the process of grading and placing murrum on the said road without compliance with applicable legal requirements. It was the Petitioners' case that the Respondents' said actions on private land were unconstitutional and an abuse of power.

3. The 1st Respondent filed a replying affidavit sworn by Dorcas Kanana Gitonga Mungai on 7th October 2019 in opposition to the said application. It was contended that upon consulting the Development Plan for the area in dispute at the Embu County Planning Offices, it was discovered that the site on which the suit properties were located was set aside as an open space for public utility. An extract of the said plan was annexed to the supporting affidavit.

4. The 1st Respondent further stated that upon consulting the Embu Land Registry it was discovered that certificates of lease for the suit properties were issued in 1996. It was further contended that upon consulting records held at Survey of Kenya it was discovered that the suit properties were in fact surveyed on 4th April 1997 meaning that the titles were issued prior to a survey being undertaken.

5. The 1st Respondent therefore contended that the Petitioners had no legitimate claim upon the suit properties since they constituted public land set aside for public purposes. It was further contended that the access road in question had existed for many years and that the Petitioners only complained when the road was being upgraded to bituminous standard. The court was urged to dismiss the application for interim orders.

6. The record shows that the 2nd Respondent filed grounds of opposition dated 30th October 2019 in opposition to the said application. It was denied that the 2nd Respondent had instructed the 3rd Respondent to undertake any roadworks. It was contended that the 2nd Respondents should not be held liable for any actions on the part of the 1st and 3rd Respondents.

7. The Attorney General also filed grounds of opposition dated 2nd October 2019 in opposition to the said application. It was contended that the Respondents were only upgrading an existing road which had been in use as a gravel road for a very long period of time. It was further contended that the Petitioners were merely land grabbers of public land who were not entitled to any equitable relief. The court was consequently urged to dismiss the said application with costs.

8. The material on record shows that the 3rd Respondent which is alleged to be the contractor did not enter appearance or file any response to the application for interim orders.

9. When the said application was listed for hearing on 31st October 2019 the advocates for the parties opted to canvass it through written submissions. The Petitioners were granted 30 days to file and serve their submissions whereas the Respondents were granted 30 days upon the lapse of the period granted to the Petitioners to file theirs. The record shows that none of the parties had filed their submissions by the time of preparation of the ruling.

10. The court has considered the Petitioner's said application, the 1st Respondent's replying affidavit in opposition thereto as well as the grounds of opposition filed by the 2nd Respondent and the Attorney General. The court is of the opinion that the main question for determination herein is whether or not the Petitioners have made out a case for the grant of an interlocutory injunction within the principles set out in the case of **Giella V Cassman Brown & Co. Ltd [1973] EA 358**.

11. The Petitioners' grievances are based upon the certificates of lease for the suit properties issued in their names. The gist of their application is that the Respondents have violated their right to property under **Article 40** of the **Constitution of Kenya** hence they ought to be restrained by an order of injunction pending the hearing and determination of the petition. The court has noted the 1st Respondent's elaborate response to the application. The court has further noted that the Petitioners have not filed any further affidavit to rebut or respond to the apparent anomalies in the acquisition of the suit properties as pointed out by the 1st Respondent.

12. The court is aware that at this juncture it is not required to make any definitive or conclusive findings on the factual matters in dispute. For that is the sole function of the trial judge. The court has, however, considered the totality of the material on record. It would appear that there is an existing access road which has been in use for a long period of time without any complaint from the Petitioners. It would further appear that what the Respondents are doing is merely expanding and upgrading the road to bituminous standard. In the circumstances, the court is far from satisfied that the Petitioners have demonstrated a *prima facie* case with a probability of success at the trial as required by law.

13. That being the position taken by the court on the first principle, it shall not be necessary for the court to consider the other two principles for the grant of an interim injunction. The Petitioners' case has simply failed at the first of the three hurdles which a successful applicant must overcome.

14. The upshot of the foregoing is that the court finds no merit in the Petitioners' notice of motion dated 31st July 2019. Accordingly, the same is hereby dismissed with costs to the 1st, 2nd and 4th Respondents.

15. It is so decided.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **6TH DAY** of **FEBRUARY, 2020**.

In the presence of Ms. Nzekele holding brief for Ms. Ndorongo for the Petitioners, Mrs. Njoroge for the 1st Respondent, Mrs. Njoroge for the

Attorney General and in the absence of the rest of the parties.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

06.02.2020