



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC NO. 42 OF 2019**

**GEORGE KARANU NDEITHI.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**DOUGLAS GITU NDEITHI.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**EDDY PETER NDUNGU KIMEMIA.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**COUNTY GOVERNMENT OF KIAMBU.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**DIRECTOR OF SURVEYS KIAMBU.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**REGISTRAR OF LANDS, KIAMBU.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

The matter for determination is the Notice of Motion Application dated 25<sup>th</sup> February 2019, brought by the Plaintiff/ Applicant seeking for orders that;

- 1. This Honourable Court do issue an order allowing/ enabling the Plaintiffs to restore, reinstate the gate and wall that were broken and demolished on land parcels known as Sigona 1391 and Sigona 1392 pending the hearing and determination of this suit.**
- 2. THAT pending the hearing and determination of this suit, a temporary injunction do issue restraining the Defendants , whether by themselves, their servants, agents employees or otherwise howsoever from breaking into, entering into and /or in any other way interfering with the Plaintiffs quiet possession and enjoyment of land parcels known as Sigona/1391 and Sigona 1392 respectively.**
- 3. THAT this Court do grant any other order that will meet the end of justice**
- 4. THAT the costs of this Application be provided for**

The Application is premised on the following grounds: that the Plaintiffs/ Applicants, are the owners of the suit lands while the 1<sup>st</sup> Defendant/ Respondent is the owner of parcel of land known as **Sigona 285** and **Sigona 138**, which are adjacent to and abut the Plaintiffs/ Applicants plots. That plot **258** has a road access at its bottom and **Plots 1391** and **1392**, have a private access that was created and allowed by the owners of **Sigona 350** and **Sigona 302**; that the Defendants/ Respondents have alleged that the private access road to plots **1391** and **1392**, is a public road and have demolished the gate leading to the plots and also demolished the wall fence separating plots **285** and plot **138**, from the Plaintiffs/ Applicants plots. Further that unless orders sought are granted, the plaintiffs/Applicants are at a risk of their property being invaded by vagabonds and their lives endangered as the demolished wall and gate have opened ingress into their properties.

In his supporting affidavit, the 1<sup>st</sup> Plaintiff/ Applicant, **George Karanu Ndeithi**, averred that he is the registered owner of **Sigona/1392**, while his brother is the registered owner of **Plot Sigona /1391**. He further reiterated the grounds on the face of the Application and contended that he built a house which is occupied by his elderly mother. Further that leading to the house is an access road, passing between the head of **plot No. 350 and 302**, at the back of plot numbers

**168,169 and 170**. He averred that the Land Registrar purported to register a dispute between plots **138** and **285**, and vide a letter dated 3<sup>rd</sup>

**March 2017**, through their Advocates, the applicants wrote to the **County Government of Kiambu**, refuting claims that they had encroached on a public road of access and even wrote to the District Surveyor explaining that the 1<sup>st</sup> Defendant/ Respondent was given an access road at the bottom when he bought his property from their father. However, on **14<sup>th</sup> November 2018**, he received a Notice from the County Government of Kiambu, demanding that he opens up the public road leading to the 1<sup>st</sup> Defendant/ Respondent's plot **285**. He further averred that his advocates replied to the demand letter stating that if a resurvey had been done, he was not aware. However, on **16<sup>th</sup> January 2019**, the Defendants knocked down the gate, entered their plots and destroyed the wall fence separating plot **1391** and plot **285**. It was his contention that there is no through road where the purported public road is said to exist.

He further averred that the access road created by their neighbour was never surrendered to the government of Kenya or the County Government of Kiambu, and could not therefore have become a public road which the public had a right of use. He also averred that as a result of the demolition of the wall and knocking down of the gate, their house has been exposed to insecurity. Further that the Defendants actions

were arbitrarily, ruthless and violent as the power to make an order of demolition is a preserve of judicial authority'. That unless restrained, the Defendants/Respondents intend to continue with the omission as on **1<sup>st</sup> February 2019**, the 2<sup>nd</sup> Defendant served them with a Notice to stop reconstruction of barriers recently demolished.

The Application is opposed and the 1<sup>st</sup> Defendant filed a Replying Affidavit and averred that he is the registered owner of **L.R Sigona /285**, which border **Sigona /349** and **Sigona/ 350**, where there is a public cum private access road that serves his property as shown in the mutation form which was created by the original owner of the suit property, one **Kinuthia John Kanyonyore**, who sold to him one part of the original property. That he sold to the Plaintiffs father another part. He further averred that his property is only accessible via the said access road which was created in **1987**, by the original owner who later subdivided the plot. He further averred that he purchased the land as it was and that the access road was in existence and was clearly meant to serve his property. He averred that he will be blocked by the Plaintiffs/ Applicants who are the owners of **Sigona/ 349**, which was subdivided into **L.R No. 1391** and **1392**, owned by the Plaintiffs/Applicants. He further averred that the Kiambu Land Registrars/officers and the surveyors went to the suit property after a complaint was made, and after undertaking a mandatory survey, the

Plaintiffs/ Applicants were informed that they needed to remove the illegal structures, but they refused to remove the barriers on the access road which forced the transport Engineer to remove the illegal barriers which action was within his authority.

He contended that the Plaintiffs/ Applicants were trying to mislead the Court into allowing them to illegally and unlawfully re-erect the illegal barriers. He averred that the Plaintiffs/ Applicants have failed to demonstrate how the actions of the County Engineer were illegal, irrational or coupled with procedural impropriety so as to be granted the orders they seek. He further contended that unless the plaintiffs are restrained, they will continue to carry out their illegal actions and he urged the Court to dismiss the Plaintiffs/Applicants' application.

The Plaintiffs/ Applicants filed a supplementary Affidavit on **14<sup>th</sup> May 2019**, and averred that there is no boundary dispute before the District Land Registrar and the District Surveyor, Kiambu. That although the dispute involves an access road, the same directly affects the value of their land. He averred that when the 1<sup>st</sup> Defendant / Respondent bought **Sigona/ 285**, from the Plaintiffs' father in **1987**, it was agreed he would be using the access road at the bottom of **285**, and that their father had occupied **Sigona/ 349/301**, which had no access road, and the 1<sup>st</sup> Defendant/ Respondent has never used the access road through **Sigona 349/ 301**, to access his land. He averred that they have never made a surrender to create an access road through their land.

The 2<sup>nd</sup> Defendant/ Respondent in opposing the Application, filed **grounds off opposition** and averred that the Application and entire suit has been prematurely filed. It was its contention that the Land Registrar is the first point of call in a boundary dispute and that the jurisdiction of the Court should not be invoked where there is a specific mechanism through which the dispute ought to be dealt with first. . It further averred that there is an ongoing dispute on the suit property since **2013**, that is yet to be resolved and that the **Physical Planning Act**, clearly defines the procedure to be undertaken when challenging an **enforcement notice**, and therefore the instant Application is frivolous, vexatious and an abuse of the Court process.

The Application was canvassed by way of written submissions which the court has carefully read and considered.

The Court has also considered the pleadings in general and the annexures thereto. Further, the Court has also considered the cited authorities and the relevant provisions of law and makes the following rendition:

The Plaintiffs/ Applicants have sought for a mandatory order of injunction, seeking that the Defendants be directed to restore and reinstate the gate which the Plaintiffs/ Applicants claim to have been

illegally destroyed by the Defendants. However this Court has noted that the bone of contention is whether or not the said gates were legally or illegally in place.

Further the Court has also noted that this is one of the prayers that has been sought by the Plaintiffs/ Applicants in their Plaint. Therefore allowing the same will be tantamount to making a finding on the case without affording the Defendants/ Respondents a chance to be heard. It is this Court's considered view that the said prayer is not merited and cannot be allowed at this juncture. See the case of **Locabail International Finance Ltd...Vs... Agroexport [1986] 1 ALL E.R.** where it was held that;

**“The matter before the court is not only an application for a mandatory injunction, but is an application for a mandatory injunction which, if granted, would amount to the grant of a major part of the relief claimed in the action. Such an application should be approached with caution and the relief granted only in a clear case.**

It is also evident that the Applicants herein have sought for injunctive orders which are governed by Order 40 Rules 1(A) & (B) of the Civil Procedure Rules, which 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.**

From the above provisions of law, it is very clear that the Court has discretion to grant temporary order of injunction in instances where the property in dispute is in danger of being wasted, damaged or alienated.

The suit properties are registered in the name of the Plaintiffs/ Applicants as from **24<sup>th</sup> August 2009**, having obtained the property from their father a fact that is not in dispute.

Having obtained the Certificate of title (registration), the Plaintiffs/Applicants qualified under Section 26(1) of the Land Registration Act 2012, to be the **absolute** and **indefeasible** proprietors of the suit property herein. The said proprietorship can only be challenged if the same was acquired fraudulently, through misrepresentation or through corrupt scheme. There is no evidence tendered to show that the Applicants' title herein has been challenged.

It is evident that these suit properties are registered in the name of the Plaintiffs/Applicants and without any evidence to challenge the said Certificate of title, the Court prima-facially holds and finds that the Applicants are the **absolute** and **indefeasible** owners of the suit property, as provided by Section 26(1) of the Land Registration Act.

As an indefeasible and absolute owners of the suit property, the Plaintiffs/Applicants have their rights provided for and protected by Sections 24(a) and 25(1) of the Land Registration Act. These rights cannot be defeated except by the operation of law.

The said provisions of law provide as follows;

**24(a) Subject to this Act—**

**‘ the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;**

**25(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever..”**

However, the Applicants have alleged that the Defendants/Respondents have damaged their walls and gates, by knocking them down and proceeded to destroy the wall claiming that their exist an access public road, an act that has left them exposed to vagabonds and insecurity as their elderly mother live on the house constructed on the suit property. Therefore, the Applicants have sought for an order of injunction in order to enjoy quiet possession and prevent further destruction of the suit property. An act of wastage or wasting of the suit property is one that can give the court discretion to

grant or issue temporary injunction as stated in Order 40 Rule 1.

The Court will further be guided by the principles set out in the case of Giella...Vs...Cassman Brown & Co. Ltd 1973 EA 358, which principles states as follows:-

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

**b) That the Applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.**

**c) When the Court is in doubt, to decide the case on a balance of convenience.**

Have the Applicants herein established the above stated criteria to warrant the court grant the orders sought?

As held earlier by the Court, the Applicants are the registered owners of the suit properties and thus prima-facially, they are the absolute and indefeasible owners of the said property. The alleged act of destruction of their gate and demolition of the wall by the Respondents goes against the spirit of Sections 24(a) and 25(1) of the Land Registration Act, as it amount to wastage. Thus, the Court finds that the Applicants have established that they have a prima-facie case with probability of success at the trial.

On the second limb of if order not granted, the Applicants can adequately be compensated by an award of damages, this Court will echo the findings in the case of *Olympic Sports House Ltd...Vs...School Equipment Centre Ltd (2012) eKLR*, wherein the Court held that:-

**“A party cannot be condemned to take damages in lieu of his crystalized right which can be protected by an order of injunction”.**

Equally, the Applicants crystalized right herein cannot be adequately compensated by an order of injunction.

On the third limb, the Court acknowledges that the access road is in dispute and whether or not it is part of the Plaintiffs/ Applicants piece of land is what is will be determined in the main suit. However it is clear that when the Court is in doubt, it should decide on balance of convenience. As the Court cannot at this juncture authoritatively state where the access road lies ,whether public or private, it is its considered view that then the balance of convenience lies in maintaining the status quo. The status quo herein being that any further destruction of the walls and the gates ought to be stopped until the matter is determined.

Having now carefully considered the pleadings herein, the instant ***Notice of Motion*** application and the written submissions, the Court finds that the ***Notice of Motion*** dated **25<sup>th</sup> February 2019** is partially merited and it is allowed in terms of prayer **No.5 wherein a temporary injunction is issued to restrain the defendants/Respondents, whether by themselves, their servants, agents, employees or otherwise from breaking into, entering into and/or in any way interfering with the Plaintiffs’ quiet possession and enjoyment of land parcels known as Sigona/1391 and Sigona/1392 respectively.**

**Further, the costs of this application shall be in the cause.**

It is so ordered

**Dated, Signed and Delivered at Thika this 12<sup>th</sup> day of March 2020.**

**L. GACHERU**

**JUDGE**

**In the presence of**

**Mr. Kimemia for Plaintiffs/Applicants**

**No appearance for 1<sup>st</sup> Defendant/Respondent**

**M/s Nguru holding brief for M/s. Chesereck for 2<sup>nd</sup> Defendant/ Respondent**

**No appearance for 3<sup>rd</sup> Defendant/Respondent**

**No appearance for 4<sup>th</sup> Defendant/Respondent**

**Lucy - Court Assistant.**