



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**CASE NO. 132 OF 2019**

**MARY MUTHONI RUARA.....PLAINTIFF**

**VERSUS**

**COUNTY GOVERNMENT OF NAKURU.....DEFENDANT**

**RULING**

1. The plaintiff commenced proceedings herein through plaint filed on 31<sup>st</sup> October 2019. Together with the plaint, she filed Notice of Motion dated 31<sup>st</sup> October 2019, which is the subject of this ruling. The following orders are sought in the application:

1. ...

2. ...

3. THAT pending hearing and determination of this suit, the Honourable court be pleased to grant a temporary order of injunction do issue (sic) restraining the defendant/respondent, its agents or servants from encroaching into or in any way interfering with parcel of land known as North of Gilgil Township Land Reference Number 3777/1157.

4. THAT the OCS GILGIL POLICE STATION to supervise compliance of the above orders.

5. THAT costs of this application be in the cause.

2. The application is supported by an affidavit sworn by the plaintiff/applicant. The defendant opposed it through a replying affidavit sworn by Simon Nginga who deposed that he is employed by the defendant as the Resident Gilgil Sub County. The Plaintiff also filed a further affidavit. Although parties were ordered to file written submissions, only the applicant filed submissions. I have considered the application, the affidavits and the submissions.

3. The applicant is seeking an interlocutory injunction. She must therefore satisfy the test in **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**. This entails establishing a *prima facie* case with a probability of success. Even if a *prima facie* case is established, an injunction will not issue if damages can be an adequate compensation. Finally, if the court is in doubt as to whether damages would be an adequate compensation then the court will determine the matter on a balance of convenience. All these conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. See **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**.

4. From the material before the court, it is not contested that the applicant is the proprietor of the parcel of land situated North of Gilgil Township, measuring 20.08 hectares and known as Land Reference Number 3777/1157 (the suit property). There is also no dispute that the defendant herein constructed a road through the said property. According to the defendant, what it actually did was to rehabilitate an already existing Kigogo – Kagumo road and that the work commenced on 26<sup>th</sup> May 2019 and was completed on 2<sup>nd</sup> September 2019, obviously before the filing of this suit. That the project was completed before filing of this suit is corroborated by the applicant's own supporting affidavit in which she deposed that she visited the suit property on 9<sup>th</sup> September 2019 "*and found that a road had been constructed thereon ...*" Similarly, the photographs exhibited by the applicant show a fully graded road surface and are in fact dated 22<sup>nd</sup> October 2019.

5. It seems to me therefore that what the applicant sought to stop through the application has already taken place. The road has been constructed and as stated in the replying affidavit, is in use by the public. In **Nguruman Limited v Jan Bonde Nielsen & 2 Others** (supra), the Court of Appeal stated:

**... The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion...**

6. Besides what happened in the past, the material placed before the court do not disclose any direct threat occasioning any urgent necessity to prevent an irreparable damage. The application is overtaken by events and no *prima facie* case has been demonstrated in view of the specific circumstances obtaining herein. Parties should prosecute the main suit so as to resolve any remaining aspects of the dispute.

7. In view of the foregoing, Notice of Motion dated 31<sup>st</sup> October 2019 is dismissed. Costs shall be in the cause.

8. This ruling is delivered remotely through video conference and e-mail pursuant to the Honourable Chief Justice's "Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic" (Gazette Notice No. 3137 published in the Kenya Gazette Vol. CXXII—No. 67 of 17<sup>th</sup> April, 2020).

**Dated, signed and delivered at Nakuru this 30<sup>th</sup> day of April 2020.**

**D. O. OHUNGO**

**JUDGE**