



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 60 OF 2019

RUTH WAKAPA.....1ST PLAINTIFF

JOSEPH LEMAYIAN WAKAPA.....2ND PLAINTIFF

JASON SENDEU WAKAPA.....3RD PLAINTIFF

VERSUS

MBURU GATHIORI NDUATI.....1ST DEFENDANT

PETER MBURU GITAU.....2ND DEFENDANT

RULING

What is before Court for determination is the Plaintiffs' Notice of Motion application dated the 1st July, 2019 and 2nd Defendant's Notice of Motion dated 24th July, 2019. The Plaintiffs' application is brought pursuant to sections 1A, 3 and 3A of the Civil Procedure Act and Order 40 Rule 1 of the Civil Procedure Rules. It seeks for orders of injunction against the Defendants by themselves, their servants, employees or agents or otherwise howsoever from trespassing, accessing, using or in any other way whatsoever interfering with the Plaintiffs' property Title numbers NGONG/NGONG/ 52126, NGONG/ NGONG/ 52131, NGONG/ NGONG/ 67180, NGONG/ NGONG/ 52128 and NGONG/ NGONG/ 52129 and/ harassing, intimidating Plaintiffs and/or their agents', pending the outcome of the suit. Further, that the OCS Rongai Police Station be directed to ensure compliance. The application is premised on the grounds on the face of it and the affidavit of the 1st Plaintiff RUTH WAKAPA where she deposes that she is the registered proprietor of land parcel numbers NGONG/NGONG/ 52126 and NGONG/ NGONG/ 52131 while the 2nd Plaintiff is the owner of land parcel number NGONG/ NGONG/ 67180. Further that the 3rd Plaintiff is proprietor of land parcel numbers NGONG/ NGONG/ 52128 and NGONG/ NGONG/ 52129 respectively. She avers that the Defendants are the registered proprietors of parcels of land adjacent and/ or neighbouring Plaintiffs' land. She claims the Defendants have on numerous occasions trespassed into the Plaintiffs' parcels of land without any justifiable cause. Further, that they have on numerous occasions threatened to have the permanent houses and structures in their aforementioned parcels of land demolished without any justifiable cause. She contends that on 29th June, 2019, the 1st Defendant caused one of their agents Theophilus Pere Wakapa to be arrested and detained at the Rongai Police Station levelling malicious and baseless accusations against him. She states that together with the 2nd Plaintiff, they have on numerous occasions verbally requested and written to the Defendants to cease from trespassing on the suit property but the Defendants have refused, neglected and/or otherwise failed to do so. She reiterates that their Certificates of title is prima facie evidence that they are the absolute and indefeasible owners of the suit property subject to encumbrances, easements, restrictions and conditions endorsed in the said titles. She insists there are no encumbrances, easements, restrictions and conditions endorsed in the Plaintiffs' titles in favour of the Defendants herein.

The 1st Defendant MBURU GATHIORI NDUATI opposed the application by filing a replying affidavit where he deposes that the instant application is misconceived, bad in law as it fails to disclose material and relevant information to the Court and the grounds advanced by the Applicants are incapable of invoking the discretion of the court. He insists application is defective and an abuse of the court process. He explains that he has been a neighbour of the 1st Applicant for a period of over 37 years, with their properties bordering each other. Further, that they all have their title deeds that show the size and area of each person's property. He denies trespassing on the Applicants properties and claims it is the Applicants' who have trespassed on his property where they caused malicious damage to his fence by cutting it without his consent or knowledge. He contends that the genesis of this suit is due to the fact that the Applicants are encroaching on the public access road that borders his property as well as his neighbours' which road has been in existence since time immemorial and is clearly marked on the area map. Further, the said road is supposed to service his property as well as several other neighbours. He avers that when he purchased his property LR NO. NGONG/ NGONG/ 3877 from one Harrison Kimeria in 1982 there was a well demarcated public access road that is clearly indicated on the mutation form as well as the map of the area. Further, he built a home thereon and planted a fence popularly known as kei – apple fence that has been on his property since 1982 until it was maliciously damaged by the Plaintiff's son, one Theophilus Pere Wakapa on two occasions on 20th and 21st June, 2019 respectively. He confirmed reporting to the Ongata Rongai Police Station and on 26th June, 2019 having a joint meeting at the Deputy County Commissioner's Office in Ngong together with the 1st Applicant as well as her son Theophilus Pere Wakapa, to deliberate on the dispute over the access road which the Applicants have annexed as their properties. He further

explains that the issue of the access road started over ten years ago when the 1st Applicant purportedly encroached on it, which in turn led to him together with the 2nd Defendant and other adversely affected neighbours making a complaint to the District Land Registrar in 2011 and also the Land Registrar Ngong in 2014 but the same is yet to be resolved. Further, in 2016, the 1st Applicant subdivided her land, annexed the access road and developed properties over it, compelling them to lodge a complaint with the National Land Commission who wrote to the 1st and 2nd Applicants together with three others who were encroaching on the road to cease doing so and remove the developments therefrom. He further claims that on 26th June, 2019 the 1st Applicant and her son Theophilus Pere Wakapa admitted to destroying his fence during a meeting at the Deputy County Commissioner's office (DCC) Ngong. Further, on 29th June, 2019 he found the 1st Applicant's son Theophilus Pere Wakapa supervising a tractor digging a trench on his property and destroying the fence. He explains that the Police conducted their own investigations, while the damaged fence was assessed by the Kenya Forest Service at a value of Kshs. 200,000/= culminating in Theophilus Pere Wakapa being arrested and arraigned in Court. He further reiterates that the Applicants have not come to court with clean hands.

The 2nd Defendant PETER MBURU GITAU in opposing the application filed a replying affidavit where he deposes that the Plaintiffs are guilty of non disclosure of material fact and have come to court with unclean hands. He confirms being the registered proprietor of land parcel number NGONG/ NGONG/ 3867 where he resides together with his family. Further, that he has been in occupation of the same since 1993 and has been unable to access his land through a road reserve registered at Kajiado Land Registry Index Survey Map Sheet No. 148/3/11/SW. He contends that there has been a dispute on the road reserve forcing him and his neighbours to use another road which is not a road reserve. He explains that the 1st Plaintiff has failed to disclose to the Court that she was the registered proprietor of NGONG/ NGONG/ 51250 that she subdivided into NGONG/ NGONG/ 52124; 52126; 52127; 52128 and 52129 which subdivisions have encroached on the road reserve. He states that his neighbours lodged a complaint with the District Land Registrar and the Permanent Secretary, Ministry of Lands and Settlement raising the issue of encroachment by the 1st Plaintiff rendering their parcels of land inaccessible. Further, together with his neighbours, they filed a boundary dispute on 22nd June, 2011 but the exercise was futile since the Plaintiffs had proceeded with construction of residential houses. He states that the National Land Commission intervened in its letter dated the 14th March, 2014 giving the 1st Plaintiff twenty one (21) days' notice to remove her developments from the road reserve. Further, the Plaintiffs have now engaged Kings Developers Limited to construct residential houses which have now encroached on the road reserve. He reiterates that the Plaintiffs have constructed a perimeter wall denying him access to his land.

The 2nd Defendant's application is brought pursuant to sections 1A, 1B & 3A of the Civil Procedure Act; Order 40 Rules 1, 2, 3, 7 and 10 as well as Order 51 Rules 1 – 3 of the Civil Procedure Rules. The 2nd Defendant seeks a mandatory injunction against the Plaintiffs or their agents, servants or any one acting on their instructions to remove any construction works carried out on a Road Reserve forming the frontage to the 2nd Defendant's parcel of land namely NGONG/ NGONG/ 3867 and to revert the subject road reserve to the former landscaped condition pending the outcome of the suit. The application is premised on the summarized grounds on the face of it and the affidavit of PETER MBURU GITAU where his averments are similar to the response to the Plaintiffs' application dated 1st July, 2019. He further claims no action has been taken against the 1st Plaintiff for encroaching on a road reserve. Further, that the 1st Plaintiff being a member of the Land Control Board in Ngong has frustrated his efforts together with the neighbours in seeking justice.

The Plaintiffs opposed the application and filed a replying affidavit sworn by THEOPHILUS PERE WAKAPA where he deposes that the 2nd Defendant's claim is statute barred as the same arose 26 years ago. He denies existence of a road reserve and contends that even the survey map does not establish one. He explains that the 2nd Defendant has failed to disclose that he filed a suit NAIROBI ELC CASE NO. 1050 OF 2016 PETER GITAU V JOSEPH LEMAIYAN WAKAPA, RUTH WAKAPA & OTHERS which was dismissed. He avers that the Defendants have not lodged an Appeal against the Land Registrar's decision. He contends that the 2nd Defendant having admitted he has access to his land using another road does not fall within the purview of being landlocked.

The parties herein filed their respective submissions which I have considered.

Analysis and Determination

Upon consideration of the Plaintiffs' Notice of Motion application dated the 1st July, 2019 and 2nd Defendant's Notice of Motion dated 24th July, 2019 including the respective parties' affidavits and submissions, the following are the issues for determination:

- Whether the Plaintiffs are entitled to orders of interlocutory injunction pending the outcome of the suit.
- Whether the 2nd Defendant is entitled to orders of a mandatory injunction pending the outcome of the suit.

As to whether the Plaintiffs are entitled to orders of interlocutory injunction pending the outcome of the suit. The Plaintiffs have sought for an interlocutory injunction against the Defendants. In their submissions they have reiterated their claim above and relied on the cases of **Giella Vs Cassman Brown (1973) EA 358; Mrao V First American Bank Limited & 2 Others (2003) KLR 125; Panari Enterprises Limited V Lijoodi & 2 Others (2014) eKLR; Auni Bhajji & 4 Others V Chief Magistrate , Milimani Law Courts & 2 others (2017) eKLR and Lucy Wangui Gachara V Minudi Okemba Lore (2015) eKLR** to buttress their arguments. The 1st Defendant submitted that it is the 1st Plaintiff who had trespassed on his land and maliciously damaged property thereon. He relied on the cases of **Rose V Plenty & Another (1976) 1ALL ER 97; Muwonge V Attorney General Of Uganda 1967 EA 17; Giella Vs Cassman Brown (1973) EA 358; Peter Muchiri Mwangi V Mololine Services Ltd & Another (2006) eKLR and Vic Preston Murithi Ruchabi V Mary Wangari & 3 Others (2018) eKLR** to oppose the application.

He 2nd Defendant submitted that the Plaintiffs were guilty of non disclosure of material fact as they failed to inform the court that they are the ones who had encroached on a road reserve. He relied on the cases of **Uhuru Highway Development Limited V Central Bank of Kenya & 2 others (1995) eKLR; Kyangavo V Kenya Commercial Bank Ltd & Another (2004) eKLR; Mugure Mahinda V Ali Mohammed Farah (2016) eKLR** to support these averments.

It is not in dispute that the Plaintiffs are registered proprietors of their respective parcels of land. It is further not in dispute that the Defendants' parcels of land neighbour the Plaintiffs'. Further, that the Defendants are registered proprietors of their respective parcels of land. The Plaintiffs contended that the Defendants had trespassed on their land and declined to stop doing so despite numerous requests from them. They claim that the Defendants have on numerous occasions trespassed into their parcels of land without any justifiable cause and threatened to demolish the permanent structures thereon. They explained that on 29th June, 2019, the 1st Defendant caused one of their agents Theophilus Pere Wakapa to be arrested and detained at the Rongai Police Station levelling malicious and baseless accusations against him. The Defendants insist it is the Plaintiffs who have encroached on a road reserve, blocked their access and declined to stop doing so. Further, that the 1st Plaintiff's son Theophilus Pere Wakapa proceeded to destroy the 1st Defendant's fence culminating in his being charged in court. Looking at the documents presented by the respective parties, I note the National Land Commission in March, 2014 had actually written to the 1st Plaintiff to cease encroaching on the road reserve. Further, there is a reference of the boundary dispute to the Land Registrar. I further note that the 1st Plaintiff's son had indeed been charged in a Court of law and the Forestry Department had even proceeded to assess the damage to the 1st Defendant's fence. It is trite law that injunction is an equitable remedy and at this juncture, I note the actions of the Plaintiffs especially the 1st Plaintiff betray her. Further, in their application they did not indicate that they had received a Notice from the National Land Commission nor the matter had been adjudicated by various government institutions. In line with the principles enshrined in the case of **Giella Vs Cassman Brown (1973) EA 358**; and based on the evidence before me, I find that the Plaintiffs have not established a prima facie case to warrant the orders of injunction. Further, in associating myself with the decision of **Nguruman Ltd v Jan Bonde Nelson & 2 others**, Civil Appeal No.21 of 2014(UR) where the Court held that:

“It is established that all the above three conditions and stages are to be applied as separate, distinct, and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd v Afraha Education Society (2001) Vol.I EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law is adequate remedy and the respondent is capable of paying, no injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without hurdles in between.”

I will not consider the other two conditions as the Plaintiffs' have failed to meet the first condition for the grant an injunction.

As to whether the 2nd Defendant is entitled to orders of a mandatory injunction pending the outcome of the suit. The 2nd Defendant submitted that he had established a prima facie case to warrant the orders sought for a mandatory injunction against the Plaintiffs. He relied on the cases of **Giella Vs Cassman Brown (1973) EA 358** and **Mrao V First American Bank Limited & 2 Others (2003) KLR 125** to buttress his arguments. On the issue of a mandatory injunction, an applicant must prove that it is a clear case that the Court will be assured that the same will succeed after the trial. In the case of **Kenya Breweries Limited vs. Washington Okeyo (2002) EA 109** the Court of Appeal stated that, ' **a mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally, be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application.**'

The mandatory injunction sought by the 2nd Defendant for the Plaintiffs to remove structures from the access road can only be granted in special circumstances where the Court thinks it ought to be decided at once, and after full trial, it will be evident that the injunction was properly granted. Even though the Plaintiffs and Defendants are registered proprietors of their respective parcels of land, I note there is a dispute in relation to the access road. Further, I note the dispute on the access road is yet to be determined by the Land Registrar as no party presented a report to that effect. The Court has taken judicial notice of the existence of a map that needs to be interpreted as to the location of the access road which fall within the mandate of the District Land Registrar as per the provisions of the Land Act. It is in these circumstances that I decline to grant the mandatory injunction sought for the removal of the Plaintiffs' structures, pending the determination of the suit.

Since the dispute herein revolves around an access road, I direct the parties to present themselves before the District Land Registrar Ngong within 60 days from the date hereof to determine the same and present a report in court.

It is against the foregoing that I find the Plaintiffs' Notice of Motion application dated the 1st July, 2019 and 2nd Defendant's Notice of Motion dated 24th July, 2019 unmerited and will disallow them. Costs will be in the cause.

Dated signed and delivered via ema this 23rd day of April, 2020.

CHRISTINE OCHIENG

JUDGE