



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENT & LAND COURT

ELC CASE NO. 774 OF 2015

MR.JOHN MURIITHI

BRIG.(RTD)BERNARD KILLU

MRS.ROSE MURIITHI

MRS. BRIDGET KILLU

CAPT.JOE GATHECHA

MRS SOPHIA GATHECHA

MR.STEVE KABII

ENG. ALBERT MUGO

REV.PHOEBE MUGO

HON.KIPRUTO ARAP KIRWA

DR.CHARLES CHUNGE

MRS.RUTH CHUNGE

DR.WARUGONGO KIONI

MRS.ALICE WARUGONGO

MR.MOSES KANENE

MR.SAMUEL ABANGA

MRS.MICHELLE ABANGA

MR. PETER MAINGI

REGISTERED AS OLESHUA COMMUNITY

ORGANISATION.....PLAINTIFFS/RESPONDENTS

VERSUS

HON.GEORGE NYANJA.....DEFENDANT/APPLICANT

RULING

The matter coming up for determination is the *Notice of Motion dated 11th May 2016*, brought under *Orders 51 Rule 1, Order 40 Rule 7, Section 3A of the Civil Procedure Act*, the inherent jurisdiction of the court and all other enabling provisions of the law. The applicant has sought for the following prayers;-

1. Spent

2. That upon hearing this application inter-parties this honourable court be and is hereby pleased to issue an order discharging and /or setting aside the ex-parte orders of injunction granted in the first instance on 14th August 2015 and extended on 18th November 2015.

3. That the cost of this application be provided for.

The application is anchored on the grounds stated on the face of the application and on the Supporting Affidavit of **HON.ARCHITECT GEORGE NYANJA** defendant/applicant herein. These grounds are;-

(a) That the plaintiffs/respondents obtained ex-parte orders of injunction way back on 14th August 2015 which orders were last extended on 18th November 2015.

(b) That the ex-parte orders herein have remained on record since 14th August 2015 a period of well over 8months.

(c) That the plaintiffs/respondents have deliberately refused an/or failed to comply with court orders on filling of submissions and have also refused to fix a date for mention to enable parties obtain directions on the pending application for injunction.

(d) That this matter was last in court on 18th November 2015 on which date the interim orders were extended for a second time.

(e) That the orders on record are clear abuse of the court process on the part of the plaintiffs and the prevailing state of affairs is highly prejudicial to the defendant/ applicant who continues being denied the use of an access road into and out of his residential premises.

(f) That it is only fair, just and in the interest of justice that the orders sought be granted.

In his supporting affidavit, **HON.ARCHITECT GEORGE NYANJA** and averred that the plaintiffs/respondents herein filed the present suit against him simultaneously with an application for injunction culminating in the Court granting exparte orders as per annexure **GN 1**. The deponent deposed that on **31st August 2015** the matter came up for hearing and thereafter stood over to **8th October 2015** and the interim orders were extended. The defendant/ applicant alleged that the Plaintiffs/Respondents sought and obtained leave to file a supplementary affidavit on which the Plaintiffs/Respondents were directed to serve the advocates for the Defendants/Applicant's on record with written submissions.

The Defendant/Applicant contended that interim orders were extended and application for injunction fixed for hearing on **18th November 2015**. The deponent averred that he is advised by his Advocate on record which advice he believes to be true that since **18th November 2015** to date the Plaintiffs/Respondents have never served him with written submissions nor did the Plaintiffs/Respondents take any reasonable step to fix their application for injunction for hearing. The Defendant/Applicant averred that the ex-parte interim orders of injunction have remained on record since **14th August 2015** a period of well over **8months**.

The defendant/applicant alleged that the plaintiffs/ respondents have deliberately refused and or failed to comply with court orders, fixing a date to enable parties obtain further directions in respect of the application for injunction and that the prevailing state of affairs is a clear abuse of the court process on the part of the plaintiffs and is highly prejudicial to the defendant/applicant. The defendant/applicant claimed that due to the orders of injunction on record, he cannot access into and out of his premises and that his access through Mwituu Road is paid for and not free and indeed he has been denied his right for last **33 years**. The defendant further claims that he has no right of way through Mwituu Road and vide **Nairobi HCCC No.1031 of 1991 MWITUU ESTATE WATER COMPANY LTD** sued the defendant seeking to block him from accessing his property through Mwituu road and the court made a finding that the defendant had no right to access through the said road and that his use amounted to trespass as per annexure **GN2'**.

The defendant averred that pursuant to the aforesaid judgement and subsequent ruling on the application on use of Mwituu Road the court ordered the defendant to be effecting payment for the use of said road as per annexure **GN 3'** and that the foregoing state of affairs continues to cause him tremendous embarrassment and inconvenience as members of his family, in-laws, friends and visitors are normally harassed and ordered to pay for the use of the road which became exceedingly expensive to the defendant. The defendant further averred that the plaintiffs/respondents allegation that his move to put up a gate will comprise plaintiffs security has no basis at all as the gate he intend to put up will lead directly to his premises.

The application is opposed by the plaintiffs/respondents and **JOHN MURIITHI** swore a Replying Affidavit on **23rd May 2016** and averred that he is the Chairman of the Karen Community (OLESHUA COMMUNITY) and that he has the authority of the other 17 members of Oleshua Community. The plaintiffs/respondents alleged that defendant/ applicant's application dated **11th May 2016** is frivolous and without merit. The deponent deposed that the delay in filing their submissions was caused wholly by unavailability of the court file and they are reasonably apprehensive that 'disappearance' of the file could have been deliberately intended to precipitate the awkward position necessitating an application to discharge the order of injunction herein. The plaintiffs/respondents further averred that the defendant/applicant intended use of the Ololua Close as a road of access not to be granted on the basis of a 'technicality' and that the **Nairobi County City Planning Authority** vide a letter dated **9th December 2015** clarified categorically that the defendant/applicant cannot use the **cul de sac** as a road of access as per annexure **JM2''**.

The plaintiffs/respondents averred that defendants/applicants application to strike out their orders is an attempt to arm twist the court into granting illegal orders as the defendant/applicant is aware that **OLOLUA CLOSE** is not a public road and cannot be used as an access road to his property.

The Notice of Motion was canvassed by way of written sub missions. The Law Firm of **Z.N.GATHAARA & CO.ADVOCATES** for the plaintiffs/ respondents filed their written submissions on **6th June 2016** and urged the court to dismiss defendant/applicant Notice of Motion dated **11th May,2016** with costs. They relied on decided case of **Meru Medical Stores Co.Ltd versus Stanley Kariba Mwithimbu & 2 Others [2011] eKLR** where Justice J.A. Makau dealt with the issue of delay caused by disappearance of a file at the courts registry. The court in this case stated that;

"The failure by the court registry to avail the court file affected the plaintiff's constitutional rights in that justice was not done and justice was delayed on his part by the registry failure to avail court file for setting a suit down for hearing.it would therefore be wrong to hold the delay against the plaintiff. The plaintiff was denied his rights of setting the action in motion. He could not take any step to have suit heard as such. The defendants though they had filed application for dismissal of this suit for want of prosecution on 27th march 2009 they did not attempt to take a hearing date between late 1998 and 2006.This I believe is because the court file could not be traced."

The Law Firm of **KABUE THUMI & CO.ADVOCATES** for the defendant /applicant filed their written submissions on **30th May 2016** and urged the court to allow the application dated **11th May 2016** with

costs. They relied on various decided case amongst the case of *Mobile Kitale Services Station versus Mobil Oil Kenya Ltd and Anor(2004) 1 KLR* Justice M. Warsame had occasion to deal with a similar application seeking the discharge of injunctive orders.

The court observed thus:

“In my view the object of granting an interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable. While an interlocutory injunction being equitable remedy would be taken away (discharged) where it is shown the persons conduct with respect to the matters pertinent to the suit does not meet the approval of the court which granted the orders which is the subject matter.”

The orders of injunction cannot be used to intimidate and oppress another party. It is a weapon only meant for specific purpose to shield the party against violation of his rights or threatened violation of the legal rights of the person seeking it.”

The court has now carefully considered the instant Notice of Motion which is brought under **Order 40 Rule 7** which states that,

‘Any Order of injunction may be discharged or varied or set aside by the court on application made thereto by a party dissatisfied with such order’.

It is clear from the above provision of law that an order for injunction may be discharged on application made by a dissatisfied party. The court therefore has discretion to allow such an order of discharge or variation but the said discretion must be exercised judicially.

Further the application is anchored under **Section 3A** of the *Civil Procedure Act* which grants the court inherent power to make such orders that are necessary for end of justice or to prevent abuse of court process.

The defendant/applicant has sought for discharge of interim orders of injunction in force on allegation that there is unexplained delay on the part of plaintiff/respondents to prosecute the application that culminated in the issuance of interim orders.

The defendant/applicant has now alleged that the plaintiffs/respondents have deliberately refused and/ or failed to comply with the court orders on filing of submissions. It was stated that the matter was last in court on **18th November 2015**.

The plaintiffs/respondents on their part have alleged that the delay has been caused by missing court file from the registry. It was submitted that Respondents should not be punished for the delay whereas they had no control of the issue of non-availability of the file from the court registry. However the plaintiffs have not availed evidence to show that they had requested for the file from the registry. The court would take that explanation by the plaintiffs/respondents with a pinch of salt.

The defendant/respondent main reason for seeking to have the orders discharged is that the applicants have failed to file its written submissions. However, there is no evidence that after **14 days**, the defendant/ applicant did file his written submissions and that the court can now find that there was good faith on the part of the defendant. Given that there were interim orders in force, the defendant/applicant should have filed his written submissions and then if the plaintiffs failed to file theirs then an application for dismissal of the application by the Defendant should have sought. Filing an application for discharge of interim orders contributed in further delay of the determination of the plaintiffs Notice of Motion dated **6th August 2015**.

The court has noted that the issue of whether *Ololua close* is public road or not is a disputed one. The defendant is in possession of a letter dated **14th August 2015** from **Nairobi County** stating that the

Ololua close is a public road which can serve ***LR.No.7583/1*** and no one should act to the contrary. However the plaintiffs/respondents are also in possession of a letter dated ***9th December 2015*** and copied to the defendant/applicant, which stated that ***LR.NO.7583/1*** should be accessed from ***Mwitu Road*** and not ***Ololua Road***. That is an issue that needs to be resolved by calling of evidence in the main trial. It is not in doubt that the defendant/applicant has been accessing his property through ***Mwitu Road***.

The Plaintiffs have alleged that opening ***Ololua Road*** to the public would be prejudicial to ***Oleshua Community*** as the said opening might bring about insecurity to the area. As the court stated earlier, that is an issue that needs to be resolved expeditiously through calling evidence. The defendant has not been using ***Ololua Close*** to access his property and the existence of interim orders cannot be said to have caused prejudice to him since he has been using the ***Mwitu Road*** to access his property. Taking into account that the plaintiffs/respondents have alleged that their Advocate could not access the court file in the registry to file their submissions, the court finds that as provided for ***Section 3A*** of the ***Civil Procedure Act***, the orders that commends herein is for extending and retaining the interim orders in place.

However, the plaintiffs/respondents will not be given a blank cheque but will be directed to file their written submissions within the period of ***7days*** from the date of this Ruling. The defendant is thereafter granted leave of ***14days*** after service to file his written submissions. Thereafter the matter be mentioned before any ELC Judge for taking of a Ruling date. Failure by the plaintiff to comply with the orders herein, then the interim orders in force will stand discharged and/ or set aside.

It is so ordered.

Dated, Signed and Delivered at ***Nairobi*** this ***17th*** day of ***February 2017***

L.GACHERU

JUDGE

In the presence of

M/s Magu holding brief for Kabue for the Defendant/Applicant

Mr Gathaora for the Plaintiffs/Respondents

Steve: Court Clerk

L.GACHERU

JUDGE

Court:

Ruling read in open Court in the presence of the above advocates and matter to be mentioned on ***16th*** March 2017 before any ELC Judge for taking of a Ruling date.

L.GACHERU

JUDGE

17/2/2017