



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 117 OF 2019

RACOM LIMITED.....PLAINTIFF/APPLICANT

VERSUS

KENYA URBAN ROADS AUTHORITY (KURA).....1ST DEFENDANT/RESPONDENT

BENISA CONTRACTORS LIMITED.....2ND DEFENDANT/RESPONDENT

RULING

The matter for determination is the **Notice of Motion Application**, dated **4th July 2019**, brought by the Plaintiff/Applicant seeking for orders that;

a) Pending the hearing and determination of this suit, a temporary injunction do issue restraining the Defendants/ Respondents whether by themselves, employees, servants and or agents from channelling storm water through the parcels of land Known as L.R No, 10910/198 and L.R No. 10901/356 or interfering with the peaceful possession of the properties by the Plaintiff in any way.

The Application is premised on the grounds that the Plaintiff/ Applicant is the registered owner of the suit properties **L.R No. 10910/198** and **L.R No. 10901/356**. That with instructions from the 1st Defendant/ Respondent, the 2nd Respondent has been illegally interfering with the Plaintiff's/Applicant's peaceful occupation of the suit properties by channelling Garrisa Road storm water into the said properties. That the illegal actions by the 2nd Defendant are being done without consultation and/or consent of the Plaintiff/Applicant. Further that the Plaintiff/ Applicant has objected to the illegal interference with its properties as the ongoing road construction was never subject of public participation and the 1st Defendant/Respondent has never sought for a wayleave through the suit properties. It was further contended that the ongoing illegal channelling of storm water into the Plaintiff's/ Applicant's properties was never licensed by **National Environment Management Authority (NEMA)**, there was no Project Assessment and no Environment Impact Assessment (EIA) done prior to the commencement. Further that the Defendants/Respondents have persisted with maliciously, illegally and unlawfully channelling storm water into the Plaintiff's property.

In his Supporting Affidavit sworn on **4th July 2019**, **James Mwaniki Njuguna**, reiterated the contents of the grounds in support of the Application. He further averred that he has been advised by his Advocates that the Defendants actions are interfering with the Applicant's Constitutional rights to own property, which right ought to be protected by the Court. Further that the Plaintiff/Applicant will suffer loss and damages unless the Court intervenes. That despite good faith correspondence, the Defendants/Respondents have refused to make good the claim. He urged the Court to allow the Application.

The Application is opposed and the 1st Defendant/ Respondent filed a Replying Affidavit sworn by **Abdulkadir Ibrahim Jatani**, its Deputy Director in charge of survey. He averred that in keeping with Constitutional structures, statutory provisions, regulations and practice on road works the planning and implementation of the said project was subjected to public participation and stakeholders sensitization forums. That the project conceptualization and designing was preceded by an environment and social impact assessment study which culminated in the issuance of an **Environment Impact Assessment** license by the **National Environment Management Authority**. It was his contention that the flooding and storm water drainage were some of the matters that were featured prominently, for which a great deal was discussed and resolved in the said public consultative forums.

He further averred that the deed plan attached to the title documents produced by the Plaintiff/Applicant shows that there is a **3m** storm water drainage Wayleave bounding the property, which is to drain the storm water from **Garissa Road** to the **Kiu River** yonder. Further that the Plaintiff's/ Applicant's title documents also confirm vides their memorandum sections of the registration of the applicable **wayleave** that pertain to the properties per their approved survey plans. That the 1st Defendant/ Respondent wrote to the Plaintiff on **26th June 2019**, in response to an objection raised against the constructions of a storm water drainage over the relevant wayleave elaborating

on the issue.

It was his further contention that the Plaintiff/Applicant has not establish a **prima facie** case with a probability of success to warrant the issuance of the interim orders. Further that the suit is misconceived and would only serve nuisance value and perpetrate mischief causing inconvenience to the greater tax paying public by delaying timely conclusion of a road project and its allied storm drain.

The Plaintiff through **James Mwaniki Njuguna** further swore a Supplementary Affidavit on **15th August 2019**, and averred that the public participation and stakeholders' sensitization forum conducted by the 1st Defendant/Respondent was organised only for Kahawa Sukari Estate residents through their Residents Association. He contended that the suit properties fall outside the Kahawa Sukari scheme and that the user properties are agricultural therefore fall outside the Kahawa Sukari scheme. That the Plaintiff/ Applicant never got any communication with regards to the consultative meeting and that it was never invited to any sensitization forum to give its views on the proposed construction. He also averred that he has been advised by his Advocates which advice he believes to be true that the project commenced before following the laid down procedures for such development as no **Environment Impact Assessment** was produced to the public or the plaintiff to peruse. Further that the **National Environment Management Authority**, issued license annexed by the 1st Defendant/Respondent is insufficient evidence that an Environmental Impact Assessment study was done. Further that both **deed plans** submitted for the two properties do not show any Way leaves. However, the deed plans attached by the Applicant were proposed subdivisions plan which has not been completed/effectuated. That the Plaintiff/Applicant contests the authenticity of the survey plan submitted by the 1st Defendant/Respondent in its Replying Affidavit as it has erroneous Land Reference Numbers and that the annexed plan differs from what the Plaintiff annexed in its Complaint. He contended that a complaint was lodged with the Director of Survey on the fake plan and a letter addressed to the Director of Survey. That the 1st Defendant cannot purport to rely on a fake plan and any claim based on the decoy documents submitted in Court by the 1st Defendant/ Respondent is founded on a wrong plan.

Further that he has been advised by his Advocates on record that the correct memorandum in the certificate of title for **L.R 10901/198** which was registered on **23rd November 1994**, cannot be referring to **wayleaves** that were created subsequently by the subdivision plan registered on **14th April 1999**. That the title refers to a different wayleave from the **3 meter** wayleave claimed by the 1st Defendant/Respondent. Further that the Certificate of title for **L.R 10901/356**, has no memorandum describing any wayleaves and the claimed way leaves are not within the Plaintiff's suit properties. Therefore, the Defendants/ Respondents acted in breach of the terms of conditions of NEMA Environmental Impact Assessment License as per clause **2.5**, no consultative plan for setting the dispute herein has been held. Further that the Defendants/ Respondents are in breach of clause **2.19** of NEMA Environmental Impact assessment license which provides that drainage system and surfaces run off are not directed into private land and individual plans. That the Constitution guarantees rights which must be held.

The Application was canvassed by way of written submission which the Court has carefully read and considered. The Court finds the issue for determination is **whether the Applicant has met the threshold for grant of interim orders**.

The Plaintiff/Applicant has sought for injunctive orders and therefore this Court cannot conclusively deal with the disputed issues as the Court is only called upon to determine whether the applicant is deserving of the injunctive orders. The principles for grant of temporary injunction have been long settled in the case of **Giella ...Vs... cassman Brown Co Ltd (1973)EA 358**, and other judicial decisions. See the case of **Kibutiri ...Vs... Kenya Shell, Nairobi High Court, Civil Case No.3398 of 1980 (1981) KLR**, where the Court held that:-

“The conditions for granting a temporary injunction in East Africa are well known and these are: First, the Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which might not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience. See also E.A Industries ..Vs...Trufoods (1972) EA 420.”

The Plaintiff/Applicant herein needed to establish the three grounds that have been enumerated above.

Has the Applicant established all the three grounds for grant of temporary Injunction

First the Court will determine whether a prima facie case has been established. The court in the case of **Eldo City Limited ...Vs...Corn Products Kenya Ltd & another [2013] eKLR** defined a prima facie case as:-

“Prima facie case has been defined in Black's Law Dictionary 2nd Edition as:-

“At first sight; on the first appearance; on the face of it.....A prima facie case is one which is established by sufficient evidence and can be overthrown only by rebutting evidence adduced on the other side”

Further in the case **Mrao –vs- First American Bank Ltd & 2 others (2003) KLR 125**, the Court of Appeal defined prima facie case as ;

“a case where on the material presented to the court, a tribunal properly directing itself will conclude that there was a right that had been breached by the other party as to call for a rebuttal.”

In line with the said decision, this Court is called upon to determine whether the Plaintiff/ Applicant has established a prima facie case with probability of success. It is not in doubt that the Plaintiff/Applicant is the registered owner of the suit properties. This has been acknowledged by the 1st Defendant/ Respondent and also evidenced by the annexures produced by the Plaintiff/ Applicant. Therefore, it is not in doubt that the Plaintiff/ Applicant has an interest over the suit property. Further the Plaintiff/ Applicant has also averred that the

Defendants/Respondents illegally entered onto the suit properties and interfered with its peaceful occupation by channeling Garissa road storm water into the said properties. Further if indeed the Defendants/Respondents have illegally been channeling the storm waters into the suit properties, then it will be infringing on the rights of the Plaintiff/Applicant. Having found that the Plaintiff/Applicant is the registered owner of the suit properties and that the Defendants/ Respondents have been channeling storm waters into the said property, the court finds that the Plaintiff/Applicant has a prima-facie case with a probability of success at that.

The second limb is whether the Plaintiff/ Applicant will suffer **irreparable loss**, which cannot be adequately compensated by an award of damages. The Plaintiff has objected on the channeling of the said storm water on various grounds. First it is its contention that there was no public participation before the project ground. Further that the Defendants/ Respondents did not get licenses from the National Environment Management Authority and that there was no project Assessment report. However, in its Replying Affidavit sworn by its Deputy Director, the 1st Defendant/Respondent produced the said documents evidencing that the procedure was duly followed. In the license granted by **National Environment Management Authority**, the Court notes that the same indicates that the Authority received the Impact Assessment project. The Court is therefore satisfied that the same were duly filed unless proven otherwise.

The major concerns seems to be whether or not there is a wayleave on the suit properties. While the 1st Defendant Respondent contend that there exist a **wayleave** which was created upon the subdivision of the property, the Plaintiff/Applicant has denied this allegations and averred that it is the process of finalizing the subdivision and that the same have not been surrendered. Therefore, it is not in doubt that these are disputed facts which the Court cannot be able to deal with at this interlocutory stage. See the case **Airland Tours and Travel Ltd...Vs... National Industrial Credit Bank, Milimani HCCC No.1234 of 2003**, where the Court held that:-

“In an Interlocutory application, the Court is not required to make any conclusive or definitive findings of facts or law, most certainly not on the basis of contradictory affidavit evidence or disputed proposition of law.”

However it is not in doubt that the subdivision presented by the Plaintiff/ Applicant provide for a **wayleave**. Therefore, that means that a **wayleave** at that point would not be so much detrimental if the Plaintiff/ Applicant had sought in their subdivision plan to provide for it.

‘**Irreparable loss**’ was described in the case of **Paul Gitonga Wanjau...Vs...Gathuthi Tea Factory Co. Ltd & 2 Others, Nyeri HCC No.28 of 2015**, as **simply injury or harm that cannot be compensated by damages and would be continuous.**

It is this Court’s considered view that any harm caused to the Plaintiff/ Applicant by the Defendants/Respondents can be compensated by way of damages. See the case of **Wairimu Mureithi..Vs...City Council of Nairobi, Civil Appeal No.5 of 1979(1981) KLR 322**, where the Court held that:-

“However strong the Plaintiff’s case appears to be at the stage of interlocutory application for injunction, no injunction should normally be granted if damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them.”

Though this Court recognizes that Courts have severally held that there are times that damages would not be the most convenient, this Court is guided by the fact that the Plaintiff/ Applicant had in their plan sought to have the wayleave and though it is contested on whether or not it has been surrendered, it is evident that the Plaintiff/ Applicant had also acknowledged the impact it may or may not cause.

Consequently, this Court finds and holds that the Plaintiff/Applicant will not suffer irreparable harm that may not be compensated by way of damages.

The third limb is if the Court is in doubt to decide on the balance of convenience. The granting of injunctive orders relies upon the Applicant satisfying all the three limbs. In this instant, the Plaintiff/ Applicant has failed to prove that it will suffer irreparable harm. Automatically the third limb fails. See the case of **Kenya Commercial Finance & Co. Ltd...Vs... Afraha Education Society (2001) 1EA 86**, where the Court held that:-

“The sequence of granting an interlocutory injunction is firstly that an Applicant must show a prima-facie case with probability of success if this discretionary remedy will inure in his favour. Secondly, that such an injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury; and thirdly where the court is in doubt it will decide the application on a balance of convenience. See Giella..vs..Cassman Brown & Co. Ltd 1973 EA pg 360 Letter E. The conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed. (emphasis mine).”

For the above reasons the Court find that the Plaintiff/Applicant herein has not fully established the threshold for grant of temporary injunction nor the inhibition order as sought in its **Notice of Motion** Application dated **4th July 2019**.

Consequently, the Court finds the said Notice of Motion Application **not merited** and the same is dismissed entirely with costs being in the cause.

It is so ordered.

Dated, signed and Delivered at Thika this 16th day of July 2020

L. GACHERU

JUDGE

16/7/2020

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via zoom

M/s Njengo for the Plaintiff

M/s Nyawira for the 1st Defendant

No consent for the 2nd Defendant

L. GACHERU

JUDGE

16/7/2020