



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC CASE NO. 43 OF 2019

LUCY OKENYURI NYAKEYO.....PLAINTIFF

VERSUS

KISII COUNTY GOVERNMENT.....1ST DEFENDANT

JOHN BILLY MOMANYI.....2ND DEFENDANT

PETER NDEGE.....3RD DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff is the donee of a Power of Attorney donated by her father Samwel Nyakeyo Ayego. By a Plaint dated 10th December 2019 the Plaintiff filed suit against the Defendants claiming that the 1st Defendant had through the 2nd and 3rd Defendants and without following any due process commenced construction of an urban road which is earmarked to pass through her father’s land parcel number WANJARE/BOMARENDA/1411. Contemporaneously with the Plaint, the Plaintiff filed a Notice of Motion of even date seeking a temporary injunction to stop the Defendants from demolishing the developments on land parcel number WANJARE/BOMARENDA/1411 pending the hearing and determination of the suit herein.

2. The application is based in the grounds stated on the Notice of Motion and the Plaintiff’s supporting affidavit sworn on the 10th December 2019. In the said affidavit she deposes that on or about the 3rd day of December 2019, the 1st Defendant through the 2nd and 3rd Defendants commenced the construction of an urban road in Bonchari sub-county which is earmarked to pass through land parcel No. WANJARE/BOMARENDA/1411. She deposes that the Defendants have without any due process demolished the properties adjacent to the suit property and the Plaintiff is apprehensive that they will proceed to demolish the developments on the suit property without any notice or compensation to the Plaintiff’s father who holds a freehold interest in the suit property. If carried out, the said demolition will interfere with the Plaintiff’s father’s constitutional right to property. The Plaintiff has annexed a copy of the title to the suit property, photographs of the on-going road construction and demolitions in the adjacent parcel of land as well as the developments on the suit property.

3. The application is opposed by the 1st Respondent through the Replying Affidavit of Festus Bosire, a Surveyor working in the department of Roads and Public Works of the 1st Defendant. He deposes that the exercise of road construction is being carried out in accordance with the approved development plan for Suneka. He denies that the construction will affect freehold titles. He further deposes that the residents of the section where the roads are being constructed met and agreed that the roads be opened up and it is only the Plaintiff who is objecting to the said construction. He deposes that the Plaintiff has obstructed the existing road by constructing structures that have encroached on the road and she is therefore not entitled to compensation. He deposes that if an injunction is granted, it will cause injustice to members of the public as it will hinder their access to vital services. He denies that the Applicant has made out a case for a temporary injunction.

4. The Applicant filed a supplementary affidavit in which she deposes that the procedure under part V111 of the Land Act with regard to compulsory acquisition of private land for public purposes has not been complied with as no compensation has not been paid to the Plaintiff’s father. She has annexed a copy of a valuation report in respect of the suit property. She deposes that her father acquired the suit property in 1981 and made developments thereon before the Suneka Development Plan was approved in 2009. She denied that they had obstructed any existing road and averred that it is the 1st respondent who intends to bring down existing structures in order to pave way for the road without following the procedure laid down in the law.

5. The application was canvassed by way of written submissions and the Applicant filed her submissions dated 4th May 2020 on 15.6.2020, while the Respondent did not file any submissions. In his submissions learned counsel for the Applicant highlighted the relevant provisions with regard to compulsory acquisition particularly Article 40 (2) (3), Article 60 and 61 of the Constitution as well as Part 8 of the Land Act

which sets out the procedure to be followed in the event of compulsory acquisition of land which includes the need to issue a notice to the land owner. He submits that no such notice was issued to the Plaintiff. He referred to Regulations 22-23 of the Land Regulations, 2017 which provide the factors to be considered when doing an assessment of compensation and submits that the said factors were ignored by the 1st Respondent. He cited the following cases on compulsory acquisition; **Isaiah Otiato & 6 Others v County Government of Vihiga (2018) eKLR**, **Mike Maina Kamau v Attorney General (2017) eKLR** and **Gami Properties Ltd v NLC(2017) eKLR** for the proposition that there is need to follow due process for compulsory acquisition of land as provided in part V111 of the Land Act.

6. Having considered the Notice of Motion, rival affidavits and the Applicant's submissions, the main issue for determination is whether the Plaintiff is entitled to an order of temporary injunction.

7. In exercising its discretion to grant injunctive relief the court is guided by the principles set out in the case of **Giella v Cassman Brown & Co Ltd (1973) E.A 358** which are as follows:

"First, the Applicant must show that he has 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 would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience."

8. In the case of **Mrao V First American Bank of Kenya Limited (2003) eKLR** Bosire JA (as he then was) stated as follows:

"A prima facie case is one which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter"

Whether the Plaintiff has established a prima facie case with a probability of success:

9. The gist of the Plaintiff's case is that the 1st Defendant intends to acquire her father's property for purposes of constructing a public road without following due process. The Plaintiff has annexed a copy of the title to the suit property to her Supporting Affidavit which shows that it is registered in her father's name. The 1st Defendant has not denied that the Plaintiff is the owner of the suit property nor has it denied that it intends to construct a road through the Plaintiff's land. Furthermore, the 1st Defendant has not refuted the Plaintiff's claim that the Plaintiff was not served with any notice of compulsory acquisition as no such notice has been exhibited by the 1st Defendant. What the 1st Defendant has exhibited is a list of people who apparently met and agreed that the road be constructed on their land. The Plaintiff's name is conspicuously missing from the said list. In any event the said list does not constitute the Notice envisaged under section 107 (5) of the Land Act. The Plaintiff's fear that her father will be unlawfully deprived of his land is therefore well-founded.

10. The second issue that I have to consider is whether the Plaintiff is likely to suffer irreparable injury that cannot be adequately compensated by damages. In its Replying affidavit the 1st Defendant contends that the road construction is in line with the approved development plan for Suneka. It is contended that the affected area does not affect freehold titles. The said road is intended to benefit the residents of the area and according the 1st Defendant, most of them are in support of the project. The 1st Defendant contends that the Plaintiff has obstructed an existing road by constructing structures that have encroached onto the road. These are issues that can only be determined at a full hearing.

11. The Plaintiff's main complaint is that no notice was given to her nor has the 1st Defendant offered any compensation. The Plaintiff has attached a valuation report to her Supplementary Affidavit which clearly depicts the value of the suit property together with the developments thereon. The loss that the Plaintiff is likely to suffer is therefore quantifiable.

12. From the material placed before the court, I am unable to conclude that the Plaintiff has satisfied the second condition in the Giella case. In the circumstances, I will decide the application based on the balance of convenience. It has been contended that the road that is being constructed is intended to benefit the public as it will enable them access vital services such as hospitals, markets among others. The balance of convenience therefore tilts in favour of the respondent. Consequently, I am not persuaded that the Plaintiff is entitled to an order of injunction and the application is hereby dismissed. The costs of the application shall be in the cause.

Dated, signed and delivered at Kisii via video link this 22nd day of September, 2020

J.M ONYANGO

JUDGE