REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

ENVIRONMENT AND LAND CASE NO. 61 OF 2013

MARTHA WAMBUI KURIA.....PLAINTIFF

VERSUS

JOHN HUMPHREY MUGO..…….....1ST DEFENDANT

JOHN KAMANJA..……...…….....2ND DEFENDANT

BERNARD GIKONYO….…….....3RD DEFENDANT

FRANCIS MARAGUA……...……..….....4TH DEFENDANT

RULING

1. The plaintiff **Martha Wambui Kuria** filed a Notice of Motion dated **18th January, 2013**, seeking the following orders *inter alia*:

i. **That the Defendants by themselves, their servants and/or agents be restrained from trespassing and/or using an illegal public road through the plaintiff's parcel No Dundori/Lanet Block 1/151 (Nyangui)** ("the suit property") **or to interfere with the same in any manner whatsoever.**

ii. **That further and without prejudice to the foregoing, the defendants, their servants and/or agents to restore the water way they had diverted into the Plaintiff's land to run its natural course.**

iii. **The defendants to meet the costs of this application.**

2. The application is premised on the grounds stated on the face thereof and is supported by the affidavit sworn by the plaintiff. She depones that she is the registered owner of the suit property and that the defendants are trespassers who had created an illegal road which run through her property and had also diverted a seasonal stream to run through her land causing soil erosion and environmental damage, hence this application must be granted to prevent further wastage of the suit property. According to her, the defendants had used various methods to achieve their ends, including publishing a fake map and using the office of the Chief to harass and intimidate her.
3. The application was opposed vide the 1st defendant's replying affidavit sworn on **16th April, 2013.** He deposed that the plaintiff bought her parcel of land with full knowledge that there was an

access road passing through her land which had been in use since the 1980s; that to enable her build her permanent home where she intended, it was agreed among all stakeholders that the access road be shifted to its current area. Later the applicant and her immediate neighbour agreed to have the access road shifted so as not to divide their two farms but this could not work because upon inspection by the Government's Roads Engineer, he found that the gradient of the area was steep and moving the access road would pose a danger to road users. It was therefore agreed that the access road reverts to its original place that was now in contention; that if the orders sought were granted, the inhabitants of Nyangui farm would suffer as they had no other means to access the main road.

4. In reply, the plaintiff filed a supplementary affidavit on **26th April, 2013** and reiterated her earlier version of facts. In addition she averred that although the owners of plot No. 49 may have given their consent for the creation of the access road, she had never given her consent to her neighbour or the so called stakeholders to have the access road shifted to any part of her farm; that no Government road engineer had ever visited her farm to create a proper access road and that the only engineer who had visited the land was called Karanja working with a private contractors' firm, SS Mehta. She further deponed that there had never been an access road in use since the 1980s and her land had not been compulsorily acquired so as to create a public access road; that she had a right to protection of her property even if the community would suffer in the process.
5. The application was heard in open court on **14th January 2014. Mr Mbugua** appeared for the plaintiff while **Ms Wanjiku** appeared for the defendants. **Mr Mbugua** relied on the plaintiff's two affidavits and reiterated their position. **Ms Wanjiku** similarly relied on the defendants' replying affidavit.
6. I have considered the application, affidavits and oral submissions by the respective Counsels. To my mind, l find the issue for determination to be only one: Is the applicant entitled to the orders sought based on the facts and circumstances of this case?
7. Before l consider the merits of the application, it is pertinent to consider the actions taken by this court since the motion was filed. On **14th January, 2013** I ordered that the respective parties do appoint a private surveyor to visit the suit property and determine the boundaries as well as establish whether the defendants had created a public access road and diverted the river into the Plaintiff's farm as alleged. The surveyor would then file his report in court within 30 days.
8. Two firms were appointed namely, **Wahome Werugia Licensed Surveyors**, appointed by the Plaintiff and **Olweny & Associates Limited** appointed by the defendants. They did not visit the site together but instead carried out the exercise on two different dates and filed two conflicting reports.
9. Wahome Werugia Licensed Surveyors, in their report **dated 13th February 2014**, stated that the 9m road marked on the Registry Index Map (RIM) did not run between parcels No 49 and 487 on the ground, but instead ran between parcels No 49 and 51 along their boundary. They found that on the ground, the stream had been diverted from running through parcel No 49 and now run along the road passing through parcels No 51 and 488. This was all consistent with the Plaintiff's version of the story.
10. Olweny & Associates Limited on the other hand, in their report dated **28th February, 2014** found that the 9m road run through parcel No 51, starting from parcel No 425 and through the immediate neighbouring plots namely, Parcels No 49, 486 and 487. There was no mention of the river the report. This was consistent with the Defendant's version of the story.
11. Due to the conflicting reports, I issued further orders on **4th April, 2014** that the Nakuru District Surveyor, being independent in this matter, do visit the suit property in the presence of all the parties and make suitable findings to enable this court reach an informed decision. This was to be done within 45 days and his report filed in court within the same period.
12. The District Surveyor visited the site in the presence of the area chief, the plaintiff and the 3rd and 4th defendants. He filed his report on **16th May, 2014**. His findings were as follows; ***"That the public access road passes through parcel No Dundori/ Lanet Block 1/49 (Nyangui); that the boundaries between No 49 and 51 were still intact and corresponded to the RIM. In conclusion he stated that the boundaries as fenced of parcel No. Dundori/ Lanet Block 1/ 51(Nyangui) as per the RIM are in their rightful positions*.''**
13. The principles upon which the court will grant an injunction are well settled and articulated in the

decision of **Giella vs Cassman Brown & Co. Ltd (1973) EA 358.** The Applicant needs to show that he has a *prima facie* case with probability of success, which was defined in **Mrao vs First American Bank of Kenya Limited & 2 Others (2003) KLR 125** as ***"...a 'genuine and arguable case'. It is a case 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"***; that he stands to suffer irreparable damage that cannot be compensated by an award in damages and if the court is in doubt, it will determine the application on a balance of convenience. These principles are to be applied sequentially in that the court need not consider the second and third principles if it finds that the appellant has a *prima facie* case. It must also be noted that the purpose of an injunction is to maintain the status quo pending the hearing and determination of the matter before it.

14. In the instant case, the plaintiff has brought a suit against defendants whose identity and role in the activities complained is not clear to this court. They appear to be among residents of Nyangui Community who have been using the access road that runs through the plaintiff's land for some time. No explanation has been given as to why the plaintiff singled them out from the other residents and no evidence has been adduced showing that the defendants are the ones who created the access road and/or diverted the course of the river into her land and should therefore be restrained. From the Minutes of a meeting held on **19th April, 2012** which was attended by 61 members of Nyangui Community in the presence of the area Chief, Assistant Chief, area Agricultural Officer and Engineer Karanja of SS Mehta Road Company to discuss the road access dispute, it is clear that this is a dispute that concerns an entire community and granting the orders sought against the defendants would be in vain. The court can therefore not issue orders in vain which cannot be complied with as held by the Court of Appeal in the case of **Eric V.J. Makokha & 4 Others vs. Lawrence Sagini & 2 Others Civil Application No.20 of 1994 (12/94 UR)** as follows;

> **"An application for injunction under Rule 5(2)(b) is an invocation of the equitable jurisdiction of the Court. So its grant must be made on principles established by equity. One of it is represented by the maxim that equity would not grant its remedy if such order will be in vain. As is said, "Equity, like nature, will do nothing in vain". On the basis of this maxim, courts have held again and again that it cannot stultify itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes. If it will be impossible to comply with the injunction sought, the Court will decline to grant it."**

15. The reports by the Nakuru District Surveyor and the other two surveyors have raised issues that need to be addressed. Owners of neighbouring plots 49, 425, 486, 487 and 488 mentioned in their three reports will be affected adversely by any orders issued by this court and yet they are not parties to this suit. Although the Plaintiff may not have a grievance with them, the outcome of this suit will affect their parcels and it is prudent for the Plaintiff to consider bringing them on board in the best way she thinks fit. See the case of **Technomatic Limited T/A Promopack Company v Kenya Wine Agencies Limited & another [2014] eKLR** where **Havelock J**, made the following observations**;**

> **"Order 1 Rule 10 (2) states 'the Court may at any stage of the proceedings either upon or without the application of either party under such terms as may appear to the Court to be just order that the name of any party improperly joined whether as a plaintiff or defendant be struck out and that the name of any person who ought to have been joined whether as a plaintiff or defendant or whose presence before the Court may be necessary in order to enable the Court effectively and completely to adjudicate upon and settle all questions involved in the suit be added'.**
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> **When the above principles are applied to the facts of these applications it is clear that the guiding principles when an intending party is to be joined are as follows:**
>
> **1. He must be a necessary party.**

2. He must be a proper party.

3. In the case of a defendant there must be a relief flowing from that defendant to the plaintiff.

4. The ultimate order or decree cannot be enforced without his presence in the matter.

5. His presence is necessary to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in the suit"

16. For the reasons stated above, I find the Notice of Motion dated **18th January 2013** without merit and the same is consequently dismissed. Costs of the application will be in the cause.

Dated, Signed and delivered at Nakuru this 10th day of October, 2014.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Njuguna Kabacho holding brief Lawrence Mwangi for Plaintiff/Applicant.

N/A for the Respondent.

Emmanuel – Court Assistant.