



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL SUIT 192 OF 2012

EDITH WANGARI GITATA (Suing as administrator
Of the Estate of Robert Gitata Gichohi
(Deceased).....PLAINTIFF/APPLICANT

VERSUS

**ATHI WATER SERVICE BOARDDEFENDANT/
RESPONDENT**

RULING

1. Edith Wangari Gitata (suing as the administrator of the estate of Robert Gitata Gichohi(deceased) the plaintiff/applicant in this matter has sued the defendant Athi Water Service Board. By a Notice of Motion dated 11/4/12 the plaintiff /applicant is seeking a temporary injunction against the defendant restraining the defendant by itself or its agents from unlawfully entering or interfering in anyway with the plaintiff's land pending the hearing and final determination of the matter. The applicant is also seeking that costs of the application be provided for. The application is premised on 10 grounds stated on the face of the application and is supported by the supporting affidavit of Edith Gitata dated 11/4/12 and a supplementary affidavit dated the 7/5/12.
2. The defendant opposed the application. Mr. Kirimi Mugambi a legal Counsel of the defendant board filed a replying affidavit and deponed facts to oppose the plaintiff's application.
3. I have read the affidavits referred to together with the annexures filed by the parties. The background of this application is that the plaintiff/applicant who is the administrator of the estate of Robert Gitata Gichohi was served with a notice dated 3th April 2012 by the defendant. In the said notice the defendant gave the plaintiff 7 days stating that it would enter the plaintiff's parcel of land Kiambu/Kugeria/Estates L.R 7022/27 and lay water pipes. According to the plaintiff the same was to be done without proper compensation for the loss of value to the estate. After the plaintiff got the said notice she wrote to the defendant through her advocates seeking documents in proof of any easement over the suit land but the defendant failed to reply or supply any. A search done on the 24/10/10 against that title and it was found there is no easement registered against the title in favour of the defendant and that the only encumbrance on the titles is a mortgage dated 7th March 1983. The plaintiff/applicant avers in her affidavit that the defendant has not informed her that it will pass or cause to pass water pipes through the suit land, pursuant to a nonexistent easement alleged to be over the land by City Counsel of Nairobi. The applicant

therefore seeks the injunctive order. In her supplementary affidavit filed in Court on the 6/5/12 the applicant gives details of their correspondence with the defendant and states how she has a prima facie case with a probability of success, the irreparable loss that she will suffer at paragraphs 21 and states at paragraphs 21 (d) that the balance of convenience tilts in her favour. She claims that the defendant has misinterpreted the law so as to give itself a free land to arbitrarily vest in itself and exercise rogue powers of entry into the private land in the name of being a state Corporation while the Water Act 2002 under which it created obligates it to obtain and register an easement against her land and which it claims an easement before it passes water pipes.

4. The respondent does not deny that it served the notice dated 3/4/12. It admits but avers that before the parties came to Court there were negotiations on the pipeline to convey the water through the plaintiff's land. That the pipeline route is designed to take the same route as it had taken by 3 water pipes transmitting water from Ngethu to Gigiri. That the property the pipeline is expected to pass through is the plaintiff's land. That the plaintiff was informed of the same and she objected stating she had no knowledge of the wayleave acquired by the City Council of Nairobi. In the said affidavit which is quite detailed the respondent attaches the correspondence with the plaintiff on the same. The respondent avers that her task is to lay out the additional pipeline with the existing 18m easement which passes through the plaintiff's parcel of land and that the plaintiff has although requested to do so has refused to clear any developments or crops lying on the easement before their contractor moves in. The respondent further states that the 3 pipes that were laid on the suit property at different periods of time, this one in 1971 and it has been on the plaintiff's land for almost 40 years and therefore creates easement by prescription and that the defendant is not creating another easement but only laying on additional pipes on the already existing wayleave. The respondent argues that it is an offence under the Wayleave's Act for the plaintiff to obstruct and or deny access to the way lease and that the plaintiff has failed to enjoin the City Council of Nairobi as parties to the suit, yet City Council is the owner of the existing way lease. Lastly the respondent avers that the project is of national importance having been funded by public resources running into millions of shillings and any stoppage or delay will increase costs, occasion a lot of inconvenience both to the defendant and the public and expose the respondent to potential 3rd party suits for breach of contract.

5. The plaintiff cited 3 cases namely Samson Khasiani Amusibwa Vs. Alphose Musotsi Ambali and 2 other 2005 eKLR; Cares Estates Ltd (in receivership) Vs. Kieran day & 5 others 2005 eKLR and the case of Sandra Grimmett and another Vs. Benedict Ndigirigi. Gichuhi. 2010 eKLR HCC 58/10 (Mombasa). I have read and considered them.

6. Apart from the affidavits filed Counsel made oral submissions in Court. I have considered the said submissions, the affidavits filed and the annexures. From what is before me there is no dispute that the plaintiff is the owner of the parcel of land the subject of this suit which the defendant/respondent seeks to lay out the water pipes. The plaintiff's case is that there is no easement over her property and therefore the defendant cannot arbitrarily move in the way that they want to. The defendant on the other hand argues that the plaintiff and they have discussed the issue of the water pipes being laid. The easement they know exist is with City council who which is not enjoined to this suit. They rely on the provisions of the Water Act and Wayleaves, Act Cap 292 Laws of Kenya to enter into the suit land and lay the pipes to improve the delivery of water services to the resident of Nairobi.

7. It is evident from their correspondence attached that the parties have had correspondence are the project the defendants were not to carry out in the plaintiff's land. These are evident from the letters attached written by Counsels for the parties. The respondent I find made the request to the plaintiff because of the existing water pipes, which pass through the plaintiff land. It is evident that the parties at one time even discussed compensation to the plaintiff for the pipes to be constructed at the suit land. The defendant has stated that they have a right by way of prescriptive easement. This I shall not deal with now. The issue is whether the plaintiff is entitled to the injunction sought. The cases the plaintiff has cited deals with injunctions and the laid down principles of an injunction. Each case cited has a different set of facts. The plaintiff is the owner of the parcel land being the administrator of the estate. So far it is evident that the respondent has not exhibited any easement over her property. However it has been explained by the defendant that the construction works of the water pipes to be done on her property is not new works.

The pipes to be laid are in addition to the existing ones. In this case the plaintiff has the right to protect her property but there is also the public's right. The public's right here is being advanced by the defendant who has explained that the said works or construction is necessary to improve the water supply to Nairobi region. In unique cases like this one a right of an individual is sacrificed over the right of the public.

The respondent has exhibited details of the events to be carried out in their letters to the plaintiff. There is need for the works to be done so that the public are supplied with adequate water. The plaintiff I find has failed to show that she has a prima facie case. It is evident it that the parties did attempt some kind of settlement for the construction that was to pass through the land. She can be compensated. I find that she has failed to establish the irreparable loss she will suffer. Lastly when I consider the facts in this case they tilt in favour of the respondent as the works they want to carry out shall benefit the public at large. Public interest takes prudence over the private or individual interest. I therefore find that granting the injunctive orders sought would restrict and or stop the defendant's works that are necessary and are of national importance. I therefore decline to grant the injunction orders. Costs shall be in the cause.

Orders accordingly.

Dated, signed and delivered this 7th day of July 2012

**R. OUGO
JUDGE**

In the Presence of:-

..... For the Applicant

..... For the Respondent

..... Court Clerk