



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**Environmental & Land Case 549 of 2011**

**JOHNMARK KIMONDO KIRUHI ..... PLAINTIFF**

**VERSUS**

**NICETA NJURA WILLIAM ..... 1<sup>ST</sup> DEFENDANT**

**CITY COUNCIL OF NAIROBI .....2<sup>ND</sup> DEFENDANT**

**RULING**

The plaintiff/applicant is the owner of L.R. No. 12146/25 and the 1<sup>st</sup> defendant/1<sup>st</sup> respondent is the owner of L. R. No 12146/24. These two properties were subdivisions created out of the original title in L.R No. 12146/2. The two properties are adjacent to each other. According to the parties in this suit there is no dispute that during the subdivision of L.R. No. 12146/2 a portion of the land from the plaintiffs and 1<sup>st</sup> defendant properties was surrendered to the Government free of costs.

According to the plaintiff that portion of land constitutes a cul-de-sac abutting his land L.R No. 12146/25 and that 1<sup>st</sup> defendants L.R 12146/24 and a 3<sup>rd</sup> party L.R. 12146/23. The plaintiff avers that the said cul-de-sac was intended to and serves as the access neck to the 3 properties and is not private land. The 1<sup>st</sup> defendant on the other hand avers that the said portion was curved out and is not a cul-de-sac and that was not an access road intended to provide access to the plaintiff's suit property. Both parties are constructing on the respective pieces of land.

According to the plaintiff, the 1<sup>st</sup> defendant has without his approval or consent constructed a gate and gate house on the cul-de-sac and a wall along the part that the same abuts the plaintiff's property and that the 1<sup>st</sup> defendant is putting up developments on a parcels of land that does not belong to her and is not private land. That by so doing the 1<sup>st</sup> defendant has without any colour of right obstructed and interfered with the Plaintiffs' access to his property.

The plaintiff avers that he wrote to the 2<sup>nd</sup> defendant about the 1<sup>st</sup> defendant's construction and the 1<sup>st</sup> defendant was served with an enforcement notice requiring her to remove the developments. That the 2<sup>nd</sup> defendant took no action and that the 2<sup>nd</sup> defendant has in failing to do anything breached its statutory duty under the Physical and Planning Land Act to enforce the notice. It\\s after the 2<sup>nd</sup> defendant failed

to do anything that the plaintiff moved and filed the Notice of Motion dated 10/10/11 under order 40 rule 2 of the Civil Procedure Rules section 3A, 1, 1A and 1B of the Civil Procedure Act seeking orders that a mandatory injunction do issue compelling the 1<sup>st</sup> and 2<sup>nd</sup> defendants by the themselves, agents and/or servants to remove and/or demolish the gate, gatehouse and wall constructed by the 1<sup>st</sup> defendant on and along the cul-de-sac abutting the properties known as L.R. No. 12146/25, L.R. No. 12146/24 and L.R. No. 12146/23 within seven (7) days of the date of issue of the order in default of which the plaintiff be at liberty to remove and/or demolish the same at the cost of both defendants jointly and severally. The plaintiff also seeks that pending the hearing and determination of the suit a temporary injunction be issued restraining the 1<sup>st</sup> defendant whether by herself, agent and/or servants howsoever from obstructing and/or in any other manner interfering with the plaintiff's access to his property L.R. No. 12146/25 through the cul-de-sac abutting the properties known as L.R. 12146/25, L.R. 12146/24 and L.R. 12146/23.

The 1<sup>st</sup> defendant denies that the said portion of land is not a cul-de-sac as averred by the plaintiff, and that the said access road is not intended to provide access to the plaintiff's land from the said St. Hellena lane. That she has not blocked the plaintiff from accessing his property as his property has approximately 40 meters wide access to the said St. Hellena Lane. She further avers that the plaintiff is at an advance stage of constructing a dwelling house on his land and has always had access to his property directly from the said St Hellena lane and he therefore cannot claim that she has blocked him from accessing his land. That the enforcement notice that was served to her by the 2<sup>nd</sup> defendant was later on cancelled by the 2<sup>nd</sup> defendant through its letter dated 27/10/10 and therefore there is no valid enforcement notice and that the 2<sup>nd</sup> defendant acted within its mandate as one who has the power to prohibit the use and development of land and build. That she is aware that the 2<sup>nd</sup> defendant has written to the plaintiff's architect asking him to amend his development plans. She asked that the plaintiff's application be dismissed.

The 2<sup>nd</sup> defendant in brief averred that the plaintiff has a right of access to his property through the main road and not through the cul-de-sac which is only 12 meters and cannot serve the three plots mentioned.

That the plaintiff did apply for development permission with access from the cul-de-sac which was approved but later they found out that the plaintiff had misinterpreted certain facts to the effect that the cul-de-sac could not functionally accommodate vehicular entrance for the 3 properties, L.R 12146/24, 25 and 23. That the plaintiff has 39 meters along the road and he can choose to relocate his access. That it was noted that the correct area out of which the driven ways of L.R. 12146/23 and 12146/24 commence is only 12 meters wide and could not function to serve with vehicular to plot L.R No.12146/25 which belong to the plaintiff.

The 2<sup>nd</sup> defendant admits issuing the enforcement notice dated 19/10/10 to the 1<sup>st</sup> defendant but cancelled it under its letter dated the 27/10/10 when they realized that the 1<sup>st</sup> defendant has property constructed as per her plans. That the plaintiff was advised on his building plans to avoid the conflict of the use of the access road and to access his plot through the main road.

Parties filed written submissions and their counsels also highlighted them in Court. The Plaintiff be cited the following cases; **Nairobi HCC No. 2225 of 1992 Belle Maison Limited Vs. Yaya Towers Limited; Nairobi Civil application No. Nai. 186 of 1992 (Nai. 77/92 UR) Kamau Muchuha Vs. The Ripples Ltd; Kamau Vs. Gathuni & another (2006, KLR (E&L) 65.**

The parties submitted at length in the submissions. I have considered all that is filed and the arguments. The Plaintiff in his application is seeking mandatory injunction in prayer no.2 and an injunction in prayer no. 3. It has been held that for a mandatory order to be given, it will be done in the clearest of case. Is the plaintiff entitled to the order for injunction as sought? The plaintiff in this case has to show that he has a *prima facie* case with a probability of a success and that he will suffer irreparable loss if the injunction is not granted and lastly that the balance of convenience tilts in his favour. (**Geilla Vs. Cassman Brown**).

Considering the facts before me I find as follows, the plaintiff alleges that the 1<sup>st</sup> Defendant has blocked

the access road to his place. This I find he has failed to establish. It is evident from the affidavit of the 1<sup>st</sup> and 2<sup>nd</sup> defendant that the plaintiff's access road is not blocked nor has the 1<sup>st</sup> defendant built along the cul-de-sac as alleged. The 1<sup>st</sup> defendant from what is annexed had the 2<sup>nd</sup> defendant's permission to build. The notice that was served on the 1<sup>st</sup> defendant was withdrawn by the 2<sup>nd</sup> defendant. The plaintiff it appears has an access road at the main road. This he did not deny. I find no inconsistency in the defendant's facts as deponed.

I note further that the issues raised by the plaintiff in his submissions are issues to be determined at a full hearing and not at this interlocutory state. So far the plaintiff has failed to demonstrate that he has a *prima facie* case with a probability of success. Secondly the issue of irreparable loss, the plaintiff has failed to show the loss he will suffer. He has an alternative access to his property from the main road. It is deponed that he has been constructing there, and has been getting into his property. I find that the plaintiff has failed to demonstrate the loss he will suffer which he cannot be compensated. In this case the balance of convenience lies in favour of the 1<sup>st</sup> defendant.

Lastly I find that granting the orders sought in prayer no. 2 of the plaintiff's applications would be giving final orders in the matter that will affect the 1<sup>st</sup> defendant gravely. This is a matter that can go for hearing and if the Court on hearing evidence from both sides finds that the said orders are justified, the Court shall grant them. I therefore decline to grant the orders sought on the applications dated 10/10/11. The same is dismissed with costs to the defendant.

**Dated, signed and delivered this 11th day of July 2012**

**R. OUGO  
JUDGE**

In the Presence of:-

..... For the Applicant

..... For the Respondent

Kabiru.....Court Clerk