

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 3231 OF 1997

FREDERICK GATERI MACHANGA AND 4
OTHERS.....PLAINTIFFS

-versus-

MOSA GICHUKI.....1ST DEFENDANT

MUNICIPAL COUNCIL OF KERUGOYA/KUTUS.....2ND DEFENDANT

R U L I N G

The plaintiffs filed the suit against the defendants for an order that there be interlocutory injunctory restraining the defendants from constructing any building on spaces between the plaintiffs' plots and Embu/Sagana road. Going by the pleadings, the plaintiffs are said to be owners of plot Numbers 4,5,6 7 and 8 at Kutus town where they run several commercial enterprises. They have carried out the said businesses for over 30 years and have invested heavily in the improvement of the businesses. It is their case that sometime in November, 1997 the first defendant was unlawfully allocated a parcel of land by the second defendant which is between plaintiffs' plots and Embu/Sagana road. The first defendant is said to have started digging the foundation of the building on the said parcel of land comprising part of the road reserve. They say that this will adversely affect the use of their plots by blocking the access thereto and bringing the devaluation effect. Despite demand the defendants have failed and have neglected to stop the said construction hence the filing of this case. There is now before me an application by way of chamber summons under Order 39 Rules 1 and 2 of the Civil Procedure Rules which seeks injunctory orders as set out in the plaint. The application is opposed and all the advocates appearing have addressed the court on the issues.

There is no doubt that the court has jurisdiction to handle this matter notwithstanding that the matter ought to have been filed in the High Court closer to the location of the subject matter. The objection as to filing of this case in Nairobi cannot therefore be sustained.

The application is said to have contravened Order 50 Rule 3 of the Civil Procedure Rules. However I am aware of the decision in Civil Appeal No. 211 of 1996 National Bank of Kenya -v- Ndungu Njau in which the learned judges said that the grounds of the application have to be set out in general otherwise that omission is fatal. In the said judgment however, the Court of Appeal proceeded to hear the party in the broad consideration of justice. I believe the same discretion should be extended here and therefore, I find the objection has no basis. There are some plans that have been annexed to the application. There is clearly a wide road between the plaintiffs' premises and the position where the first defendant has carried out the construction. There is no obstruction and there is no blocking of access as the plaintiffs have alleged. The building plans have been annexed. The approval of the relevant authorities and the lease issued in favour of the first defendant are also part of the evidence

There is no evidence of loss of business or devaluation of the premises or businesses owned by the plaintiffs. However, if they were to show that loss, they were required by law to satisfy the court that such loss cannot be compensated by an award of damages. If the court is in doubt it shall decide the case on balance of convenience.

There is evidence that the first defendant has acquired a loan from a bank to construct the said premises and so, whereas the plaintiffs have not shown what loss they are likely to suffer, the first defendant is likely to suffer loss if construction stops and he has to repay the loan he has taken from the bank. Finally

the plaintiffs have not made any offer 8as to damages in the event that they lose the case in the end.

Accordingly I find that the application lacks merit and same is hereby dismissed.

Order accordingly.

Dated and delivered at Nairobi this 16th day of July, 1998

A. MBOGHOLI MSAGHA

JUDGE