REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. 52 OF 2019

ROSEMARY MUENI MUKAVI.....PLAINTIFF/APPLICANT

VERSUS

KENYA NATIONAL HIGHWAY AUTHORITY.....DEFENDANT/RESPONDENT

R U L I N G

1. What is before court for ruling is the Plaintiff's/Applicant's notice of motion application expressed to be brought under Sections 1(A), (B), (C), 3(A) of the Civil Procedure Act, Order 40 Rules 1, 2 and 3 and Order 51 Rule 1 of the Civil Procedure Rules and all other guiding and enabling provisions of the law and procedure for: -

a) Spent.

b) That the defendant, the defendant's agents and/or servants be restrained by way of injunction from effecting any construction works in violation of the Plaintiff's proprietary rights unless the defendant makes prompt payment of due and just compensation in accordance with the law.

c) Damages on account of the defendant's violation of the plaintiff's constitutional rights to peaceful enjoyment of his proprietary rights.

d) Any further or other Order that this Honourable court deems fit to grant in the circumstances.

2. The application is dated 29th July, 2019 and was filed in court on 31st July, 2019. It is predicated on the ten (10) grounds on its face and is supported by the affidavit of Rosemary Mueni Mukavi, the Plaintiff/Applicant herein, sworn at Makueni on the 29th July, 2019.

3. The Defendant/Respondent has opposed the application vide the replying affidavit of Daniel Mbuteti, its Senior Surveyor, sworn at Nairobi on 24th January, 2020 and filed in court on 27th January, 2020.

4. The application was disposed off by way of written submissions.

5. In grounds (a), (b), (c), (d) and (e) of his application, the Plaintiff/Applicant has deposed that the she is the administrator of the estate of the late John Maluku Mukavi and the registered proprietor of Plot No.6 within Kivani market, Makueni County and was duly issued with title deed in respect of the suit plot and is thus entitled to the rights of an absolute proprietor as conferred under the Constitution, the Land Act and the Land Registration Act, that in or about October, 2018, the Defendant/Respondent issued notice of intended demolition/removal of encroachment on classified road reserves on class A, B and C roads to the Plaintiff among other persons based on the Defendant's misconception that the Machakos-Wote-Makindu (B60) besides which the Plaintiff's premises is located was of the class and width that the Defendant purports to ascribe to it, that in Kenya Gazette Notice Number 4369 of 21st August 1998 as amended by Kenya Gazette Notice Number 3966 of 16th July 1999 wherein the Government of Kenya compulsorily acquired parcels of land for upgrading of Katumani-Wote road to class C99. The same process ought to be followed if the Respondent wishes to upgrade the current road to Class B60 as indicated in the demolition Notice they have issued, that the Respondent has since the said Gazette notices unilaterally redesigned the aforesaid Machakos-Wote-Makindu road thereby widening and possibly reclassifying the same into its current status, that the Applicant was neither invited nor involved in the expansion process nor was there any mention of encroachment by the Plaintiff's parcel of land affected by the offending notices now in issue.

6. The Plaintiff has deposed in paragraphs 2, 3, 4, 5, 6, 7 and 8 of her supporting affidavit that she is the administrator of the estate of the late John Maluku Mukavi who is the registered proprietor of Plot No.6 within Kivani market, Makueni County and was duly issued with title deed in respect of the suit plot and is thus entitled to all the rights of an absolute proprietor as conferred under the Constitution, the Land Act and the Land Registration Act, that the suit plot which is located in Kivani Trading Centre was duly allocated to the late John Maluku Mukavi on 10th August, 1981 by the then Masaku County Council, that she has developed the aforesaid plot with permanent buildings with

full approval and permission of the then County Council, that Kenya Gazette Notice Number 4369 of 21st August 1998 as amended by Kenya Gazette Notice Number 3966 of 16th July, 1999 wherein the Government of Kenya compulsorily acquired parcels of land for upgrading of Katumani-Wote road to class C99. The same process ought to be followed if the Respondent wishes to upgrade the current road to Class B60 as indicated in the demolition Notice they have issued, that in October, 2018 the Respondent issued notice of intended demolition/removal of encroachment on classified road reserves on class A, B and C roads to her (Plaintiff) among other persons based on the Defendants misconception that the Machakos-Wote-Makindu (B60) besides which the Plaintiff's premises is located was of the class and width that the Defendant purports to ascribe to it, that the Respondent has since the said Gazette notices unilaterally redesigned the aforesaid Machakos-Wote-Makindu road thereby widening and possibly reclassifying the same into its current status, that she was neither invited nor involved in the expansion process nor was there any mention of encroachment by the Plaintiff's parcel of land affected by the offending notices now in issue.

7. Daniel Mbuteti has deposed in paragraphs 4 (a), (b), (c), (d) and (e), 5, 6, 7, 9, 10, 11, 12, 13, 14, 15 and 16 of his replying affidavit that he has been advised by the Counsel for the Respondent, which advice he verily believes to be true that the Plaintiff's Application is bad in law for reasons that; the application is incompetent and fatally defective, that the Orders sought in the application and in particular prayers (b), (c) and (d) have the effect of determining the suit and are indeed similar to the prayers sought in the plaint, that granting the orders sought at the interlocutory stage would determine the suit without a trial and in the absence of the Constitutional safeguards of a fair hearing, that the application and the entire suit is incompetent having been instituted by a person who has not demonstrated authority to administer the estate of the deceased, that where a suit is commenced without letters of administration in respect of a deceased estate such a suit is null and void abinitio and cannot be cured by a party subsequently obtaining the letters of administration, that the Authority has powers under Section 22(1)(a) of the Roads Act to maintain, operate, improve and manage the national trunk roads, that he is aware that under Section 49(1)(a), the Applicant and all other persons are prohibited from erecting, constructing, laying or establishing any structure or other thing, on or over or below the surface of reserve without the prior written consent of the Authority, that he is aware that under Section 49(4) of the Roads Act that where a person, without the permission of the Authority or contrary to any permission given by the Authority, erects, constructs, lays or establishes a structure or other thing, or makes a structural alteration or addition to a structure or other thing, the Authority is empowered by notice in writing to direct that person to remove the unauthorized structure, thing, alteration or addition within a reasonable period of time, that similarly, he is aware that the Traffic Act at Section 91(1) and (2), makes it an offence for any person to encroach on a road or on any land reserved therefore at the side or sides thereof by making or erecting any building, fence, ditch, advertisement sign or other obstacle, without the written permission of the Authority and in any such case, the Authority is given the power to remove that thing which has been placed or erected on a road or land reserved therefore in contravention of the Act, that the Authority surveyed and determined the suit property erected on that piece of land referred to as Parcel No.Makueni/Kavani/1041 encroaches on road reserve of Machakos-Wote-Makindu (B60 formerly C99) Road, that the road reserve width at this section of the road is measured at 20m on both sides from the centerline of the existing road, that the investigations by the Authority revealed that the suit property encroaches upon the road reserve by about 13m, that he is aware that no permission has been sought and none has ever been granted by the Authority to the Plaintiff permitting the erection or construction of the suit property, that he is aware that the Respondent issued a Statutory Notice under Section 49(4) of the Roads Act to John Maluku Mukavi and directed him to remove the structures erected upon the road reserve, that the intention of the notice was to avail an opportunity to the said Mukavi to voluntarily and in a manner economical and appropriate to him, to remove the offending structures, that he is advised by Counsel for the Respondent, which advice he finds extremely sound, that where land has been compulsorily acquired by the Government for the development of a public utility, the entire of that land compulsorily acquired becomes subject to the relevant legal regime applicable to the utility in question, that he is further advised by the said Counsel that the Respondent does not have the mandate of acquiring land compulsorily and that all matters relating to acquisition and compensation rests with the National Land Commission.

8. The Counsel on record for the parties herein are in agreement that the principles for the grant of the order of interlocutory injunction are as stated in the case of **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358**. I need not repeat those grounds herein. In addition, the Counsel for the Defendant/Respondent has submitted that the Plaintiff/Applicant lacks authority to sue on behalf of a deceased person and that the final orders sought by the Plaintiff/Applicant cannot be granted at an interlocutory stage.

9. Regarding the principle that the Applicant must show a prima facie case with probability of success, the Plaintiff's/Applicant's Counsel submitted that it is not in dispute that the offending notice of demolition was issued against the Plaintiff/Applicant. The Counsel further submitted that the Plaintiff/Applicant has annexed all the necessary documents to prove that the suit plot was duly allocated to his late father, John Maluku Mukavi, on 10th August, 1981 by Masaku County Council. The Counsel went on to submit that the permanent buildings on the suit plot were erected with approval and permission of Masaku County Council. The Counsel has also submitted that the Plaintiff/Applicant contention is that the registry index map defines the actual boundaries of the suit property beyond any doubt and hence the Defendant/Respondent's notice has no basis in law or fact. The Counsel added that section 30 of the Registered Land Act *(now repealed)* provided for the indefeasibility of the first registration except on the basis of fraud to which the holder of the said property was a party. The Counsel was of the view that no such evidence has been presented to warrant interference with the Plaintiff's/Applicant's proprietary rights.

10. The Counsel submitted that the Plaintiff/Applicant contends that the Kenya Gazette No.4369 of 21st August, 1998 as amended by Gazette notice number 3966 of 16th July, 1999 contains the list of the properties affected by the expansion of Machakos-Wote Makindu road to class C99 status. That the gazette notice clearly shows the Plaintiff's/Applicant's property is not contained in the said gazette notices which is proof of the fact that the Plaintiff's/Applicant's permanent building which has stood on the suit property since 1981 did not encroach onto the land reserve.

11. In response to the replying affidavit filed by the Defendant/Respondent, the Counsel submitted that the purported maps and survey plan have no probative value as they have been fabricated by the Defendant/Respondent itself and that they do not emanate from the Land Registry.

12. Arising from the above, the Counsel was of the view that the Plaintiff's/Applicant's proof of ownership of the suit property thus remains unchallenged and hence she has demonstrated a prima facie case.

13. On the other hand, the Counsel for the Defendant/Respondent cited the case of **Paul Gitonga Wanjau vs. Gathuthi Tea Factory Company Ltd. & 2 others [2016] eKLR** which cited the case of **R.J.R Macdonald vs. Canada [Attorney General]** in which the

principles in **Giella vs. Cassman Brown** were captured as follows: -

> *"i) Is there a serious issue to be tried?;*
>
> *ii) Will the applicant suffer irreparable harm if the injunction is not granted?*
>
> *iii) Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (often called 'balance of convenience')."*

14. The Counsel further cited the case of **American Cyanamid Co. vs. Ethicom Limited [1975] A AER 504** where the three elements were noted to be of great importance namely;

> *i. There must be a serious/fair issue to be tried,*
>
> *ii. Damages are not an adequate remedy,*
>
> *iii. The balance of convenience lies in favour of granting or refusing the application.*

15. The Counsel further relied on the case of **Moses C. Muhia Njoroge & 2 others vs. Jane W. Lesaloi & 5 others [2014] eKLR** which cited with approval the case of **Mrao Ltd vs. First American Bank of Kenya and 2 others [2003] KLR 125** where the Court of Appeal defined a prima facie case as: -

> *"A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later."*

16. The Counsel was of the view that the Plaintiff/Applicant has miserably failed to establish a prima facie case within the definition of **Mrao's** case and urged the court to dismiss the application for the following reasons:-

> *i. The Plaintiff has not demonstrated capacity to sue on behalf of the deceased registered owner of the suit property.*
>
> *ii. Annexture DM-001 to the Replying Affidavit sworn by Mr. Daniel Mbuteti on behalf of the Defendant clearly demonstrates that the Plaintiff's structures the subject of this suit are constructed on a road reserve. The Plaintiff has not filed any affidavit disputing this fact.*
>
> *iii. Section 49(1) (a) of the Roads Act prohibits the Applicant from erecting, constructing, laying or establishing any structure on a road reserve without prior written consent of the Defendant.*
>
> *iv. Section 91(1) and (2) of the Traffic Act makes it a traffic offence for a person to encroach on a road in the manner in which the Plaintiff has done.*
>
> *v. There has been no demonstration of any such consent having been sought or obtained by the Plaintiff herein.*

17. Regarding the principle of an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages, the Plaintiff's Counsel submitted that the threat to the Applicants freedom and source of livelihood is imminent. The Counsel went on to submit that the Plaintiff's/Applicant's business is her sole source of income, an issue that has not been controverted. The Counsel submitted that the loss of liberty and business by the Plaintiff/Applicant will not be recovered by her if the Defendant/Respondent proceeds as threatened by the notice of demolition. The Counsel urged the court to take judicial notice of the fact that land is an emotive issue and that the Plaintiff/Applicant having ran the business on the suit plot for the past thirty-nine (39) years uninterrupted, has become emotionally attached to it and hence damages will not provide sufficient redress for the loss.

18. Regarding the Respondent's contention that the Plaintiff/Applicant is not the administrator of the estate of her late father *(emphasis are mine)*, the Counsel submitted that the demolition notice was issued to her in person which is an acknowledgement by the Defendant/Applicant that the building and premises on the suit property are owned and occupied by her. The Counsel was of the view that since the imminent threat of loss to be occasioned by the offending notice is posed to the Plaintiff/Applicant, the Defendant/Respondent is thus stopped from any argument to the contrary.

19. The Counsel termed the replying affidavit relied upon by the Defendant/Respondent as based on procedural technicalities.

20. The Counsel for the Defendant/Respondent submitted that even if an injunction is not granted, the Plaintiff/Applicant will not suffer any substantial loss that cannot be adequately compensated by an award of damages, the reason being that the value of the illegal structure is easily ascertainable. The Counsel added that the Plaintiff's/Applicant's submissions that the loss of liberty and business will not be recovered by way of damages is misplaced and urged the court to so find.

21. None of the two parties herein submitted on the third principle which is if the court is in doubt, it will decide an application on the balance of convenience.

22. Having read the application together with its supporting affidavit as well as the replying affidavit and the rival submissions filed by the Counsel on record for the parties herein, my finding is as follows: -

23. On the issue of the Applicant must show a prima facie case with probability of success, it is not in dispute that plot No. 6 is registered in the name of the late John Maluku Mukavi, the father of the Plaintiff/Applicant herein, as land parcel number Makueni/Kivani/1041. The Plaintiff/Applicant has annexed a copy of the title to the suit property as MM1. Even though the Plaintiff/Applicant has described herself in paragraph 2 of her supporting affidavit as the administrator of the estate of her late father, she has not controverted paragraph 4(d) of the Defendant's/Respondent's disposition that the application and the entire suit are incompetent for having been instituted by a person who has not demonstrated authority to administer the estate of the deceased. The submissions by the Plaintiff's/Applicants Counsel that the issuance of the notice of demolition upon the Plaintiff/Applicant in person is an acknowledgement by the Defendant/Respondent that the buildings on the suit property are owned/occupied by the former is neither here nor there since jurisdiction cannot be conferred on a party by another party. On this ground alone, I hold that the Plaintiff/Applicant has not shown that she has a prima facie case with probability of success.

24. On the issue of an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, the Plaintiff/Applicant contends that having run a business on the suit property for the past thirty-nine (39) years uninterrupted and has become emotionally attached to it such that damages will not provide sufficient redress for the loss. Whereas the attachment to the property may be true, it is clear that the demolition notice concerns only the part the Plaintiff's/Applicant's property has encroached onto the road reserve. I say so because there is nothing on record to show that the Plaintiff/Applicant is in imminent danger or threat of losing the entire suit property.

25. For those reasons, I would agree with the Counsel for the Defendant/Respondent that the value of the illegal structure is easily ascertainable and thus can be compensated by way of an award of damages. It is clear to me, therefore, that the Plaintiff/Applicant has not satisfied the second principle in **Giella's** case (supra).

26. Of importance to note is that as earlier on observed in my ruling, neither of the parties herein submitted on the third principle enunciated in **Giella's** case.

27. It was held in the case of **Kenya Commercial Finance Co. Ltd vs. Afraha Education Society [2001] EA 86** that: -

> "*the sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first is satisfied.*"

28. In my view, therefore, even though this Court could have dismissed this application at the stage where it found that the Plaintiff/Applicant had failed to satisfy the first condition, it was important for the Plaintiff/Applicant to submit on the three principles.

29. The upshot of the foregoing is that the application by the Plaintiff/Applicant has no merits and same is dismissed with costs to the Defendant/Respondent.

Signed, dated and delivered at Makueni via email this 5th day of November, 2020.

MBOGO C.G.,

JUDGE.

Court Assistant: G. Kwemboi