



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC CASE NO. 17 OF 2020 (O.S)**

**IN THE MATTER OF AN APPLICATION UNDER SECTION 38(3) OF THE LIMITATION OF ACTIONS ACT CHAPTER 22 OF THE LAWS OF KENYA FOR AN ORDER VESTING AN EASEMENT OF RIGHT OF WAY OVER PROPERTY KNOWN AS LAND REFERENCE NUMBER 10082**

**BETWEEN**

**MARSH VIEW LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**BENVAR ESTATES LIMITED.....DEFENDANT/RESPONDENT**

**RULING**

The matter for determination is the **Notice of Motion Application** dated **26<sup>th</sup> February 2020**, by the Plaintiff/ Applicant seeking for orders that;

**1. Pending the hearing and determination of this suit, the Defendants, its servants, agents, lessees, licensees, successors in title and assigns be restrained from blocking, preventing or interfering in any way with the use, repair and maintenance of the road (hereinafter called the road) across the property known as Land reference Number 10082 and any and all subdivisions thereof (hereinafter called the servient land) measuring 15 metres running along the Eastern Boundary of the servient land bordering the property known as Land Reference Number 10081 from Bob Harris Road up to the Western Boundary of the property known as Land Reference Number 7532/2 (hereinafter called the Dominant land) bordering the servient land by the Plaintiff, its successors in title and all owners . lessees, licensees and occupiers for the time being of the dominant land.**

**2. Pending the hearing and determination of this suit, the Plaintiff be at liberty to remove any blockages of or on the road (Hereinafter called the road) across the property known as Land reference Number 10082 and any and all subdivisions thereof (hereinafter called the servient land) measuring fifteen metres wide running along the Eastern Boundary of the servient and bordering the property Known as Land reference Number 10081 from Bob Harris Road up to the Western boundary of the property known as Land Reference Number 7532/2 (Hereinafter called the Dominant land) bordering the servient land).**

**3. The Inspector General of Police be directed to take all necessary steps to enforce the orders granted by the Court herein and to ensure and secure the safety and protection of the Plaintiff , its successors in title, lessees, licensees and occupiers for the time being of the dominant land so as to prevent or deal with the occurrence of any breach of the peace during the enforcement of the orders granted.**

**4. That Costs of this Application be borne and paid by the Defendant.**

The Application is premised on the grounds that the Plaintiff/ Applicant is the registered owner of **L.R 7532/2**, which land was transferred to it on **22<sup>nd</sup> April 1999**, while the Defendant/ Respondent is the registered owner of **L.R 10082**. That since the Plaintiff/Applicant became the owner of the **Dominant land**, it has been accessing it using a road across the **Servient land**, measuring **15 metres** wide running along the Eastern boundary of the **Servient land**, bordering **L.R 10081**. That the use by the Plaintiff/ Applicant has been open, peaceful and without interruption with the Defendant's/ Respondent's knowledge until **December 2019** . That the Plaintiff/ Applicant has acquired easement right of way over the **servient land** in respect of the road.

Further that the Plaintiff/ Applicant is entitled to an easement of necessity in respect of the road, as it is the only reasonable expeditious, safe and non-disruptive access from the dominant land to the nearest public road . That in **December 2019**, part of the road was damaged by rain and the Plaintiff/ Applicant efforts to repair the same were thwarted by the Defendant/ Respondent, who for the first time prevented the Plaintiff/ Applicant from using the road and making the required repairs. It was contended that the Defendant/ Respondent then completely blocked off the road by dumping a large pile of rock and soil at the junction of the road and **Bob Harris Road** and by

constructing a fence across the road as it enters the dominant land.

Further that the owners/occupiers of the subdivisions of the neighbouring plot **L.R 10081**, have also been using the road to access their respective plots and the Defendant/Respondent has also prevented them from using the said road. That the only other access to the **Dominant land** is through a narrow track through a densely populated village. That the limited use of that alternative road by the Plaintiff/ Applicant has occasioned strong objections and reactions from the local inhabitants, who have also blocked the Plaintiff/ Applicant from using the same on the ground that the use of the said narrow track by the Plaintiff's/ Applicant's lorries and large commercial vehicles poses a danger to the local children who use the track to travel to and from school. That the Defendant/ Respondent has by its action prevented the Plaintiff/ Applicant from accessing its property and has effectively stopped it from using and enjoying its property. As a result, the Plaintiff's/ Applicant's commercial operation have been grounded.

In his Supporting Affidavit **Jahangir Tejani**, a Director of the Plaintiff/ Applicant averred that he is aware of the road and its use as he negotiated the purchase of the Dominant land. That he used the road to access the Dominant land while negotiating its purchase and thereafter and one of the factors that he considered during the negotiation was the direct access to the Dominant land from **Bob Harris Road** via the road. That after purchasing the **Dominant land**, the Plaintiff/Applicant continued using the road for its vehicles in the course of its business and its use has been open, peaceful and with no interruption. That his Advocate has advised him that the Plaintiff/ Applicant has acquired an easement over the way. Further that the Plaintiff/ Applicant is also entitled to easement of necessities over the **Servient land** in respect of the road.

Further the Defendant/ Respondent is in the process of subdividing the **Servient land** and has completely ignored the existence of the road in its said proposed subdivision. He contended that it is necessary that the Plaintiff's/ Applicant's easement of right of ways in respect of the road be registered and enforced as sought for the interest of Justice.

The Application is opposed and the Defendant/ Respondent filed a Replying Affidavit sworn by **Kennedy Thairu** on **6<sup>th</sup> March 2020**. He averred that he is the Director of the Defendant/ Respondent, who is the registered proprietor of **L.R 10082**, but in the year **2017**, the land was subdivided into three portions and the new numbers are **L.R 10082/2**, **10082/3** and **10082/4**. He denied the Plaintiff's/ Applicant's allegation that it had been accessing **L.R 7532/2**, through the road access on **Benvar Estate Limited**. He contended that the only road through their land is a track used by their farm vehicles, tractors and other utility machinery used to carry their farm produce. That as a Director, he has been on the land for over **20** years and he did not recall any time that the Plaintiff/ Applicant has used their track on the access track. That there have been no activities going on in the Plaintiff/ Applicant's land for a period of over **ten years** as admitted by the Affidavit of **Raphael Nguyo** sworn in support of the Plaintiff's/ Applicant's case. That the coffee farming appears to have stopped on **2007**.

It was his contention that in **December 2019**, the Defendant/ Respondent fenced off its Western boundary, bordering **L.R Juja/Komo Block 2(Kiahuria)**, due to the various cases of insecurity arising thereto. That the same was done without any problems and there have been no activities on the **Marsh land** and if there was any, it has not been using the said road. Further, the Plaintiff/ Applicant has been using the **Karamaini road**, which is a public road with direct access to their property and it would be wrong for the Plaintiff/Applicant to move the Court for orders to be allowed to trespass on Respondent's land because the road they have been using has been damaged. That there is a **15 metre** public road running parallel to **Benvar Estates land** on the Western boundary which ought to access the Plaintiff's/ Applicant's land. That the Applicant may be confusing the road with the track on their land.

He contended that the only reason the Plaintiff/ Applicant moved the Court was to have a short cut to their land through the Respondent's land. That the Plaintiff/ Applicant has continued to use the **Karamaini Road** and the allegation that they have suffered loss due to the closure of the road is not true. It was his contention that the orders sought in the Application are similar to the ones in the Originating Summons and to allow the Application at this stage would amount to pre determining the entire suit.

Further **Robert Muchoki**, swore an Affidavit on **6<sup>th</sup> March 2020** in support of the Defendant/Respondent and averred that he was employed on **7<sup>th</sup> December 2003**, by the Defendant/ Respondent as a Manager in charge of Horticultural Produce and has been working there for over **17 years**. It was his contention that there are several tracks, feeder roads, Power lines, vegetation, Coffee plantation and a Dam in the Defendant's/Respondent's land all used by the Defendant/ Respondent for its own use and purpose. That the various tracks/ feeder roads are used by the employees, clients and owner in order to access the different sections of **Benvar Estates Land** and that the alleged road running across **Benvar Estates Land** and allegedly used by the Plaintiff/ Applicant to access **Marsh land** does not exist. However, there is a track used by their tractors and other vehicles to transport their farm produce. He alleged that there has been no activities on the Plaintiff's/ Applicant's land for over **10 years**.

The Application was canvassed by way of written submissions which the Court has now read and considered. The Court finds that the issue for determination is *whether the Application is merited*.

The Applicant has sought for temporary injunctive orders. In the case of **Nguruman Limited ...Vs... Jan Bonde Nielsen & 2 Others [2014] eKLR; Civil Appeal No. 77 of 2012 (Nairobi)** the Court of Appeal held that;

***“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;***

- (a) establish his case only at a prima facie level,***
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and***
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.***

*These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."*

Has the Plaintiff/ Applicant herein established a prima facie case?

In the case of **Mrao Ltd ...Vs... First American Bank of Kenya and 2 others, (2003) KLR 125** , 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."**

It is the Plaintiff's/ Applicant's contention that it has been using the road across the **Servient land**, measuring **15 metres** since it purchased the Dominant land in **22<sup>nd</sup> April 1999**, being a period of over **20 years**. That it is thus claiming an **easement** in respect of the said road.

**Section 32 of the Limitations of Actions Act Cap 22** provides ways in which easements may be acquired. It is not in doubt that the Defendant/ Respondent has acknowledged that it has fenced the said road and though the Defendant/ Respondent denies that there has been such acquisition, the Court finds that the issue of whether or not the same has been acquired goes to the merit of the case and the said issue can only be determined during the hearing.

However, the Plaintiff/ Applicant has claimed to have acquired an **easement** over the road and therefore has a right to claim the said easement, If the Defendant/ Respondent has blocked the use of the said Road, then the right of the Plaintiff/ Applicant to use the easement may have been infringed and the said assumed infringement calls for a rebuttal.

A prima facie case is an arguable cases, and in this instant case, based on the provisions of law and the available evidence, the Court finds and holds that that the Plaintiff/ Applicant has an arguable case and has therefore established a prima facie case.

The 2<sup>nd</sup> limb is that the Plaintiff/ Applicant has to establish that it will suffer irreparable loss. **'Irreparable loss'** was described in the case of **Paul Gitonga Wanjau...Vs...Gathuthi Tea Factory Co. Ltd & 2 Others, Nyeri HCC No.28 of 2015**, as **simply injury or harm that cannot be compensated by damages and would be continuous**.

The Court notes that though the Plaintiff/ Applicant has claimed that it has been using the said Road for over a period of 20 year, these allegations have been rebutted by the Defendant/ Respondent who has claimed that the Plaintiff/ Applicant has been using a road that is adjacent to it. It is the Plaintiff's/ Applicant's contention that the Defendant/ Respondent having blocked the road, it is forced to use another road that is longer and that it is not direct to its property.

Suffering irreparable loss in the Court's considered view requires that the party to show that it has no alternative, In the instant case, the Court finds that the Plaintiff/ Applicant has an alternative route to get his goods to and out of his properties. Further given that the Plaintiff/Applicant is claiming an easement, it must follow that the Applicant has to satisfy the court that it indeed has acquired the said easement. However, it is clear that the Applicant herein has another access route to its properties. Since the Plaintiff/ Applicant has an alternative access route to the Dominant land, it will not suffer irreparable loss.

As was held in the case of **Nguruman Limited ...Vs... Jan Bonde Nielsen & 2 Others (supra)**, the three principles are sequential in nature and the Applicant ought to satisfy the three of them.

**The Court has held and finds that the Applicant will not suffer irreparable harm, therefore the Court finds and holds that the Plaintiff/ Applicant has not established the threshold for grant of the injunctive orders .**

Having now carefully read and considered the instant Application, the affidavits and annexures thereto together with the rival written submissions, the Court finds and holds that said the **Notice of Motion Application** dated **26<sup>th</sup> February 2020** is not **merited** and the same is dismissed entirely with costs being in cause.

It is so ordered.

**Dated, signed and Delivered at Thika this 14<sup>th</sup> day of December, 2020.**

**L. GACHERU**

**JUDGE**

14/12/2020

Court Assistant – Lucy

**ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**With Consent of and virtual appearance via video conference – Microsoft Teams Platform**

**No appearance for the Plaintiff/Applicant**

**No appearance for the Defendant/Respondent**

**L. GACHERU**

**JUDGE**

14/12/2020