REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC CASE NO. 191 OF 2019

DREAMRISE LIMITED...PLAINTIFF

VERSUS

BHAGISANA LIMITED..DEFENDANT

AND

CHIEF LAND REGISTRAR......................................1ST INTERESTED PARTY

NAIROBI COUNTY GOVERNMENT.....................2ND INTERESTED PARTY

RULING

The plaintiff is registered as the proprietor of all that parcel of land known as L. R. No. 1870/1/528 (hereinafter referred to only as "plot No. 528") while the defendant is registered as the proprietor of all that parcel of land known as L. R. No. 1870/1/527 (hereinafter referred to as "plot No. 527"). Plot No. 527 and plot No. 528 are adjacent to each other and are subdivisions of L.R No. 1870/1/181 (hereinafter referred to as "the original parcel"). The plaintiff acquired plot No. 528 from Mwanzi Road Developers Ltd. ("Mwanzi Road Developers") on 31st May, 2014 while the defendant acquired plot No. 527 on 25th July, 1994. From the time the original parcel was sub-divided to give rise to plot No. 527 and plot No. 528, the two parcels of land have shared a common access from the main road known as Mwanzi Road. The said common access is on plot No. 527. The plaintiff brought this suit against the defendant on 7th June, 2019 seeking the following reliefs;

(i) A declaration that plot No. 527 is subject to an encumbrance in the form of a right of way in favour of plot No. 528.

(ii) An injunction restraining the defendant from fencing off the plaintiff's access to Mwanzi Road, harassing, threatening or otherwise adversely interfering with the plaintiff's proprietary right of way through plot No. 527 to plot No. 528.

(iii) A mandatory injunction compelling the defendant to remove any obstruction imposed on the common access.

(iv) A permanent injunction restraining the defendant from constructing a boundary wall that would restrict the plaintiff's use of the common access on plot No. 527.

(v) A permanent injunction restraining the defendant from restricting any access to the common amenities enjoyed by the plaintiff over plot No. 527 which includes a borehole situated on plot No. 527.

In its plaint, the plaintiff averred that during the subdivision of the original parcel that gave rise to plot No. 527 and 528, the subdivision scheme was approved on among other conditions that plot No. 527 and plot No. 528 would have common access from the main road. The plaintiff averred that the proprietors of plot No. 527 and plot No. 528 held the same subject to both parcels of land having a common access from the main road. The plaintiff averred that after the said common access was created, the same was used by the owners of both plot No. 527 and plot No. 528 and a common parking was created thereon for people visiting both parcels of land.

The plaintiff averred that it acquired plot No. 528 from Mwanzi Road Developers Ltd. (Mwanzi Road Developers) on 31st May, 2014 and that the common access was one of the reasons why it purchased plot No. 528 as it was made to believe that the same was for the use of both plot No. 527 and plot No. 528. The plaintiff averred that when it was carrying out renovation of the apartments that were existing on plot No. 528 to convert them to high end residential apartments with other amenities such as a restaurant, the defendant raised no objection to the project and the use of common access.

The plaintiff averred that on 13th March, 2019, the defendant unlawfully and/or improperly ordered the plaintiff to establish its own access to the main road within 3 months' failure to which the defendant would fence off the common boundary between plot No. 527 and plot No. 528

thereby blocking the plaintiff from using the common access to the premises without further reference to the plaintiff. The plaintiff averred that since the common access had been in use for over 20 years, it constituted an easement under section 32(2) of the Limitation of Actions Act, Chapter 22 Laws of Kenya and an overriding interest over plot No. 527 by virtue of section 28(h) of the Land Registration Act, 2012. The plaintiff averred that once an easement was created validly as a prerequisite to the approval of the subdivision of the original parcel, the same attached to plot No. 527 that became a subservient tenement and that the burden of that easement passed to the defendant when it acquired plot No. 527. The plaintiff averred that obstruction of the common access would render the plaintiff's premises on plot No. 528 completely inaccessible to the plaintiff's guests and service providers and would lead to the collapse of the entire development on plot No. 528. The plaintiff averred that plot No. 528 was fully developed and as such it was not possible to create any other access to the parcel of land and that the parking that was being used by those visiting both plot No. 527 and plot No. 528 would be inaccessible to the plaintiff.

Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 6th June, 2019 seeking, a temporary injunction restraining the defendant from harassing, threatening or otherwise adversely interfering with the plaintiff's use of the common access to both plot No. 527 and plot No. 528 from Mwanzi Road and also the common amenities currently enjoyed by the plaintiff pending the hearing and determination of the suit and in the alternative, an order that the existing status quo as it relates to the use of common access and other common amenities be maintained pending the hearing and determination of the suit. The application was brought on the same grounds set out in the plaint that I have highlighted above. It is not necessary for me to repeat the same here save to state that the application was supported by the affidavit and supplementary affidavit of Faiyaz Mirza Kurji sworn on 6th June, 2019 and 25th November, 2019 respectively to which he annexed a number of documents.

The plaintiff's application was opposed by the defendant through a replying affidavit and supplementary affidavit sworn by Onesimus Mwangi Gichuiri on 21st June, 2019 and 4th March, 2020 respectively. In the said affidavits, the defendant admitted that the plaintiff owned plot No. 528 while the defendant owned plot No. 527 which are situated along Mwanzi Road in Westlands area of Nairobi. The defendant admitted further that plot No. 527 and Plot No. 528 are sub-divisions of L.R No. 1870/1/181 (the original parcel). The defendant averred that the original parcel belonged to one, Samji Ravji Halai (hereinafter referred to only as "Samji"). The defendant averred that in 1986 Samji applied for permission to develop apartments on a portion of the original parcel and that he was granted the permission. The defendant averred that Samji went ahead to construct the said apartments on a portion of the original parcel and retained his old house on the other side of the property. The defendant admitted that the City Council Nairobi approved Samji's development on condition that the two portions of the original parcel would have a common access from the main road. The defendant averred that the subdivision of the original parcel was not completed at that time and that both portions of the original parcel remained in the name of Samji.

The defendant averred that it acquired the original parcel comprising of the two portions aforesaid in 1990 and developed apartments on both portions. The defendant averred that on 8th February, 1994, the directors of the defendant met and resolved that the original parcel be sub-divided into two portions (now plot No. 527 and plot No. 528) and that one portion; plot No. 527 remains in the name of the defendant and the second portion, plot No. 528 be transferred to a new company, Mwanzi Road Developers Ltd. (Mwanzi Road Decelopers). The defendant averred that it was agreed further in that meeting that Mwanzi Road Developers would ensure that a boundary fence between plot No. 527 and plot No. 528 and a new entrance to plot No. 528 were constructed at no cost to the defendant in the event that plot No. 527 and plot No. 528 would be managed separately. The defendant averred that on 1st September, 1994, Mwanzi Road Developers confirmed the earlier agreement that as and when required, it would install its own gate on plot No. 528 and also erect a boundary wall on the said parcel of land at its own expense. The defendant averred that Mwanzi Road Developers continued to use the common access or gate with the defendant's permission until 10th March, 2014 when they transferred plot No. 528 to the plaintiff. The defendant averred that when Mwanzi Road Developers transferred plot No. 528 to the plaintiff, its directors must have informed the plaintiff that it was supposed to construct a gate to its property and a boundary wall and that Mwanzi Road Developers had been using the defendant's gate. The defendant averred that in the discussions that the defendant's director had with the plaintiff's director, the plaintiff was informed that it was supposed to construct its own gate while it was carrying out renovations on plot No. 528. The defendant averred that in 2015, the plaintiff was informed that it was improperly using the common gate and that the defendant did not intend to share common services with the plaintiff such as the gate on plot No. 527 and security.

The defendant averred that the plaintiff did not heed its request to construct its own gate and that in 2016, it wrote to the plaintiff demanding that; the plaintiff establishes access to plot No. 528 for vehicles, limits its activities to its own plot and constructs a boundary fence on the common boundary. The defendant averred that it was after the plaintiff deliberately refused to construct an access to plot No. 528 that the defendant gave it a notice on 13th March 2019 requiring the plaintiff to establish a gate to its own premises within 3 months failure to which the defendant would construct a wall on the common boundary. The defendant averred that the plaintiff had all along used the plaintiff's gate with the defendant's permission. The defendant averred that plot No. 528 is not landlocked as it has a 27 metre frontage to Mwanzi Road. The defendant averred that the plaintiff had not acquired a right of way through plot No. 527. The defendant averred that the plaintiff had not given any reason why it had not constructed its own access. The defendant averred that the plaintiff had not established a prima facie case with a probability of success to warrant the grant of the orders sought. The defendant averred that the access to plot No. 527 belonged to the defendant and that there was no provision for common access to plot No. 527 and plot No. 528.

The Plaintiff's application was argued by way of written submissions. The plaintiff filed its submissions on 27th November, 2019 while the defendant filed its submissions on 3rd February, 2020. I have considered the plaintiff's application together with the affidavits filed in support thereof. I have also considered the affidavits filed by the defendant in opposition to the application. Finally, I have considered the submissions of counsels and the various authorities cited in support thereof. The following is my view on the matter. The principles upon which this court exercises its discretion in applications for temporary injunction are now well settled. As was stated in Giella *v* Cassman Brown & Co. Ltd. [1973] E.A 358**,** an applicant for interlocutory injunction must show a prima facie case with a probability of success and such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience.

In Nguruman Limited *v* Jan Bonde Nielsen & 2 Others [2014] eKLR the court of Appeal adopted the definition of a prima facie case that was given in of Mrao Limited *v* First American Bank of Kenya Limited & 2 Others [2003] KLR 125 and went further to state as follows:

> **"The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. …All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation…The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed."**

It is on the foregoing principles that the plaintiff's application falls for consideration. I am satisfied from the material placed before the court that the plaintiff has established a prima facie case with a probability of success against the defendant. From the defendant's own admission, the original parcel was owned by one person when development permission was granted in respect thereof in 1986. The defendant has admitted further that when the development permission was granted to the original owner of the original parcel, it was on condition that the two portions of the original parcel; the portion on which the said owner wanted to develop apartments and the other portion that had his old house, would have a common access. The defendant admitted that the original owner of the original parcel accepted that condition and developed a portion of the original parcel on that understanding. The defendant argued that the original parcel was not subdivided in 1986 when the said development permission was granted and that the said property was subdivided in 1994 after the defendant had acquired the same and developed apartments on both portions thereof. The defendant contended that when the original parcel was subdivided in 1994 into plot No. 527 that remained in the name of the defendant and plot No. 528 that was transferred to Mwanzi Road Developers, it was agreed that Mwanzi Road Developers would construct a new gate to plot No. 528 and a boundary wall on the common boundary of the two parcels of land. The defendant did not place before the court any new approval for the subdivision of the original parcel. It follows that the subdivision of the original parcel that was undertaken in 1994 was on the basis of the 1986 approval which had a condition that the two portions of the original parcel had to have a common access. From 1986, both portions of the original parcel shared a common access. When the defendant acquired the original parcel in 1990, the two portions thereof were sharing a common access. When the defendant developed the two portions of the original parcel, the two developed portions were sharing a common access. After the original parcel was formally subdivided in 1994, the resultant plot No. 527 and plot No. 528 continued to share a common access. When the defendant transferred Plot No. 528 to Mwanzi Road Developers in 1994, Mwanzi Road Developers continued to use the common access on plot No. 527 to access its premises on plot No. 528. After acquiring plot No. 528, Mwanzi Road Developers used the common access on plot No. 527 to access plot No. 528 for 20 years before it sold the said parcel of land to the plaintiff. There is no evidence that the defendant took issue with Mwanzi Road Developer's continued use of the common access after it had allegedly agreed to construct its own access to plot No. 528. There is also no evidence that the defendant attempted to enforce the alleged agreement that it entered into with Mwanzi Road Developers.

When the plaintiff acquired plot No. 528 from Mwanzi Road Developers in 2014, access to the premises was through common gate on plot No. 527. There is no evidence that either Mwanzi Road Developers or the defendant which was aware of the plaintiff's acquisition of the premises informed the defendant that the common access that was in use by both plots was meant for plot No. 527 and that it would be required to construct a new access to plot No. 528. The plaintiff has averred that when it purchased plot No. 528, it was already developed and that no room had been left for another gate. I doubt if the plaintiff would have paid Kshs. 235,000,000/- for the property if it had no access.

Without determining the matter with finality, I am persuaded on a prima facie basis that the plaintiff has established the existence of an easement in the form of a right of way through plot No. 527. The defendant has submitted at length that Plot No. 528 is not landlocked and as such cannot burden plot No.527 with an easement in the form of a right of way. That may be so but if plot No. 528 was developed with a common access through plot No. 527 in mind such that no room was left for its own gate, there is no difference between it and a landlocked plot. I am of the view that whether or not an access can be created from plot No. 528 to Mwanzi Road is a matter of evidence that the court cannot determine at this stage. For now, I am satisfied on a prima facie basis that the plaintiff has acquired a right to an easement in the form of a right of way over plot No. 527 by prescription. As rightly submitted by the plaintiff, such easement is provided for under section 32 of the Limitation of Actions Act, Chapter 22 Laws of Kenya. Under section 38 (3) of the Limitation of Actions Act, Chapter 22 Laws of Kenya, the plaintiff is entitled to apply to be registered as the owner of the easement.

The plaintiff has demonstrated that its right to the said easement is threatened by the defendant. The threat by the defendant that it would construct a boundary wall between plot No. 527 and plot No. 528 if actualized would deprive the plaintiff of the right of way through plot No. 527. From what I have set out above, that threatened action by the defendant is wrongful as it will interfere with a right that has accrued to the plaintiff. In the circumstances, the plaintiff is entitled protection against the defendant's unlawful threat to its right to an easement.

On whether the plaintiff stands to suffer irreparable harm if the orders sought are not granted, I am persuaded that that would be the case. The common access in dispute has been used to access what is now plot No. 527 and plot No. 528 since 1986. It is not only used for accessing the two plots but also as a parking for visitors. If the defendant carries out its threat to block the plaintiff from using the common access, there will be no access to the plaintiff's premises on plot No. 528. The plaintiff will also not have parking for its visitors. The plaintiff's business being run on plot No. 528 will collapse straightaway. The loss to the plaintiff would be difficult to quantify for compensation.

Due to the foregoing, I am satisfied that the plaintiff has met the conditions for the grant of a temporary injunction. Injunction is however an equitable remedy. The court can exercise its discretion not to grant the same even where grounds have been established warranting the grant of the order where it would be inequitable to do so. From the material before the court, it appears as if the plaintiff has not been a good neighbor and that the defendant was pushed to the limit before it gave the plaintiff a notice to construct a separate gate to its premises. The conduct of the plaintiff enumerated in the various letters that were addressed to it by the defendant cannot be sanctioned by the court. For the foregoing reasons, I will not grant the injunction sought but will grant an alternative prayer for status quo which I will also limit in duration.

In conclusion, the plaintiff's Notice of Motion application dated 6th June, 2019 is allowed on the following terms;

1. Pending the hearing and determination of this suit or for a period of 12 months from the date hereof, the existing status quo on the continued use of the common access to L.R No. 1870/1/527 and L.R No. 1870/1/528 and all other common amenities shall be maintained on condition that the plaintiff shall make timely payments for any of the shared services and common amenities.

2. The costs of the application shall be in the cause.

Dated and Delivered this 10th day of December 2020

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Shah for the Plaintiff

Mr. Kamau Muturi for the Defendants

Ms. C. Nyokabi-Court Assistant