



**REPUBLIC OF KENYA**

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

**ELCA NO. 1 OF 2015**

**PATRICK KIMANI MWANGIE.....APPELLANT**

**VS**

**SAMSON THURANIRA (WARD**

**REP – NTIMA WEST WARD &**

**MEMBER OF COUNTY ASSEMBLY**

**MERU COUNTY).....1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF MERU.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. This appeal relates to the decision of Hon. D. W. Mburu, Principal Magistrate (PM) in Meru in Civil Case No. 290 of 2014 delivered on 19/12/14 in respect to L R NO NTHIMBIRI/IGOKI/695 situate at Ntima West Ward, Meru County (the suit land).

2. In the lower Court the Appellant filed suit against the Respondents claiming that the Respondents have trespassed onto the suit land by expanding the road under construction and consequently encroaching onto his parcel of the land aforesaid. The Respondents refuted the Appellant's claim and averred that to the contrary and as agents of the County Government of Meru they entered the Appellant's piece of land and upon survey of the road reserve noted that the Appellant had encroached on the road reserve and in any event the developments he claims to have been interfered with are not on the road but quite inside the suit property. The Respondents further denied that the Appellant is entitled to any form of compensation for damages, if any. That the removal of the Appellant's fence was in furtherance of rectifying the encroachment of the Appellant onto the road reserve.

3. Simultaneously the Appellant filed a Notice of Motion seeking, *inter-alia*, the following reliefs;

a. That the honourable Court be pleased to issue temporary orders of injunction to restrain the Respondents, by themselves their agents, servants, employees or anybody else acting under their names, directives from interfering, widening the road of access into the Appellant's parcel of land or constructing a bridge thereon and other structures thereon pending the hearing and determination of this application.

b. That the honourable Court be pleased to issue temporary orders of injunction to restrain the Respondents, by themselves their agents, servants, employees or anybody else acting under their names, directives from interfering, widening the road of access into the Appellant's parcel of land or constructing a bridge thereon and other structures thereon pending the hearing and determination of this suit.

c. That the honourable Court be pleased to issue penal notices for the disobedience of the Court orders issued and such other and further orders as are necessary and just to meet the ends of justice.

d. Costs.

4. The application was supported by the grounds, *inter-alia*, that the Appellant is the registered owner of the suit land; there exists roads of access on the ground and the Respondents have no legal basis to widen the road into the Appellant's land without following due process of the law; the Appellant has not authorized the construction of a bridge onto his land; the actions of the Respondents have not been explained, contrary to the rule of law and are illegal and must be restrained; status quo should be preserved.

5. Further, in his supporting affidavit the Appellant deposed that the suit land is well delineated on the ground as well as the maps annexed to the application and it measures 0.060 Ha as reflected in the title deed duly issued in his name. He cited developments on the land to include cultivation of bananas, grevillea and Muringa trees as well as nipper grass. The land borders a road reserve of 30 meters, which has been in use and existence for a while. The land was purchased in 2003 by the Appellant, fenced it with a barbed wire, and planted gravellier along the said fence. He deposed that the Respondents have destroyed and damaged the barbed wire for which he reported to the police vide OB 56/2/5/14.

6. In response, the 1<sup>st</sup> Respondent through his replying affidavit deposed and admitted that the Plaintiff is the registered owner of the suit land though the boundaries were yet to be determined by a surveyor. He explained that the road and bridge construction (project) which was partially complete then was aimed at serving the public and provide access to the markets, schools, churches that proved inaccessible especially during the rainy seasons. The project did not encroach on any land as it is being done along the road reserve, which is 40, and not 30 feet wide as contended by the Appellant. Whilst admitting the developments on the Appellant's land, he stated that they are way beyond the boundary inside the land and therefore have not been destroyed. That no grevillea trees along the barbed wire as alleged by the Appellant. In that regard, he faulted the Appellant for misleading the Court and approaching the Court of equity with unclean hands.

7. In a supplementary affidavit filed on 1/10/14 the Appellant stated, *inter-alia*, that the acreage and measurement of the suit land are as stated in the title deed, a copy of which was annexed and marked PKM1 and therefore the Respondents allegations that the measurements are not known are untrue. That the Respondents did not consult him before commencing the constructions and if they want to annex part of his land for the bridge he must be compensated first under section 107 of the Land Registration Act, 2012. That his fence was maliciously damaged by the Respondents for which he reported to the police who have not taken any action against them. That the existing road access is 30 meters and there is no justification for encroaching on to the suit land. The fence had been in existence for a long time and it is untrue that he had put it up when the project began.

8. On the 10/11/14, the Court in the presence of the parties and their Counsels visited the Suit Land and appreciated the situation on the ground. It was observed that the fence of the land had been removed. The bridge was being built to provide access across a stream that borders the Appellant's land. The road borders the Appellant's land and the developments on the suit land were noted. The Court observed that the road is constructed at the section bordering the Appellant's land. On 5/12/14, the application was canvassed by way of oral arguments before the learned Principal Magistrate and Counsel cited legal authorities to support their clients' positions. The learned PM rendered his ruling on the 19/12/14.

9. In the said ruling, the learned Principal Magistrate stated that the cause of disagreement is the width of the road reserve, which the Respondents stated that it is 40 feet while the Appellant insists that it is 30 feet. Neither of the parties presented any documentary evidence to prove their averments.

10. As to whether the Appellant had established a prima facie case with a probability of success, the learned Principal Magistrate found that the Appellant had failed to do so. The contention is on the measurement of the road, which the Appellant contends is 30 feet while the Respondents claim it is 40 feet. Neither party has produced evidence in support of their allegations. The burden of proof, the Magistrate ruled lay upon the Plaintiff, which he failed. On the second limb of irreparable damage, the Principal Magistrate ruled that even if the Appellant had proved a prima facie case with a probability of success, an award of costs could easily compensate the Appellant's loss. He found that the balance of convenience lay in declining the injunction for the above reasons and in addition, that the road being constructed was a public road and stopping it would lead to loss of colossal amounts of public funds already expended on the construction.

11. It is this ruling that the Appellant has appealed against. The grounds are as follows;

a. The learned Acting PM erred in law by failing to find that the Appellant being the registered owner of the suit land is absolute and that the Respondents had no rights to interfere with the same.

b. The learned Acting PM erred in law and fact by failing to find that the construction of the bridge and road adjacent to the Appellant's land will encroach into the Appellant's land thereby reducing the same in size without compensation

c. The learned Acting PM erred in law by finding that the bridge complained of by the Appellant has been constructed which is erroneous, the Court having stopped its constructions and therefore the Respondents will not suffer damage or loss if the orders of injunction then in force were confirmed by the Court.

c. The learned Acting PM erred in law and fact by failing to find that the Respondents' actions amounted to compulsory acquisition of the Appellant's land without following the law and procedure.

d. The learned Acting PM erred in law and fact by failing to find that the Appellant's application satisfied the conditions for granting injunction before the hearing of the main case.

e. The learned Acting PM erred in law and fact by failing to find that the Appellant will suffer irreparable loss and damage which cannot be compensated by an award of damages.

f. The learned Acting PM erred in law and fact by finding that the bridge being complained of by the Respondents was being constructed with public funds when there was no evidence before the Court and therefore relied on extraneous matters which tendered before the Court thereby arriving at the wrong conclusions.

g. The learned Acting PM erred in law and fact in that he disregarded the evidence which was tendered by the Appellant including the map for the area and the judicial authorities which were tendered before the Court thereby arriving at the wrong conclusion.

h. The learned Acting PM erred in law that he failed to find that the evidence which was tendered by the Respondents had no probative value since there was no replying affidavit from the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

i. The decision of the learned trial magistrate is against the weight of evidence and the same was bad in law.

12. The Appellant sought the following orders on appeal;

a. That the appeal be allowed and the ruling and orders issued on 19/12/14 be set aside.

b. That the honorable Court do issue an order for temporary injunction against the Respondents to restrain them from interfering with the Appellant's land and constructing a bridge on the Appellant's land pending the hearing and determination of Meru CMCC No 311 of 2014.

c. That this Honourable Court be pleased to make such orders as may be necessary and appropriate to meet the ends of justice.

d. The costs of the appeal to be paid by the Respondents.

13. The Court granted interim orders on the 15/1/15 restraining the Respondents from interfering widening the road access into the Appellant's parcel of land and building a bridge thereon pending the inter-partes hearing of the application. These orders were extended resting with the orders of the Honourable Court on 28/2/17 extending the orders in terms of section 63 of the Civil Procedure Act. On the 19/7/17 the Court granted status quo orders enjoining the Respondents not to interfere with the Appellants land until the appeal is heard and determined.

14. On the 14/3/18, the Court directed the parties to file written submissions within 42 days. At the time of writing this ruling, the Respondents had not filed any.

15. The Appellant submitted that the suit land is protected under section 24 – 28 of the Land Registration Act and as such the Respondents have no rights to interfere with the ownership of the Appellant's land as they did by constructing the road and the bridge thus encroaching onto the said land contrary to section 107 – 133 of the Land Act, 2012. That the due process of the law and procedure was not followed. That the acts of the Respondents are illegal and amount to trespass which is actionable *per se*. He contended that the learned PM erred in holding that the Appellant did not satisfy the principles of granting injunctions set out in the case of **Giella Vs Cassman Brown & Co (1973) EA 358**.

16. Having read the pleadings and Ruling of the Magistrate in the Court below, the only issue for determination is whether the learned Magistrate fell in error by failing to grant an injunction as prayed in the Notice of Motion filed at the same time with the Plaint. It is trite that this being a first appeal, this Court is at liberty to review the documents and evidence tendered in the Court appealed from and make an independent finding thereon.

17. In compliance with its mandate as the first Court on appeal, this Court has read and considered all the pleadings and Ruling appealed from the Principal Magistrate's Court. The principles for granting or denying an injunction are clearly set out in popular case of **Giella Vs Cassman Brown & Co (1973) EA 358**. The learned Magistrate reviewed these principles and made conclusions thereon leading to the dismissal of the Appellant's Notice of Motion. The actions of the Respondents complained in seeking to dispossess or acquire the Appellant's land or part of it in the manner not prescribed by the law.

18. Refence is made to the right of property under Article 40 as enshrined in the constitution. The area of the land affected by the Respondents' actions is not clearly ascertained and value thereof not determined. This can be deduced from the contradictory statements of the parties wherein one states 40 meters and another 30 meters. One may ask why the Respondent could not ascertain the same and follow the laid down law and procedure in the construction of the road. It matters not that the road is for public use. It is the finding of the Court that the Appellant established that he is the registered proprietor of the suit land hence a *prima facie* case. The Court finds that the application warranted granting. This Court finds that the lower Court fell in error in its findings and conclusion about the two elements, namely probability of success and compensation set out in the **Giella** case cited above.

19. This appeal is merited. It is hereby allowed with costs to the Appellant.

**Orders accordingly.**

**SIGNED AT MURANGA THIS 31<sup>ST</sup> DAY OF JANUARY 2019.**

**J G KEMEI**

**JUDGE**

**DATED, DELIVERED AND SIGNED AT MERU THIS 6<sup>TH</sup> DAY OF FEBRUARY, 2019.**

**L N MBUGUA**

**JUDGE**

**Delivered in open Court in the presence of:**

Kiogora Arithi for the Appellant