



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 35 OF 2017

PETER MIDIMO AGALO.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF TRANS-NZOIA.....DEFENDANT

HON. ATTORNEY GENERAL.....1ST INTERESTED PARTY

ANNE WANJIKU KIBE

T/A ANNE KIBE & CO. ADVOCATES....2ND INTERESTED PARTY

DANIEL KAGECHE MUNGAI.....3RD INTERESTED PARTY

KEPHAS ONSINYO AYIECHA.....4TH INTERESTED PARTY

JOHN WANJALA MULONGA.....5TH INTERESTED PARTY

MONICA WAITHERA.....6TH INTERESTED PARTY

R U L I N G

1. The application dated **15/1/2019** and filed in court on the same date has been brought by the plaintiff. It seeks the following orders:-

(1)spent

(2) That this honourable Court be pleased to issue an order of temporary injunction restraining the defendant/respondent its servants or agents under its authority from paving, constructing or even repairing the road more particularly known as Police Lane or carrying out any activities on the property more particulars known as Kitale Municipality Block 4/413 pending the inter partes hearing and determination of this application.

(3) That this honourable Court be pleased to issue an order of temporary injunction restraining the defendant/respondent its servants or agents under its authority from paving, constructing or even repairing the road more particularly known as Police Lane or carrying out any activities on the property more particulars known as Kitale Municipality Block 4/413 pending the hearing and determination of the suit hereto.

(4) That the respondent to bear the cost for this application.

2. The applicant has brought the application pursuant to **Section 3 & 3A** of the **Civil Procedure Act and Order 40 Rules 1(1) Order 50 Rule 1 of the Civil Procedure Rules (2010)**.

3. The grounds upon which the application is made are contained at the foot of the application. Briefly those grounds are that the applicant is the registered owner of **Kitale Municipality block 4/413**; that the respondent has created a road through that plot and christened Police Lane; that there is pending dispute before this court which is part-heard; that the outcome may have an effect on ownership or access on the said property; that the acts of defendant/respondent are not suitable at this juncture as there is dispute pending before court; that the applicant would be affected by the roadworks as it will become a permanent feature across the suit land and increase the costs of reconstruction should

the dispute result in the plaintiff's favour; that the defendant has made out a prima facie case that he owns the suit land and that the status quo should be preserved by an order of injunction.

4. The application is supported by a **28** paragraph affidavit of the applicant dated **15/1/2019** which lays emphasis on the above grounds. Annexed to that affidavit is a copy of certificate of lease for **Kitale Municipality Block 4/413**, a copy of a letter of allotment dated **14/1/1993** as well as copy of a lease **2/5/1995**.

5. In reply to the application the **2nd, 3rd, 4th and 6th** interested parties filed a replying affidavit sworn by John Wanjala Mulonga on **31/1/2019**. In that affidavit the deponent states that he has been using the access road known as Police Lane for over **18** years and that no material has been placed before court to prove that the applicant ever took possession of the road after the allotment or issuance of certificate of lease. The deponent maintains that the property in dispute is a public road that the court cannot disregard, and the interested parties would be frustrated as they have businesses along the said road; that the applicant will not suffer any prejudice if the road is maintained since it only makes access easier for him; that **80%** of the work on the road has been done and if the road is left unfinished at this stage the business operation of the interested parties will be adversely affected; that only tarmacking and laying drainage remains and that there should be struck a reasonable balance between the rights of an individual and that of a society. Further it is averred that no substantial loss or irreparable damage has been demonstrated and neither has the plaintiff/applicant given any undertaking as to compensation.

6. The **1st** defendant/respondent filed its replying affidavit by Sifuna Wakofula the County Secretary to the **1st** defendant/respondent on **25/1/2019**. In that affidavit he deposes that the road objected to by the applicant has been in existence for a period of over **2** decades; that the same is crucial for the purposes of accessing the Kitale police station and other plots in the neighbourhood including the Kitale Fire Station whose services are crucial to the public; that the applicant has never been in occupation of the suit plot; that the county government is mandated to plan control the development and maintain infrastructure within the county; that it is necessary to maintain the Police Lane in good condition; that leaving the road in an unfinished state may pose a danger to the public; that there are timelines to be met by the contractors on the ground and any stoppage of the works may lead to claims against the **1st** respondent; that the balance of convenience continues to tilt in favour of the **1st** respondent and the public and their interests should override that of individual plaintiff.

7. I have perused through the file record and I have found no submissions filed on behalf of the applicant and the **1st** respondent. The **2nd to 6th** respondents filed their submissions on **20/2/2019**.

8. I have considered the application and the responses thereto. It appears to be an undisputed fact that though the applicant claims the suit land and has some documents of title which he insists are in respect thereof, there has been a road of access in existence on the ground which has been in use for many years.

9. In his affidavit the applicant avers that when the court issued an order of status quo he believed that the order of status quo meant that he ceases developing the property and no more. He now believes that by developing the road the **1st** respondent is violating that order. It is the correct position that the court on **28/3/2017** ordered that the *status quo ante* be maintained and that the applicant herein do remove the iron sheets with which he had barricaded the road.

10. This is not an application for the enforcement of an order of status quo and I will keep the issue of the interpretation of that order in abeyance a while as I examine the application at hand.

11. The vital aspect of the **1st** respondent's claim and which has not been addressed by the applicant to a sufficient degree is that though the land appears to have been allocated to him he never took possession thereof because it was a public road known as Police Lane. I have examined the photographs annexed to the **1st** respondent's affidavit in reply to the application and found that there is what appears to be a road. The sworn affidavit of the **2nd 3rd 4th 5th and 6th** respondents asserts that the road has been in use for **18** years and the deponent has been utilizing that road to access the Tabasia Building where he is a tenant having business premises. I believe the same case applies to the **2nd, 3rd 4th and 6th** respondents. These businesses are their source of income and the stoppage of construction would affect their businesses adversely to a great degree.

12. I think that the demonstrated continuous usage of the road is the main pivot on which the instant application turns. If there was no road at all prior to the filing of the instant application there would have been no good reason why the application should not have been brought at the preparatory stage of the road construction works. Now the road is almost complete. Indeed the court record reads that on **23/3/2017** the Attorney General as an interested party lodged an application to have this court's interim orders issued on **27/2/2017** be stayed in the interest of justice.

13. Subsequent to his joinder as a co-defendant in the instant suit, one of the prayers in the Attorney General's defence filed on **14/11/2017** is that the title documents in favour of the applicant herein, having been allegedly issued illegally and fraudulently, be cancelled. The Attorney General vide his application dated **23/2/2018** secured an order reverting the suit land to the status quo ante (before the injunction order was made).

14. The **2nd - 6th** interested parties were not left behind and they had their own application dated **27/3/2017** seeking more or less similar orders.

15. On a cursory glance, there appears to be no need for repeated oscillation between injunction and stay orders in this matter concerning a road that has been in existence for decades and which the applicant had not been utilizing as private property until the injunction of **27/2/2017** was issued in this suit.

16. It would also appear that the construction of the road to bitumen standards as envisaged may change nothing as far as the merits of each party's case or defence is concerned. The legality of the documents of title claimed to have been issued in favour of the applicant will still be

addressed in the main hearing of the suit. In my view the only outcome is that the road users would have a smoother experience than before while driving or walking on the said road. This court's jurisdiction remains the same over the subject matter.

17. Nevertheless I do not think it is seemly for the process of justice to have parties undertake works on the land that change the nature of the land while a dispute is still underway. In normal circumstances the subject matter of a suit should be maintained, even where no express orders exist, in the manner it was in at the time of service of the suit papers upon a defendant.

18. However it is unfortunate that the planning authorities ignored the fact that there was a suit pending over the land in question and included the said road rather than other deserving roads with no dispute into their workplans. It has not been demonstrated that the work plans were made before the suit was filed.

19. Though I deprecate this sort of conduct I have indicated that there is evidence that the road was in use for a long time before the plaintiff came to court and possibly before the title documents were issued. This is a different situation from that in which a land parcel is lying vacant. If the suit land were an idle parcel of land, the 1st respondent would have been deemed to be in the position of an occupier against whom a mandatory injunction may not easily issue at the instance of a person not otherwise in possession without a final investigation vide a full hearing of a suit on its merits. The length of time the 1st respondent has put the land into use on behalf of the beneficiaries - the residents - would have been the parallel of the period of possession required of a person to impress upon this court of a prima facie case of overriding rights that may need be investigated.

20. It is further worthy of note that if this court issues orders stopping the road construction works, the suit property will continue being used as a road by virtue of the orders of the court recorded on **28/3/2017** reinstating the status quo before the issuance of the injunction order of **27/2/2017** which had enjoined the 1st defendant from interfering with the suit land.

21. Should this court issue the orders sought by the applicant in those prevailing circumstances?

22. The answer to the above question lies clearly in two things: first, the resolution of the delicate balance between protection of private property rights as provided for in **Article 40(1) of the Constitution of Kenya** and the public interest in maintaining and improving for the benefit of ordinary citizens a road of access that has been in use as such for many years and which is also alleged to be used by crucial arms of the state such as a police station and a fire station. However this court has not resolved the title issue in favour of the applicant and this suit, which is meant to resolve that issue is still pending. Secondly, the appearance of whether justice is done and is seen to be done demands that no party be seen to be gaining an upper hand in the proceedings by changing the very nature of a suit property. However to attain a reasonable conclusion in this matter I have allegorized the position of the 1st respondent who is undertaking the road works into that of a person in possession of a private land parcel not ordinarily used as a road, who has been dealing with the property as he deemed fit, until challenged in a suit like this one, and against whom an order of injunction, leave alone a mandatory injunction would be hard for an applicant to secure. I therefore consider that in the special circumstances of this case there would be a public inconvenience if an injunction were issued as sought by the applicant as large sums of public funds have already been committed to the road construction yet there was no order halting the construction issued beforehand.

23. In the final analysis I am of the view that an order striking the balance between the rights of both sides in this dispute must take into consideration the public interest.

24. Consequently, I find that a conditional injunction should issue.

25. I therefore grant the application dated **15/1/2019** in terms of **prayer no. (2)** at the portion where it reads as follows :

“That this honourable Court be pleased to issue an order of temporary injunction restraining the defendant/respondent its servants or agents under its authority from paving, constructing or even repairing the road more particularly known as Police Lane or carrying out any activities on the property more particular known as Kitale Municipality Block 4/413 pending the hearing and determination of the suit hereto.”

26. The grant of the said injunction is subject to the applicant executing and filing in court and serving upon all the other parties hereto within **seven (7) days** hereof an undertaking to meet the full cost of ascertainable damages that may be occasioned by the stoppage of the road works being executed on the suit land by reason of the injunction issued above, and further, that the applicant, being the plaintiff shall prosecute his suit to conclusion within **30 days** of this order in default of which conditions either singly or cumulatively shall occasion the lapse of the injunction hereinabove without absolving the applicant from the effects of either the injunction or undertaking aforementioned for the period the injunction will have lasted before its lapse.

27. For clarity, the orders herein above shall apply only in so far as the road works affect the portion of land claimed by the applicant.

Dated, signed and delivered at Kitale on this 11th day of March, 2019.

MWANGI NJOROGE

JUDGE

11/03/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Collins

Mr. Bisonga holding brief for Mr. Atudo for the plaintiff

Mr. Kipruto holding brief for Karani for the 1st respondent

N/A for the 2nd - 6th Interested Parties

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

11/03/2019