



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT & LAND COURT

ELC CASE NO. 157 OF 2017

HARUN OSORO NYAMBOKI.....PLAINTIFF

=VERSUS=

KENELEC SUPPLIES LIMITED.....1ST DEFENDANT

COUNTY GOVERNMENT OF NAIROBI.....2ND DEFENDANT

NATIONAL LAND COMMISSION.....3RD DEFENDANT

THE LAND REGISTRAR, NAIROBI.....4TH DEFENDANT

DIRECTOR OF SURVEYS.....5TH DEFENDANT

PERMANENT SECRETARY, MINISTRY OF LANDS,

HOUSING AND URBAN DEVELOPMENT.....6TH DEFENDANT

THE HON. ATTORNEY GENERAL.....7TH DEFENDANT

RULING

1. This is a ruling in respect of a Notice of Motion dated 30th July, 2018 which seeks the following orders:-

(a) Spent

(b) Spent

(c) THAT the Honourable Court be pleased to issue a Mandatory Injunction compelling the 1st Defendant/Respondent to remove all obstructions and/or containers blocking the sewerage lines and storm water drains and further be compelled to correct, repair and/or restore the sewerage lines and storm water drains to their working conditions.

(d) THAT the Honourable Court be pleased to review and/or set aside the order made on 16th July, 2018.

(e) THAT in the alternative the Honourable Court be pleased to make such orders as it may deem fit in the circumstances.

(f) THAT the costs of this application be provided for.

2. The Applicant had filed a Notice of Motion dated 9th March, 2017 in which he sought the following orders: THAT-

1. The application be heard ex parte in the first instance and service be dispensed with.

2. The application be certified urgent.

3. Pending the hearing and determination of the application, the Defendant by itself, its agents, servants and/or employees be restrained by an interim order from encroaching, fencing, blocking, obstructing, preventing usage, constructing any building and/or structures of any type whatsoever, storing any materials of any kind, interfering with the water and sewer lines and/or dealing in any manner whatsoever with the service lane measuring 6 metres serving the Plaintiff's/Applicant's premises known as L.R No. 209/13557 situate along Lang'ata road-Nairobi West within Nairobi City County.

4. The Honourable Court be pleased to issue an interim injunction restraining the 1st Defendant by itself, its agents, servants and/or employees from encroaching, fencing, blocking, obstructing, preventing usage, constructing any building and/or structures, storing any material of any kind, interfering with the water and sewer lines and/or dealing in any manner whatsoever with the service lane measuring 6 metres serving the Plaintiff's/Applicant's premises known as L.R No. 209/13557 situate along Lang'ata road-Nairobi West within Nairobi City County pending the hearing and determination of the suit.

5. The costs of the application be borne by the 1st Respondent/Defendant.

3. The Notice of Motion dated 9th March, 2017 was heard by brother Justice Eboso who delivered a ruling on 16th July, 2018 dismissing the same on grounds that the Applicant had not annexed evidence to show that he was the owner of the property served by an alleged public service lane. In this application, the Applicant had inadvertently annexed a copy of a title which had no grant number, signature of commissioner of lands and attesting signature of the Registrar of Titles. The Applicant has therefore come to Court for review of the ruling on grounds that there was a title which was a proper one but the one which was annexed to the dismissed application was inadvertently annexed during the process of photocopying.

4. The Application for review was placed before me because Justice Eboso who is serving at Milimani ELC Court had recused himself from this matter. The Applicant argues that had a proper copy of title been annexed to the Applicant's application, the Court would have reached a different decision. The Applicant contends that the annexing of a wrong copy of title was a pure human error. The Applicant therefore argues that the ruling of 16th July, 2018 can be reviewed on the ground of any sufficient reason as per order 45 Rule (1) of the Civil Procedure Rules.

5. Besides the prayer for review of the ruling of 16th July, 2018, the Applicant also seeks a mandatory injunction directed at the 1st Defendant/Respondent ordering it to remove all obstructions and or containers blocking the sewer lines and storm water drains and further be ordered to correct, repair and or restore the sewer lines, and storm water drains to their working conditions.

6. The Applicant contends that after delivery of the ruling of 16th July, 2018, the Respondent escalated its activities and blocked the sewer line. As a result of this, storm water from the Applicant's apartment cannot discharge to the public sewer line and this has posed a serious health threat to the occupants of the apartments on his land.

7. The Applicant's application has been opposed by the Respondent through grounds of opposition dated 15th January, 2019 and filed in Court on 25th January, 2019. The Respondent contends that this Court is *functus officio* and that the Applicant's application is *Res judicata*. The Respondent further contends that the Applicant having conceded that there was an error on his side, he cannot now fault the Court for dismissing the application. The Respondent further argues that the application by the Applicant does not meet the threshold for grant of a review.

8. I have carefully considered the Applicant's application as well as the opposition to the same by the Respondent. I have also considered the oral submissions by Counsel during the hearing of the application. The only issues which emerge for determination are firstly whether the ruling of 16th July, 2018 should be reviewed and secondly, whether a mandatory injunction ought to issue in the manner prayed for.

9. The background facts leading to the filing of this application are fairly simple. The Applicant is the registered owner of L.R No. 209/13557 on which he has put up a block of apartments which are occupied by tenants. Prior to the apartments being occupied, he had applied to the then Nairobi City Council to be allowed to connect a sewer to the public sewer which had been built on a six meter wide public sewer lane. The Nairobi City Council allowed him and he duly connected to the public sewer lane.

10. The Respondent is the registered owner of L.R No. 209/18289. This title includes the six metre wide public sewer lane which the Respondent acquired in or around 2002. Prior to the acquisition of the new title, the Respondent's land was L.R 209/10191. The Respondent applied to the Commissioner of Lands who allowed the Respondent to extend its land to include the six metre public sewer lane. This is how the Respondent came to be given a new title which included the public sewer lane.

11. The Respondent armed with its new title moved to the ground and blocked the public sewer lane claiming that it had title to the same. After the dismissal of the Applicant's application, the Respondent moved to block the sewer lane thus affecting the Applicant.

12. I have looked at the ruling delivered by Justice Eboso. It is clearly indicated that the Judge could not proceed to consider whether the Applicant had established a prima facie case because he did not have a title the basis of which he would have laid his claim. The Applicant has now annexed a copy of a title which shows that he is the registered proprietor. The Applicant has even attached a recent search which shows that he is the registered owner.

13. The failure to annex a proper title was inadvertent. The Applicant had demonstrated that his rights to access a public sewer line had been infringed. There is a letter from the Respondent in the file which show that it applied to the Nairobi City Water & Sewerage Company to remove sewer lines which are below its land. This request was declined in writing.

14. There is no contention that prior to the acquisition of the six metre sewer lane by the Respondent, the property was public land. It was acquired and was annexed to the Respondents land and a new title issued. There was no notice inviting the public to give their objections. This is clear in the letter by the Ministry of Lands which purported to exempt the Respondent from the requirement of giving the public notice of the intended acquisition. The reason for the exemption was that already title in favour of the Respondent had been issued.

15. Had the Applicant annexed a proper title, the Court would not have reached the decision it reached given the circumstances of this case. The failure to annex a proper title has been explained. This Court is entitled to review the ruling of 16th July, 2018 on the grounds that the Applicant has given a sufficient reason to warrant the Court to review the ruling and orders made.

16. This application by the Applicant is not *Res judicata*. A party is entitled to come to Court for review of any orders. The Applicant's application is not an abuse of the process of the Court. I therefore find that the application for review is well grounded. I allow the application for review with the result that the orders of the Court given on 16th July, 2018 dismissing the Applicant's application of 9th March, 2017 are hereby set aside and in place thereof an order is made allowing the Applicant's application dated 9th March, 2017 in terms of prayers 4 and 5.

17. As for the second issue whether a mandatory injunction ought to issue, the law is clear that a mandatory injunction can be given at interlocutory stage where it is shown that the matter in issue is a simple one which can be remedied in a summary manner and where the Court is convinced that at the end of the trial it will be satisfied that it was properly issued. In the instant case, there is no doubt that the contested six metres lane was a public sewer lane. There were sewer lines laid on that piece even before acquisition by the Respondent.

18. The Applicant had applied and had been granted permission to connect his sewer to the public sewer lane. The Respondent has now cut off the Applicant from the connection. The cutting off of the Applicant is not only a threat to the health of the occupants of his apartments but also an infringement of his right to access to public utilities. I find that the Applicant has made a clear case of grant of a mandatory injunction. I therefore allow a mandatory injunction in terms of prayer (c) of the Notice of Motion dated 30th July, 2018. The Respondent shall pay the costs of this application.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 4th day of April, 2019.

E.O.OBAGA

JUDGE

In the presence of Mr. Manyara for Plaintiff/Applicant and M/s Kaberia for Mr. Kago for 1st Defendant/Respondent.

E.O.OBAGA

JUDGE

4.4.2019