



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT KERICHO

ELC PETITION NO.1 OF 2019

IN THE MATTER OF ARTICLE 22(1), 23, 71(1) ARTICLE 40 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ALLEGED VIOLATION OF ARTICLES 2, 10, 21, 28, 29, 31, 40, 42, 47(2), 60(1)(B) AND 69 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF OPENING AND WIDENING OF VILLAGE ROAD ADJACENT TO PETITIONERS PARCEL OF LAND KERICHO/CHEMOIBEN/186 WITHOUT NOTICE AND OR COMPENSATION BY THE COUNTY GOVERNMENT OF KERICHO ON 19TH DECEMBER TO 21ST DECEMBER 2018

AND

IN THE MATTER OF SECTION 4 OF THE FAIR ADMINISTRATIVE ACTION ACT

AND

IN THE MATTER OF SECTIONS 10 AND 11 OF PUBLIC ROAD ACCESS ACT

AND

IN THE MATTER OF SECTIONS 107, 108, 109, 111, 112, 113, 114, 115, AND 118 OF LAND ACT 2012

AND

IN THE MATTER OF CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS AND ENFORCEMENT OF THE CONSTITUTION (PRACTICE AND PROCEDURE RULES) 2013

BETWEEN

JOEL KIPRONO MUTAIPETITIONER/APPLICANT

AND

THE COUNTY GOVERNMENT OF KERICHO.....1ST RESPONDENT

THE CHIEF OFFICER ROADS

COUNTY GOVERNMENT OF KERICHO.....2ND RESPONDENT

RULING

Introduction

1. By a Notice of Motion under Certificate of Urgency Dated 15th January, 2019 The Petitioner/Applicant moved this Honourable Court

seeking the following orders:

1. *Spent*

2. *That pending the inter partes hearing of this application and petition this Honorable Court be pleased to order the Respondents by themselves, their servants or agents against causing wanton destruction of his property, trespassing, and alienating his land being **KERICHO/CHEMOIBEN/186**, without due process of the law.*

3. *That pending the hearing and determination of the petition herein this Honorable court be pleased to order the Respondents by themselves, their servants or agents or otherwise howsoever from continued alienation ,disturbing the original boundaries and trespassing on the petitioners land being parcel **KERICHO/CHEMOIBEN/186**.*

4. *That the costs of this application be in the cause.*

2. The application is based on the grounds stated on the face of the Notice of Motion and the Petitioner's affidavit sworn on the 15th January 2019. In the said affidavit, the Petitioner has deponed that he is the registered proprietor of land parcel number **KERICHO/CHEMOIBEN/186** measuring 4.4 hectares. He has annexed a certificate of official search and photographs of the damage caused by the Respondents to his affidavit.

3. The gist of the Petitioner's complaint is that while opening up a what is supposed to be a 6 metre road next to his parcel of land, the Respondents encroached on the Petitioner's land, pulled down his fence along a stretch of 280 metres and destroyed his mature trees and tea bushes thus exposing his home and school and creating insecurity. He avers that the said destruction has reduced the acreage of his land and caused him to incur unplanned expense in hiring extra security officers.

4. He avers that the alienation of his land was done without following due process as no notice was given and it constitutes an act of trespass as well as a violation of his rights. He further avers that unless the Respondents are restrained by way of injunction, the Petitioner will suffer irreparable damage.

5. The application is opposed by the Respondents through the Replying affidavit of John Mibei, the County Surveyor in the Department of Lands and Physical Planning, Kericho County.

6. In the said affidavit he avers the county officials engaged the public before opening up the village road. He further avers that the road which joins the Kericho-Kisii Highway is supposed to be 9 metres as per the Physical Planning Act of 1945. Mr. Mibei avers that the county officials visited the site and confirmed that the villagers who border the road had encroached on the road by 3 metres. They subsequently held meetings with them and gave them time to remove their property but the Petitioner failed to attend the said meetings. He has attached a copy of the minutes said meeting.

7. Mr. Mibei avers that even though the Petitioner holds a title for the suit property, the acreage indicated therein is an approximate figure and does not confer on him a right to encroach on a public utility. He denies that the Respondents have violated the Petitioner's Constitutional right to own property.

8. The application was canvassed by written submissions and counsel for both parties filed their submissions which I have considered.

Issue for Determination

9. The main issue for determination is whether the Petitioner has met the threshold for the grant of injunctive orders.

Analysis and Determination

10. In order for the court to exercise its discretion in granting injunctive relief the applicant must meet the conditions set out in the case of **Giella V Cassman Brown & Company Ltd 1973 EA 358** which are as follows:

“First, the applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”

11. The first condition that the applicant must demonstrate is that he has established a prima facie case with a probability of success.

12. A prima facie case has been defined by the court in the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR** as follows:

A prima facie case in a civil application includes but is 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 that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

13. It is not in dispute that the Petitioner/Applicant is the registered proprietor of that parcel of land known as **KERICHO/CHEMOIBEN/186**. What is in contention is whether the Respondents have encroached on the Petitioner's land and destroyed

his property without following due process. In line with the definition of a prima facie case in the Mrao case (supra), the Plaintiff has therefore established a prima facie case with a probability of success.

14. The second condition that the Applicant needs to demonstrate is that he is likely to suffer irreparable loss.

15. Counsel for the Respondents has submitted that the subject property herein is land whose value can be accurately ascertained and should the applicant succeed in his suit, his loss can be adequately compensated by an award of damages.

16. He has cited the case of **Nguruman v Jan Bonde Nilesen & 2 Others Civil Appeal No. 77 of 2012** where the Court of Appeal stated as follows with regard to the phrase irreparable loss:

“the applicant must establish that he might otherwise suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, this is a threshold requirement and the burden is on the applicant to demonstrate prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such that monetary compensation, of whatever amount, will never be adequate remedy”.

17. The Petitioner’s counsel has countered that above submission by citing the case of **Olympic Sports House Limited v School Equipment Centre Limited (2012) eKLR** which cited the case of **Waithaka v Industrial and Commercial Development Corporation (2001) KLR 374** where it was held as follows:

“As regards damages, I must say that in my understanding of the law, it is not an inexorable rule that where damages may be an appropriate remedy, an interlocutory injunction should never issue. If that were the rule, the law would lean unduly in favour of those rich enough to pay damages for all manner of trespass. That would not only be unjust but it would also be seen to be unjust. I think that is why the East African Court of Appeal couched the second condition in very careful terms by stating that normally an injunction would not issue if damages would be an adequate remedy... if the adversary has been shown to be highhanded or oppressive in its dealings with the applicant this may move the court of equity to say; money is not everything at all times and in all circumstances and don’t you think you can violate another citizen’s rights only at the pain of damages! In the instant case although I have found myself in doubt as to the existence of a prima facie case, I have said enough to show that the Plaintiff has an arguable case and that the Defendant’s conduct may be regarded as high handed and probably unfounded in law”

18. In the instant case, even though the applicant has quantified the cost of the trees that have been destroyed, the psychological fear of insecurity and aesthetic value of the environment cannot adequately be compensated in monetary terms. I must be quick to add that this will depend on whether the Petitioner proves his case at the main hearing. In view of the foregoing, I am persuaded that the Petitioner has demonstrated that he is likely to suffer irreparable loss.

19. Having said that, the opening of the village road is meant for the benefit of the public including the applicant and he has expressly stated at paragraph 24 of his supporting affidavit that he is not opposed to the opening up of the said road. His main concern is the manner in which it has been carried out. It has also been stated by the County Surveyor that a notice was issued to all the land owners who border the road but the Applicant failed to heed the notice by cutting his trees and instead waited for the Respondent to commence their work. That being the case, the balance of convenience tilts in favour of Respondents who should be allowed to complete the road for the benefit of the public. If any more trees need to be cut in order to open up the remaining portion of the road the Petitioner should be given 60 days notice to remove them. I therefore decline to exercise my discretion in favour of the applicant and disallow the application.

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

Dated, signed and delivered at Kericho this 22nd day of May, 2019.

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J.M ONYANGO

JUDGE

In the presence of:

1. Mr. Kemboi for the Petitioner/Applicant
2. Miss Cheruiyot for Mr. Lemayan for the Respondent
3. Court assistant – Rotich