REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC JUDICIAL REVIEW NO. 2 OF 2016

REPUBLIC...APPLICANT

VERSUS

DIRECTOR OF SURVEY...................................1ST RESPONDENT

CABINET SECRETARY, MINISTRY OF

HOUSING & URBAN DEVELOPMENT.........2ND RESPONDENT

THE ATTORNEY GENERAL...........................3RD RESPONDENT

AND JOHN SAKAJA....................................INTERESTED PARTY

EX-PARTE APPLICANT..................................PETER K. WILSON

RULING

1. The application before me is the Notice of Motion dated **5/2/2019** filed by **Peter K. Wilson** the ex-parte applicant in the already concluded Notice of Motion for Judicial Review. It seeks the following orders:

> **(a) …..(spent)**
>
> **(b) THAT this Honourable court be pleased to grant an order of temporary injunction stopping the 1st Defendant and/or its agents from excising a 40 feet road on property land LR. Nos. 2073/36-37 pending inter partes hearing of this application.**
>
> **(c) THAT this Honourable court be pleased to grant an order of temporary injunction stopping the 1st Defendant and/or its agents from excising a 40 feet road on property land LR. Nos. 2073/36-37 pending inter parties hearing of the appeal Eldoret COA Civil Appeal Number 46 of 2017; Peter K. Wilson VS Director of Survey , Cabinet Secretary Ministry of Housing and urban Development, the Attorney Generally and John Sakaja.**
>
> **(d) THAT costs of this application be provided for.**

2. The grounds are on the face of the application and are set out in paragraphs **1 (a)** to **(h).** The application is supported by the affidavit of Peter Wilson, the applicant sworn on the **5/ 2/ 2019**.

3. The dispute in the judicial review application was over the decision of the Director of Surveys embodied in a letter of **6/4/2016** written by the County Surveyor, Trans Nzoia County giving notice of intention to excise a 40 feet wide road of access from LR. Nos. **2079/36-37**. The applicant's main grievance in the judicial review notice of motion was that the respondents unilaterally made the decision to excise the road out of his land without giving him audience and that by virtue of that proposed exercise he would lose land. He averred that the road was only a proposed road.

4. The respondent's and interested party's response was that the road had already existed prior to the decision to open it up and they relied on a **1952** map. They aver that in **1952,** LR Number **2073** was subdivided and the road reserve of **40 feet** was created.

5. The ex-parte applicant sought for an order certiorari to quash the aforementioned decision vide an application dated **10/5/2016** which application was dismissed with costs to the respondents and the interested parties vide a ruling delivered on **29/5/2017.**

6. The applicant thereafter preferred an appeal against the said ruling. The applicant alleges that all the parties have been served with a copy of the record of appeal. The applicant also avers that the Court of Appeal is yet to serve the applicant/ appellant with a case conferencing date as its diary cannot accommodate the applicant's appeal yet due to a backlog of pending appeals.

7. It is the applicant's further contention that the 1st Respondent through the Trans- Nzoia County Surveyor in a letter dated **31/1/2019** set **13/2/2019** as the date of the excision of a **40** feet access road which would render that appeal nugatory. The applicant has maintained that the respondents had not threatened any action since the filing and service of the appeal to them hence the applicant was not previously apprehensive of any action hence the letter by the 1st respondent date **31/1/2019** necessitated this application.

8. The applicant has taken sufficient caution to attach to his application an affidavit sworn by a process server showing that the record of appeal in **Civil Appeal Number 46 of 2017 - Peter K. Wilson -vs- That Director of Surveys , The Cabinet Secretary Urban Development, The Attorney General and John Sakaja** has been served upon the 3rd respondent in the appeal who also is the Chief Legal Adviser to the National Government of Kenya and is deemed to represent the 1st and the 2nd respondents and also upon the 4th respondent in the appeal who is the interested party herein.

9. I do not find the applicant's statement that he desires to be heard on appeal in these matters to be idle. He has amply demonstrated that the appeal exists. To my mind, the injunction sought by the applicant is for purposes of maintaining the *status quo* prevailing until the appeal is heard and determined.

The Interested Party's Response

10. The application is opposed. There is a replying affidavit by the interested party dated **8th March 2019**. The gist of the affidavit is that the access road being contested has existed in the maps which date back to **1952** and the same is still being used even now, only that the same has been reduced in size by the applicant upon subdivision and selling part of his land to another farmer; that the provision for the **40** feet wide road was made during the sub division of **L.R No. 2073** into No. **2073/11-22** carried out in **1952** by Government Surveyor; that the applicant's land parcel numbers **L.R. 2073/37** and **L.R. 2073/36** are served by two roads running parallel right from the main Webuye-Kitale road as shown in the **1952** map and illustrated by the attached road drawing. It is deponed that there are two roads that start from the main road and each is marked by several beacons and both roads have a provision of **40** feet in terms of width. The interested party avers that the application lacks merit and that the applicant has not disclosed material facts to this court and that it should be dismissed.

11. Mr. Wekhomba while arguing the application for the applicant connected his argument to the provisions of Article 40 (3) (b) (ii) of the Constitution of Kenya by stating that the state intends to take away the applicant's land and the taking away is within the meaning of those provisions. I do not agree with that view. The dispute between the applicant and the interested party is over whether the road exists or not and the width thereof while the dispute between the applicant and the respondents is over the propriety of their decision to demarcate the road which decision the applicant avers was taken without his being accorded a hearing yet it allegedly affects his land. Mr Wekhomba submitted that there was a prima facie case and the appeal before the Court Of Appeal had probability of success. He submitted further that the balance of convenience lay in allowing the area used as a road to continue being so used pending the determination of the appeal. In his view the excision of the road to a **40** feet width dimension was tantamount to disallowing the applicant from defending his property. He further submitted that owing to the doctrine of *lis pendens* this court is vested with power to prevent wastage of any property. He cited the case of **Naftali R. Kinyua vs the City Council of Nairobi, eKLR** and stated that when the subject is emotive the court has to grant an injunction.

12. On her part Ms. Nasike for the interested party faulted the applicant for the two year delay incurred without moving the court by way of an application such as the current one and averred that allowing the application is tantamount to punishing the persons entitled to use the road.

Analysis and Determination

13. I have carefully considered the notice of Motion, affidavits and the rival affidavit filed and the oral submissions made by the parties on **11/3/2019**. I have especially taken stock of Mr. Wekhomba's submission regarding the conditions set out in **Giella -vs- Cassman Brown 1973 EA 358** for the grant of an injunction.

14. Ordinarily in an application for an interlocutory injunction, the Applicant must satisfy the conditions laid down in case of the **Giella -v- Cassman Brown & Co. Ltd (1973) EA 358**. The Plaintiff must show that he has a *prima facie* case with a probability of success and that he stands to suffer irreparable damage. If the court is however in doubt on the foregoing, it will decide the matter on the balance of convenience.

15. The crucial issue for determination is whether the applicant should be granted the order of injunction sought given the circumstances of this case. In the case of **Mrao Ltd -v- First American Bank of Kenya Ltd (2003) eKLR,** the Court of Appeal defined a prima facie case.

> **"…. A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of the Applicant's case upon trial….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 all explanation from the latter…... "**

16. It is now a principle generally accepted by courts that when dealing with an application for an interlocutory injunction, the Court is not necessarily bound by the three principles set out in the **Giella -v- Cassman Brown case**. The Court may look at the circumstances of the case generally and the overriding objective of the law. In the case of **Suleiman -v- Amboseli Resort Ltd (2004) KLR 589**, Ojwang, Ag. J (as he then was) stated, *inter alia:-*

“Counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago, <u>in Giella -v- Cassman Brown, in 1973</u> cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of Films Rover International made this point regarding the grant of injunctive relief (1986) 3 AA EL 772 at page 780-781: “A fundamental principle of…... that the court should take whichever course appears to carry the lower risk of injunction if it should turn out to have been ‘wrong’… Traditionally, on the basis of the well accepted principles set out by the Court of Appeal in <u>Giella -v- Cassman Brown,</u> the Court has had to consider the following questions before granting injunctive relief:

i) Is there a prima facie case

ii) Does the applicant stand to suffer irreparable harm….

iii) On which side does the balance of convenience lie….

Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court in responding to prayers for interlocutory injunctive relief should always opt the lower rather than the higher risk of injustice…if granting the Applicant’s prayers will support the motion towards full hearing, then should grant those prayers.

I am unable to say at this point in time that the Applicant has a prima facie case with a probability of success, and this matter will depend on the progress of the main suit. Lastly, there would be a larger risk of injustice if I found in favour of the defendant than if I determined this Application in favour of the Applicant.”

17. The guiding principle of the overriding objective is that the court should do justice to the parties before it and their interest must be put on scales.

18. In my view, the applicant has demonstrated sufficient reason for seeking orders to preserve **LR. No. 2073/36-37** from being excised. He states that that intended excision, if carried out, would render the appeal nugatory; he imagines that perchance this court fails to issue the orders sought herein and that appeal succeeds, the work done by the surveyors on the land will be futile.

19. In my view the respondents would also not be barred from carrying out the exercise if that appeal fails. I must also consider that currently the parties herein are able to access their respective plots as the appeal pends hearing.

20. However the application has been brought under the provisions of **Order 40 Rule 2** of the **Civil Procedure Rules** the provisions of which are as follows:

Injunction to restrain breach of contract or other injury [Order 40, rule 2.]

(1) In any suit for restraining the defendant from

committing a breach of contract or other injury

of any kind, whether compensation is claimed in

the suit or not, the plaintiff may, at any time

after the commencement of the suit, and either

before or after judgment, apply to the court for

a temporary injunction to restrain the

defendant from committing the breach of contract

or injury complained of, or any injury of a like kind

arising out of the same contract or relating to

the same property or right.

(2) The court may by order grant such injunction on

such terms as to an inquiry as to damages, the

duration of the injunction, keeping an account,

giving security or otherwise, as the court deems fit.

21. It is clear that those provisions envisage an injunction may be granted only where there is a pending suit and where during the pendency of that suit there is threat of breach of contract or other injury.

22. Furthermore, the substantive relief in that suit must be restraint of breach of contract or other injury. Those provisions do not envisage that such injunctive orders can be made where the suit is finalised and an appeal is pending. There is no pending suit before this court at the moment, the judicial review notice of motion having been dismissed on **29/5/2017**. Those provisions are therefore not applicable in this application.

23. The applicant has also cited **Article 40 (3) (b) (ii)** of the Constitution the provisions of which are, to paraphrase, that the state shall not deprive a person of property of any description unless the deprivation is for a public purpose or in the public interest and is carried out in accordance with the constitution and any Act of Parliament that allows any person who has an interest in or right over, that property a right of access to a court of law. I connect these provisions to Mr. Wekhomba's oral submission that the state intends to take away the applicant's land. However as I have already stated before there is no intention of compulsory acquisition evinced by the respondents in this matter and the main issue is whether the road legally existed in the maps since 1950s and whether their decision to demarcate the same to higher dimensions was supported in law.

24. The absence of any provisions that empower this court to grant an injunction is not surprising. The Court of Appeal has noted this, and observed that in matters judicial review the High Court (and hence this court of equal status) is governed by the **Law Reform Act**.

25. In **Cortec Mining Kenya Limited v Cabinet Secretary, Attorney General & 8 others [2015] eKLR** it was argued that Court of Appeal could not grant the injunction sought pending conclusion of an appeal before it because it does not have jurisdiction. Counsel for the respondents in that case postulated that as the High Court could not grant an order for injunction as it is not one of the orders it is empowered to grant under **Section 8** of the **Law Reform Act** as **Section 3(3)** of the Law Reform Act requires that the law to be applied in hearing of an appeal before the Court of Appeal shall be the law applicable to the case in the High Court.

26. The Court of Appeal stated as follows in the case of **Cortec Mining Kenya Limited (supra)**:

> **"31. It is pertinent to ascertain whether in the judicial review proceedings in the High Court, the High Court had jurisdiction to grant injunction, interlocutory or otherwise such as is now sought in the applicant's notice of motion and if it did not have, whether this Court could grant it as an interlocutory relief pending the determination of the appeal."**

27. The court in the **Cortec Mining Kenya Ltd** case upheld the respondent's preliminary objection and ruled that the High court could not issue an injunction in judicial review proceedings and observed as follows:

> **"In conferring this constitutional mandate to the High Court, Parliament did not expand the amplitude of the reliefs under Section 8 of the Law Reform Act beyond the three orders and consequently the jurisdiction of the High Court in this regard remains confined to that set by Section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938 of the United Kingdom as stated in section 8(2) (supra)."**

28. The same court stated as follows later in its ruling:

> **"The High Court could only grant these three prerogative orders. It could not in the judicial review under Section 8 of the Law Reform Act grant an order of injunction such as is sought in the motion before us for the simple reason that injunction is not authorized by and falls outside the amplitude of the reliefs available under Section 8 of the Law Reform Act. An injunction is also not exclusively within the amplitude of public law remedies….**
>
> **…It is plain to see that in judicial review, the Court is concerned with public law remedies. An injunction is a private law remedy, and it can also serve as a public law remedy. However, in the context of judicial review, it is not available either in the High Court or in this Court on appeal under the Law Reform Act.**
>
> **As is apparent, judicial review being *sui generis* in which the only orders available are certiorari, mandamus & prohibition, the notice of motion in judicial review having been dismissed, there is nothing that can be stayed under rule 5 (2) (b). Mr. Ngatia was quite correct when he postulated this to be the reason why an order of stay was not sought.**
>
> **In the instant case, the High Court was not legally empowered to grant the remedy of injunction. The law governing judicial review as set out in Section 8 of the Law Reform Act did not then as now permit the Court to grant an injunction. It is as plain as daylight that, an order of injunction which the High Court was not by law empowered to grant is not available on appeal from this Court."**

29. In **Nbi Civil Application No. 394 of 2016, Mativo J** declined an application seeking an injunction pending the hearing of an appeal against a judgment issued in a judicial review proceedings.

30. While following the **Cortec Mining** decision, Ogola J in **Republic V Kenya Revenue Authority Ex-Parte Corrugated Sheets Ltd Misc. Civil Application No. 85 of 2012 (JR)** stated as follows:

> **“While this court has wide powers under Sections 1B and 3A of the Civil Procedure Act to give such orders that may ensure the dispensation of justice, it is to be noted, and as correctly submitted by Mr. Ado, after a Judicial Review application the only recourse open to a party is to appeal. There is no jurisdiction to grant injunction. That is more so true considering that the Judicial Review case from which this matter emanates did not have the power to grant injunction. Indeed in this matter the Applicant is not seeking a stay of any orders arising from the Judicial Review case.”**

31. Though Ogola J applied the inherent jurisdiction of the court to issue a temporary order of injunction, it was specifically to safeguard the property in the suit which was considerable sum of money demanded of the applicant by the respondent as tax and penalties, which the court observed that:

> **“…if the subject matter of the intended appeal is lost, then there is no appeal, in which case the right to appeal which is provided at the end of Judicial Review proceedings is not really a right.”**

32. In the instant case the subject matter is immovable property in the form of land. Whether the excision takes place or not, the land will still be there at the end of the appeal. It is not intended to be sold. It would only be used as a public road. I can not even remotely consider that the reasoning applied in **Republic -vs- Kenya Revenue Authority Ex-Parte Corrugated Sheets Ltd Misc. Civil Application No. 85 of 2012 (JR)** case would apply here.

33. Accordingly, I find no merit in the application dated **5/2/2019** and I hereby dismiss it with costs.

Dated, signed and delivered at Kitale on this 6th day of May, 2019.

MWANGI NJOROGE

JUDGE

6/5/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

N/A for the Ex-parte Applicant

N/A for the Respondents

N/A for the Interested Party

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

6/5/2019