



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 3 OF 2019

FILLISILA MBENEKA MBUTHIIMWE

(Suing as the Administratrix of the estate of

MBUTHIIMWE IRERI - Deceased).....PLAINTIFF

VERSUS

NYAGA GATURI.....1ST DEFENDANT

EMBU COUNTY GOVERNMENT.....2ND DEFENDANT

RULING

1. By a notice of motion dated 24th January 2019 brought under **Order 51 Rule (1) of the Civil Procedure Rules and sections 1A & 1B of the Civil Procedure Act (Cap. 21)** the Plaintiff sought the following orders:

a. That the application herein be certified as urgent and heard ex parte in the first instance.

b. That this honourable court be pleased to issue a temporary injunction against any further excavation and/or digging of an access road and encroachment over land parcel No. Embu/Mavuria/580 pending the hearing and determination of this application inter parties.

c. That this honourable court be pleased to issue prohibitory orders against any further excavation and/digging of the access road and encroachment over land parcel No. Embu/Mavuria/580 pending the hearing and determination of this suit inter parties.

d. That this honourable court be pleased to direct that a Regional Surveyor drawn from a region outside of Embu do visit land parcel No. Embu/Mavuria/580 and restore the land to its status quo prior to the Respondent's activities on the land on 15th January 2019 pending the hearing of this application.

e. That this honourable court be pleased to direct that a Regional Surveyor accompanied by Land Registrar drawn from a region outside of Embu do visit land parcel No. Embu/Mavuria/580 and restore the land to its status quo prior to the CEC's activities on the land on 15th January 2019 pending the hearing of the main suit.

f. That the Applicant be allowed to fence off the land as it was prior to the activities on 15th January 2019 pending hearing and determination of the application inter parties.

g. That the costs be in the cause.

2. The said application was based upon the grounds set out on the face of the motion and supported by the Plaintiff's own affidavit sworn on 24th January 2019. It was contended that owing to a boundary dispute concerning *Titles Nos. Embu/Mavuria/580, 583, 1573 and 1574* the 2nd Respondent had arbitrarily decided to excise an access road measuring 15 x 200 metres over the Plaintiff's parcel No. 580.

3. It was further contended that the 2nd Defendants County Executive Committee member had wrongfully caused the Plaintiff's fence to be brought down and his indigenous trees to be destroyed in the process of unlawfully creating an access road through the Plaintiff's land. The Plaintiff contended that the said actions were acts of abuse of office.

4. The 1st Defendant filed a replying affidavit sworn on 20th February 2019 which gave a detailed history of the dispute concerning the

access road the Plaintiff was complaining about. The 1st Defendant stated that the said access road had been the subject of earlier legal proceedings in Siakago PMCC No. 44 of 2016 whereby a consent order was recorded for the District Land Registrar, Mbeere, Provincial Surveyor, Embu, the parties and their respective surveyors were to visit the ground and ascertain the boundaries of the properties involved including parcel 580.

5. The 1st Defendant contended that by a further consent dated 21st February 2017 the Provincial Surveyor was ordered to place beacons on the access road so that the public is made aware thereof. The 1st Defendant exhibited a copy of the said order and a letter dated 6th February 2018 from the Provincial Surveyor's office confirming the placement of the beacons to mark out the access road.

6. Although the 2nd Defendant filed a notice of appointment of advocate through Rugaita & Co. Advocates, there is no indication of any response to the said application having been filed by the time of preparation of this ruling.

7. When the said application was listed for hearing the advocates for the Plaintiff and the 1st Defendant agreed to canvass it through written submissions. The Plaintiff was granted 30 days to file a further affidavit and written submissions whereas the Defendants were granted 30 days to file and serve their submissions upon the lapse of the period granted to the Plaintiff. However, by the time of preparation of the ruling, none of the parties had filed any submissions.

8. The court has considered the Plaintiff's notice of motion dated 24th January 2019 and the 1st Defendant's replying affidavit in opposition thereto. The court has also considered the pleadings and documents on record. The Plaintiff has moved the court under certificate of urgency on the basis that the 2nd Defendant had illegally and arbitrarily violated her property rights by creating an access road through her land without lawful justification.

9. The main question for determination in this matter is whether or not the Plaintiff has made out a case for the orders of injunction, prohibition and other orders sought in the application. The court will apply the test laid down in the case of **Giella V Cassman Brown & Co. Ltd [1973] EA 358** on the application for injunction.

10. The court has noted that the dispute before his court is not entirely new. It has previously been handled by the Land Registrar, Mbeere, the District Surveyor and the Provincial Surveyor. It has also been the subject of *Siakago PMCC No. 44/2016* where the warring parties recorded two consents for the purpose of resolving the dispute, even though the County Government of Embu was not a party thereto.

11. The court is satisfied from the material on record and by the Plaintiff's own admission in her supporting affidavit that she was at all material times represented by her sons in the proceedings before Siakago Law courts. She is therefore deemed to have been aware of the aforesaid consents, the site visits by the surveyors and the Land Registrar as well as the resultant reports. There is evidence on record to the effect that the Provincial Surveyor marked out the boundaries of the access road which was really the subject of the dispute all along.

12. If, therefore, officers of the 2nd Defendant decided to open up the access road which had been identified by competent experts employed by the Government of Kenya, there would be absolutely nothing arbitrary or unlawful about it. The court is of the view that opening up an access road which had already been marked pursuant to a court order cannot found a cause of action against the County Government of Embu.

13. There is no indication on record that the Plaintiff although aggrieved by the consent orders recorded in *Siakago PMCC No. 44 of 2016* ever applied for their variation or setting aside. There is no indication that the Plaintiff ever appealed those orders. It is, therefore, surprising that the Plaintiff decided to move the court only during the physical implementation.

14. The Plaintiff has also not come out clear on why she filed separate proceedings before this court whereas there is a suit which is still pending at Siakago law courts over the same matter of the location of the access road. The court has noted that even though the Plaintiff made reference to the previous case in her witness statement, there is no reference to the case in the plaint at all as required **by Order 4 Rule (1)(f) of the Civil Procedure Rules**. The court has further noted that there was no full and faithful disclosure in the supporting affidavit on the proceedings and orders in the previous suit even though some court orders were attached to the affidavit.

15. The court is thus far from satisfied that the Plaintiff has made out any *prima facie* case let alone one with a probability of success at the trial. The court finds that the Plaintiff has been guilty of non-disclosure of material facts or suppression of material facts. The court is further of the view that the instant application is simply mischievous.

16. The upshot of the foregoing is that the court finds no merit whatsoever in the Plaintiff's notice of motion dated 24th January 2019. The same is accordingly dismissed with costs to the 1st Defendant assessed at Kshs.20,000/- to be paid within the next 30 days in default of which execution may ensue.

17. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 27TH DAY of JUNE, 2019

In the presence of the Plaintiff in person, Ms. Maina holding brief for Ms. Muthoni for the 1st Defendant and in the absence of Rugaita & Co. Advocate for the 2nd Defendant.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

27.06.19