



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAROK

ELC CAUSE NO. 5 OF 2018

ABDI NASIR SHEIKH OSMAN.....PLAINTIFF

-VERSUS-

NAROK COUNTY GOVERNMENT.....DEFENDANT

RULING

The Application before court is the Plaintiff/Applicants Notice of Motion dated 17th January, 2018 and brought under Article 159 and Article 40 of the constitution of Kenya, Order 40 Rule (1) Order 51 Rule 1,3 and under section 18,19,25 and 26 of Land and sought for the following orders:-

- 1. THAT** pending the inter parties hearing and determination of this application, the court be pleased to issue an order of injunction restraining the defendant, their servants, licensees, agents or any other persons acting on their behalf from howsoever trespassing, encroaching upon, occupying, demolishing any structures, utilizing any portion, excising any part of the suit property or interfering with the ownership, quiet possession and occupation by the Plaintiff of all that piece of land known as **TITLE NUMBER NAROK TOWNSHIP/378** and plot No. **354 BLOCK 4 NAROK TOWN** (“the suit property”)
- 2. THAT** pending the hearing and determination of this suit, the court be pleased to issue an order of injunction restraining the Defendant, their servants, licencees, agents or any other persons acting on their behalf from howsoever trespassing, encroaching upon, occupying, demolishing any structures, utilizing any portion excising any part of the suit property or interfering with the ownership, quiet possession and occupation by the Plaintiff of all that piece of land known as **TITLE NUMBER NAROK TOWNSHIP/378** and plot No. **354 BLOCK 4 NAROK TOWN** (“the suit property”)
- 3. THAT** the Narok County Police Commander and Officers under his command to assist in enforcing compliance of the court orders as may be granted by this court for purposes of maintaining law and order.
- 4. THAT** this court issues such orders or directions as it deems fit to grant for the ends of justice to be met in this application.
- 5. THAT** costs of this application be borne by the Defendant.

The Application is based on the grounds that the Applicant is the lawful and beneficial owner of land parcel title Number NAROK TOWNSHIP/354 Block 4 hereinafter referred to as the suit property and the applicant has an indefeasible title to the said parcel of land and that the applicant has always enjoyed occupation and possession of the suit property until 4th December, 2017 when the Defendants servants, and hired groans without authority forcibly entered into the suit property and interfered with the applicants enjoyment of quiet possession.

The Applicant further contends that the respondents caused to be demolished a section of the Plaintiff’s property and converted it into a matatu stage without according the Plaintiff a fair hearing or administrative action and against the rules of Natural Justice and that the Respondent did not have any lawful authority to trespass, occupy, invade and remain on the suit property and the Respondents actions aforesaid deprives the Applicant of the suit property. The Applicant contends that the Respondents actions hereinabove stated was preceded by a Notice dated 21st November, 2017 issued by the Respondent’s Chief Officer for Physical Planning and Urban Development to all kiosk owners and he avers that he is not a kiosk owner but he legitimate owner of the suit property.

The Application was supported by the affidavit of the Applicant in which he deponed to and expounded on the grounds on which the Application was based and to the supporting affidavit the Applicant annexed a copy of the title in respect of the suit property, survey map of the area where the suit property is situated and a copy of the Notice issued by the Respondents.

In his supporting Affidavit the Applicant avers that he has title to the suit property which title is indefeasible and that on 1st December, 2017

he was assured by one Justus Rutto in the company of one Mr Shankil together with his tenants that the suit land was not earmarked for demolition. However, on the 4th December, 2017 he received calls from his tenants informing him that the Respondents were at the suit property with intent of demolishing the buildings on the suit land and on arrival he found heavy machinery and when he protested he was arrested and locked up at Narok Police station and released without charge.

The Applicant contends that on the material day the Respondents demolished his property and he found his power rooms were broken into, electrical mains cut off, iron sheets, metal doors and window grills stolen and his septic tanks destroyed. He further states that his attempts to access the suit property has been met with threats and if the same continues he will suffer irreparable loss and damage.

The Application was opposed by way of a Replying Affidavit sworn by Godfrey Ndubi Kwera who is the Town Administrator of the Respondent who confirmed that Notices were issued by the Respondents on 21st November, 2017 to all kiosk owners in town who had encroached on all road reserves to pull down their structures and he states that the Applicants buildings were erected adjacent to a road reserve and various kiosks have mushroomed in front of his building into about 20 meters of the reserve.

The Respondents contend that the Applicants buildings were not affected but the kiosk in front of him. He further averred that they went to the site on 2nd December, 2017 in the presence of the Applicant and other kiosk owners where measurements were taken in which it was confirmed that indeed they had encroached on the road and it was during this time that the Applicant's septic tank was found to lay on the way and he contends that contrary to the allegations of the applicants the operation was undertaken by county officials protected by their rangers.

The Respondent argued that the applicant is intent to increase the acreage of his land by what he owns and further that there exists Narok Chief Magistrate's Civil Case No. 202 of 2014 which relates to the Applicant's encroachment on riparian land to the south of the same property and that the applicant had used unapproved plan and erroneous Partial Development Plan to exceed the two acreage of the suit land.

In his submission the applicant asserts that he is the lawful owner of the suit property and he has indefeasible title to the same. However, the Respondent arbitrarily demolished the same and converted it into a public car park which amounts to deprivation of his property and compulsory acquisition of property without following due process and he has framed the issues for determination as to whether there was violation of his property and whether he has established a prima facie case for grant of orders of injunction.

The Applicant urged the court to uphold his right to property which deserves protection under Article 40 of the Constitution of Kenya.

On whether the Applicant has established a prima facie case with a probability of success and he relied on the case of **MRAO LTD-VERSUS-FIRST AMERICAN BANK & 2 OTHERS (2003)eKLR 125 BORA & 2 OTHERS (2003) KLR** and he states that he has made out a prima facie case and is deserving the orders sought.

The Applicants further stated in his submissions that his rights have been violated and hence seeks the court to intervene.

The Respondent in his submissions have outlined the issues for determination similar to those of the applicant save for who is entitled to costs. On whether the Applicants rights to property has been infringed upon, it states it does not dispute the plaintiff's title to the land. However, what is in contest is the extended boundaries of the property by the Applicant on the road reserve and the 6 Metre way leave which it asserts is contrary to law. The Respondents have relied on the case of **VERONICA NJERI WAWERU & 4 OTHERS -VERSUS-CITY COUNCIL OF NAIROBI AND 2 OTHERS (2012)eKLR** where the court held that:-

“The land in question is a road reserve and public interest demand that such land be used for the purpose it was intended for and should not be appropriated for private use”.

It is the Respondent's contention that the Applicant extended and used the road reserve without the authority of the respondent whose authority must be sought.

The Respondent further contended that the applicant's actions on encroachment on the road reserve violated the rights of the members of the public to use the same.

On whether the Applicants are entitled to the reliefs sought the Respondent seeks to obtain injunctive orders against an action that has already taken place. They have already reclaimed what was duly public land and the applicant's parcels remain intact and that the Applicant has not demonstrated how his land was violated and that the Application before court is based on misleading information and in acting to enforce an illegality.

I have read the application before me and the submissions filed by the parties. The Applicant contends that there is violation of his rights and that the respondent's actions was out to the deprivation of his property. I will not go to the merits and make a finding whether the applicant was deprived of his property. At this interlocutory stage, no evidence was tendered before to make that conclusion.

The Application before me is one of an injunction which the Applicant is seeking the court to exercise its discretion to stop the respondent from infringing on the applicant's property. For one to succeed for the conditions for the grant of orders of injunction is now well settled and as both parties herein have framed. What is before court for determination is whether the plaintiff has established a prima facie case with a probability of success and whether damages will be adequate compensation and in whose favour does the balance of convenience tilt.

In the instant case it is not in dispute that the Applicant is the owner of **LAND PARCEL NO. NAROK TOWNSHIP/378**. The Applicant contends that the Respondent had on the night of 4th December, 2017 interfered with the peaceful and quiet enjoyment on the suit land and demolished structures thereon and thus seeks the intervention of the court. The Respondent on its parts contends that it carried out

demolitions on the material night on illegal structures on the suit land which had encroached on a road reserve and a way left in accordance with its mandate. What was demolished was his property and the respondent contends it demolished structures on a road reserve. From the above as with the denial of the applicant that he has not encroached on a road reserve is a matter that can only be determined at a full hearing in which evidence will be taken and same tested in cross examination. As it stands what is before me are accusations and counter accusations that the court can't conclusively and logically ascertain who is right among the two parties and for this state of affairs I find that the Applicant has not established a prima facie case with a probability of success. However, in the interest of justice I find that there is need to preserve the subject land by way of maintaining of status quo obtaining by the parties herein pending the hearing and determination of the suit herein.

From the pleading before me I find that the Applicant has not demonstrated any threats of future demolition actions by the respondent against his property what is complained about are actions that took place on 4th December, 2017 and there are no complaints as regards future proposed activities by the Respondent and thus a claim for interlocutory injunction is not tenable as held in the case of **AMERICAN CYANAMID-VERSUS-ETHICON LTD (1975)AC 396**

“if there is no prima facie case on the point essential to entitle the Plaintiff to complain of the Defendant’s proposed activities that is the end of the claim to any interlocutory relief.”

In view of the foregoing it is my finding that without there being future threats courts will be constrained to grant the injunctive orders sought.

Having carefully considered the pleadings and the submissions before me and in the interest of justice I make the following orders: -

1. That there be maintenance of status quo obtaining today in preserving the suit land pending the hearing and determination of the suit.
2. That parties set down the suit herein for hearing within the next 60 days.
3. Each party to bear its own costs.

DATED, SIGNED and DELIVERED in open court at **NAROK** on this **12th** day of **July, 2019**

Mohammed Kullow

Judge

12/7/19

In the presence of:-

Mr Kilele for the Plaintiff/Applicant

N/A for the Defendant/Respondent

CA:Kimiriny

Mohammed Kullow

Judge

12/7/19