



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 89 OF 2013

WILLIAM KANGOGO BARMASAI.....PLAINTIFF

VERSUS

GATHERINE RONO.....1ST DEFENDANT

KIPKOECH RONO.....2ND DEFENDANT

GIDEON KIPTOO RONO.....3RD DEFENDANT

MAGDALENE CHEPCHIRCHIR RONO.....4TH DEFENDANT

RITA CHELIMO RONO.....5TH DEFENDANT

KIPNGETICH RONO.....6TH DEFENDANT

ONESMUS KIPLAGAT RONO.....7TH DEFENDANT

KIMUTAI RONO.....8TH DEFENDANT

RULING

This ruling is in respect of an application dated 8th July 2019 by the plaintiff/applicant seeking for the following orders:

- a) A temporary injunction to restrain the Defendants jointly and severally, by themselves, their servants, agents, employees, proxies or any other person acting on their behalf from blocking the access road into and out of the Plaintiff's parcel of land known as UASIN GISHU/ELGEYO BORDER/260 and erecting and/or constructing barbed wires, fencing posts and a house thereon pending the inter partes hearing of the application.
- b) A temporary mandatory injunction to restrain the Defendants jointly and severally, by themselves, their servants, agents, employees, proxies or any other person acting on their behalf from blocking the access road into and out of the Plaintiff's parcel of land known as UASIN GISHU/ELGEYO BORDER/260 and erecting and/or constructing barbed wires, fencing posts and a house thereon pending the hearing and determination of this suit.
- c) The Defendants/Respondents jointly and severally by themselves, servants, agents, employees, proxies or any other person acting on their behalf to forthwith open the access road into and out of the Plaintiff's parcel of land known as UASIN GISHU/ELGEYO BORDER/260 and remove the barbed wires, fencing posts and a house constructed thereon pending the hearing and determination of this suit.

Counsel for the applicant submitted that the issues for determination are as to whether the applicant has met the threshold for grant of injunction. Counsel further submitted that the Plaintiff/Applicant has a prima facie case with a probability of success and stand to suffer irreparable loss and damage if the Defendants/Respondents and/or their agents are not restrained.

That the Plaintiff is the personal representative of the estate of BARMASAI BOSIOM (deceased) who is the registered owner of whole parcel of land known as UASIN GISHU/ELGEYO BORDER/260 measuring approximately 8.2 Ha and the only child surviving the deceased person.

It was Counsel's submission that the Plaintiff's case is that there exists an access road between the Plaintiff/Applicant's parcel of land and

that of the Respondents known as UASIN GISHU/ELGEYO BORDER/261 which has been in existence since 1963 as indicated in the Original Survey Map annexed to the application. That the Respondents have, without any justification blocked the said access road rendering the Plaintiff and his family landlocked.

Mr. Kiplagat Counsel for the plaintiff/Applicant further submitted that the applicant has on several occasions reported the matter to Kapsoya Police Station but no action has been taken and that the Respondents have refused to open the access road. It was Counsel's submission that the Applicant annexed a copy of the Chief Land Registrar's letter dated 27th June, 2019 written to the County Land Registrar, Uasin Gishu informing him of the problem contrary to what was in the Survey Plan and the Part Development Plan and requesting him to arrange an appointment with the County Surveyor to do a site visit and access the road after lodging a complaint with the Chief Land Registrar.

Counsel cited the case of **Registered Trustees of Child Welfare Society of Kenya v Warp Drive Limited (2017) eKLR, where Gitumbi, J.** in allowing the application for a temporary injunction stated that:

"One of the issues that I am called upon to determine is whether or not to issue an order of temporary injunction as sought by the Plaintiff/Applicant. In deciding whether or not to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the case of GIELLA versus CASSMAN BROWN (1973) EA 358 in which the conditions for the grant of an interlocutory injunction were settled as follows:

"The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. "

It was Counsel' submission that the court in that case was not satisfied that the Plaintiff/Applicant had demonstrated that there has been any structures erected by the Defendant/Respondent on the suit property or that any building materials had been dumped on the suit property.

Counsel further submitted that in this case, the applicant has furnished the Court with photographs showing that the Respondents had put up a structure and indeed planted along the road access hence a mandatory injunction should issue against them. Counsel also cited the case of Michael **Kiarie v Soikan Peliai(2018) eKLR** where the Honourable Court in its analysis and determination found that the application had merit and ordered inter alia that:

"The prevailing status quo be maintained wherein the Defendant be and is hereby directed to leave the access road open pending the outcome of the suit." The court also stated that:

"As to whether the Plaintiff has established a prima facie case with a probability of success, I wish to rely on the case of Mrao Vs First American Bank Limited. I note the Plaintiff is the registered proprietor of the aforementioned parcels of land.

Counsel submitted that the defendant/respondent claims that the Plaintiff has converted a road reserve into plots and intends to use his land as an access road which is not substantiated.

Mr. Kiplagat further submitted that the Applicant stands to suffer irreparable loss which cannot be compensated by way of damages as the defendant has blocked the access road rendering him landlocked. Counsel cited the case of **Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012, the Court of Appeal** held that in seeking injunctive relief, speculative injury cannot suffice and there must be more than unfounded fear and the injury should be actual as well demonstrable that cannot be compensated by damages. He therefore submitted that the plaintiff has proved that he will suffer irreparable loss.

Counsel finally submitted that the Applicant has furnished the Honourable Court with photographs showing the extent of trespass into the Plaintiff/Applicant's parcel of land by the Respondents. Counsel relied on the case of **Richard Mecha Kabagendi v John Mongare Nyarondia (2014) eKLR**, the Honourable Justice S. Okong'o in allowing the application for a temporary injunction stated at paragraph 6 and 7 that:

I am satisfied that the Plaintiff has demonstrated that he has a prima facie case against the Defendant. The Plaintiff's title to the suit property has not been challenged in any material respect. Even if it were true that the defendant has been occupying the suit land since 2003 without any interruption from the Plaintiff, the plaintiff still has a right to the suit land since the defendant's occupation of the suit land has not lasted long enough for the defendant to claim ownership of the suit land by way of adverse possession. Under section 24(a) of the Land Registration Act, 2012, the registration of a person as a proprietor of land vests upon that person the absolute ownership of that land together with all the rights and privileges belonging and appurtenant to. Under section 25(1) of the same Act, the rights of a proprietor of land acquired for valuable consideration is indefeasible except as provided under the said Act.

The defendant/respondent has not placed any evidence before this court of any irregularity in the acquisition of the plaintiff's title that can defeat the plaintiff's rights over the same. It follows therefore that the plaintiff has a prima facie case with a probability of success against the defendant. I am also satisfied that the plaintiff stands to suffer irreparable harm unless the orders sought are granted. The plaintiff is the proprietor of the suit property and the defendant's continued occupation thereof, would deny the plaintiff the use and enjoyment thereof which would result in irreparable injury to the plaintiff.

Counsel therefore urged the court to allow the application as prayed.

1st-8th Defendant's/Respondents Written Submission.

Counsel for the respondents opposed the application and submitted that it is the respondents case that there is no access road passing through their parcel of land LR NO. UASINGISHU/ELGEYO BORDER/261 into the plaintiffs/ applicants parcel of land LR NO. UASINGISHU/ELGEYO BORDER/260. That the plaintiff/applicant has encroached into the respondents parcel of land and has since claimed the existence of an access road in and out of LR NO. UASINGISHU/ELGEYO BORDER/260 leaving the applicant's rightful access road located to the North of his parcel and adjacent to LR NO. UASINGISHU/ELGEYO BORDER/242.

Counsel submitted that the issue for determination is as to whether on the evidence and material placed before court, the plaintiff has satisfied the conditions upon which a temporary injunction can be granted. On this Counsel submitted that the application should be dismissed as there is no access road on LR NO. UASINGISHU/ELGEYO BORDER/260

Counsel cited the case of **R, J. R. Macdonald vs. Canada (Attorney General)**, which was cited with approval by the court in **Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd 2 others [2016] eKLR** which captured the principles in *Giella vs Cassman Brown*. Counsel therefore submitted that the applicant has not met the threshold for grant of injunctions and the application should be dismissed with costs.

Analysis and determination

This matter was filed under certificate of urgency and the court ordered that the application be served for inter parte hearing on 17th July 2019. The applicant served the application

but the defendants did not appear in court during the hearing of the application. The court gave an order directing that the access road be opened pending the hearing of this application inter partes.

The principles of grant of an interlocutory injunction are now settled as per the *Giella Casman Brown* case cited above. If the court is satisfied that the applicant has established a prima facie case with probability of success then it can go ahead and grant the orders. But if the court is in doubt then it can proceed to look at the other limb of irreparable harm and a balance of convenience. This is as was stated in the case of **Aikman – vs- Muchoki (1984) KLR 353** where their Lordships stated thus:-

“My understanding of the Court of Appeal decision in Giella case is that the court proceeds to consider the second condition of irreparable harm which cannot be adequately compensated for an award of damages only if it entertains some doubt on the first condition of the probability of success, like when the court thinks that the plaintiff has a fifty/fifty chance of success, However where going by the material placed before it at an inter partes hearing of an application for injunction it appears to the court that the plaintiff has a strong case like where it is clear that the Defendant's act complained of is or may be unlawful, the issue of whether or not damages can be an adequate remedy for the plaintiff does not fall into consideration. A party should not be allowed to maintain an advantageous position he has gained by flouting the law simply because he is able to pay for it”.

The plaintiff has established that he has a prima facie case with a probability of success by annexing photographs of the said access road together with a letter from the Chief Land Registrar in respect of the complaint about the access road and a survey map. What more would you need to establish a prima facie case? The plaintiff cannot just wake up and claim that an access road has been blocked.

The defendant has made general denials and not substantiated the averment that the plaintiff wants to encroach on the defendants' parcel of land. I find that the plaintiff/applicant has met the threshold for grant of interlocutory injunction and is therefore allowed as prayed.

DATED and DELIVERED at ELDORET this 21ST DAY OF NOVEMBER, 2019.

M. A. ODENY

JUDGE

RULING read in open court in the presence of Mr. Too for defendant and in the absence of Mr. Kiplagat for the Plaintiff.

Mr. Mwelem – Court Assistant