



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT NYAHURURU**

**ELC CASE NO 353 OF 2017**

**JOSEPH WAININA KINYANJUI.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**HERMAN KINYANJUI.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**KENYA NATIONAL HIGHWAYS AUTHORITY....DEFENDANT/RESPONDENT**

**RULING**

1. By a Notice of Motion dated 7<sup>th</sup> April 2017 filed under Section 63 (c) and (e) of the Civil Procedure Act, Order 40 Rules 1,2,3 and 4 of the Civil Procedure Rules, 2010 and all other enabling provisions of the Law where the Plaintiff/Applicants' seeks orders that:-

**i. Spent**

**ii. Spent**

i. That pending the hearing and determination of the suit, a temporary injunction be issued restraining the Respondent and its employees, servants and/or agent from entering or going onto or demolishing the Applicant's permanent residential house, structures and improvements on Land Title No. Laikipia Nyahururu/5970 or in any other manner interfering with the Applicant's quiet possession and occupation, use and enjoyment of Land Title No. Laikipia Nyahururu/5970.

ii. That this honourable court be pleased to issue any other interlocutory orders or reliefs as may appear to the court to be just and convenient to grant to the Applicants/Applicant's.

iii. That costs of the Application be provided for.

2. The said application was supported by the grounds on the face of the application and the Affidavit, sworn by Joseph Wainaina Kinyanjui the first Applicant herein.

3. By consent parties agreed that the matter be disposed of by way of written submissions. The Applicants filed their submissions on the 20<sup>th</sup> July 2017 while the respondent filed theirs on the 28<sup>th</sup> September 2017 which submissions largely reiterated the facts as set out in the filed affidavits by the parties.

4. I have read the written submissions by both parties as well as looked at the cited authorities and the relevant law therein.

5. The Applicants' submission was to the effect that the 1<sup>st</sup> Applicant holds a valid title to the suit property, whereas the 2<sup>nd</sup> Applicant is his father and lives on the suit land with permission and has been in occupation of the said property since March 2003 making it about 13 years wherein he has made investments on the said land, on which there is a residential house, and other structures.

6. The 1<sup>st</sup> Applicant in his affidavit gave a detailed account of the history of the process of acquisition of the suit property and attached the title deed to the suit property issued on 7<sup>th</sup> March 2002, certificate of search, Sale agreement, as well as the letter of consent to sub-division from Rimuruti Land control Board. Mutation form and certificate of compliance under the Physical Planning Act.

7. That sometime in January the 2<sup>nd</sup> Applicant received a 30 days demolition Notice from the Respondent to the effect that they(Applicants) had encroached on the road reserve on the old Nakuru - Nyahururu high way. (B5 road)

8. That despite a letter from their counsel to the Respondent to withdraw the said Notice, the Respondent as remained adamant to the effect that on the 3<sup>rd</sup> April, his servants, employees or agents visited the suit land and took some ground measurement wherein they informed the 2<sup>nd</sup> Applicant that they would be back to demolish the building and structures therein.
9. The Applicant submitted that the suit property did not encroach on the road reserve, and that the land was a private land. That if the Respondent carried put their threat, then the 2<sup>nd</sup> Applicant would be rendered homeless and a destitute and that the Applicant's right to own property would equally be infringed. He further submitted that the 2<sup>nd</sup> Applicant stood to suffer irreparable injury therefore, unless a temporary injunction was issued.
10. It was further submitted that the Applicants had established a prima facie case in terms of the laid down principles in the case of Giella vs Cassman Brown and prayed that this application allowed.
11. The application was opposed by the Respondent through a replying affidavit sworn by Eng. Isaiah Onsongo on the 5<sup>th</sup> May 2017 as well as a further Affidavit by one Mr. Thomas Gachoki, the Respondent's manager Survey, sworn on the 13<sup>th</sup> June 2017 to the effect that the suit land was created from the subdivision of a land known as Laikipia/ Nyahururu/4706 which was previously owned by one Rakeli Wangari Muchei.
12. That No. Laikipia Nyahururu/5970 the suit land herein, was an out come of that subdivision, and that the same lies squarely within the old road C717 as evidenced by the survey plan annexed to the replying affidavit of Thomas Gachoki.
13. That in the mid 1970's a section of the old Nyahururu Road was redesigned and land acquisition to the affected parties was carried out through gazette Notice No. 3085 and 3086 of 27<sup>th</sup> September 1974 and gazette notices No. 2331 and 2332 of 26<sup>th</sup> July 1976. That the length of the road was at the time 100Km, with a road reserve width of 60 meters. That according to the proposed plan the road then had to be shifted from the old road and thus vide gazette notices No 2090, 2092 and 2093 of 22<sup>nd</sup> July 1982, annexed herewith, the government acquired land for the new designed road.
14. The respondent's submission was that the old abandoned road still remained a government road and has never been alienated at any time. That the suit premises abuts the new road but rests squarely within the old road and that a mere search at the Land's Registry was not enough as it would not have revealed that the land was on a road reserve, it was therefore incumbent upon the Applicants to have conducted due diligence by conducting a further search in the office of the Director of survey and the Authority. (The Respondent herein)Only then would they have discovered that the suit land was on the road reserve and therefore not available for alienation. Further that the Applicants never sought any authority from the authority for construction on a road reserve.
15. The Respondent further contends that the structures put up by the Applicant on a road reserve, ought to be demolished as the land was not available for alienation. The Respondent submitted that the structures put up by the Applicant had encroached onto a road reserve in contravention of **section 91** of the Traffic Act Cap 403 of the Laws of Kenya and that by virtue of **section 91 (2)** of the said Act, the Respondent had the statutory mandate to remove or demolish the structures and having served the appropriate notices on the Applicants, the Respondent was entitled to carry on with the demolition exercise.
16. The respondents submitted that the Applicants had not established prima facie with a probability of success to warrant the orders sought as they had constructed on a road reserve which was not subject to alienation and as such the title they held was illegal and not enforceable in law.
17. I have reviewed the affidavits and the annexures thereto and have also considered the filed submissions by the parties. The issue for determination is whether on the material and evidence presented to the court, the Applicants had established a prima facie case with a probability of success to enable the court to grant to them the order of injunction.
18. The often cited case of **GIELLA –VS- CASSMAN BROWN & COMPANY LTD (1973) EA 358** is the leading authority on the conditions that an applicant needs to satisfy for the grant of an interlocutory injunction. An applicant needs, firstly to establish and demonstrate they have prima facie case with a probability of success, secondly that they stand to suffer irreparable damage/loss that cannot be compensated in damages if the injunction is not granted and they are successful at the trial, and thirdly in case the court is in any doubt in regard to the first two conditions the court may determine the matter by considering in whose favor the balance of convenience tilts.
19. In the present case there is no dispute that the 1<sup>st</sup> Applicant was the registered proprietor of the suit land which was issued regularly by the Registrar of Lands who is mandated under the law to issue the documets.
20. The suit land having been registered in 2002, was governed by the repealed **Registered Land Act, Cap 300 which then** constituted the Respondent as an absolute proprietor and conferred on him all rights, privileges and appurtenances thereto, free from all other interests and claims, which rights, privileges and appurtenances were not liable to be defeated except as provided in the Act (**section 28**).
21. The current land regime is set out in the Land Registration Act, Act No. 3 of 2012, and the Land Act, Act No. 6 of 2012.
22. The rights of a proprietor are set out in Section 25 of the Land Registration Act, which provides as follows.

*Section 25 (1) provides:-*

*The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by order of court shall not be liable to be defeated except as provided in this Act and shall be held by the proprietor, together with all privileges*

*thereto, free from all other interests and claims whatsoever, but subject:-*

- a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any shown in the register, and
- b. to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

23. Section 26 (1) of the Act provides that the certificate of title is to be taken as conclusive evidence of proprietorship section 26 (1) provides:-

“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of that subject to challenge, except

- a. on the ground of fraud or misrepresentation to which the person is proved to be a party, or
- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”.

24. The Respondent has argued and asserted that the Applicants title was illegally and unlawfully procured and therefore cannot be deserving of protection under the law. However there is no evidence that the Government has recalled and/or revoked the title. Both the Land Registration Act section 26 (1) that provide for the indefeasibility of title and Article 40 (6) of the constitution envisage that where a registered title is impugned on the grounds set out in the provisions that due process would be followed to have such title revoked, cancelled and/or annulled. The courts have in a series of cases in the recent past held that due process has to be followed before a registered title can be revoked on the grounds of having been fraudulently or irregularly issued.

25. The Applicants are entitled to observance of due process to have their title cancelled, revoked and/or annulled. The Respondent did not follow due process to have the Applicant’s title impugned for any reason.

26. The 1<sup>st</sup> Applicant having demonstrated that he is the registered owner of the suit property having been issued with a title, Prima facie their title is indefeasible and the burden shifts to the Respondent to show or demonstrate that the title is challengeable within the provisions of the law. Quite clearly it is not possible to make a final determination at this interlocutory stage on the validity of the Applicants title but the mere proof that the Applicants hold a duly registered certificate which on the face of it was properly acquired is sufficient to lead the court to hold that the Applicants have established that there is a prima facie case.

27. On the second limb as to whether the Applicants have demonstrated they stand to suffer irreparable damage that cannot be compensated in damages in case the injunction is not granted, the court has to consider the rival arguments by the parties. The Applicants argue that if the Respondent carried out their threat, then the 2<sup>nd</sup> Applicant would be rendered homeless and a destitute. That the Applicants right to own property would equally be infringed. And they stood to suffer irreparable injury therefore unless a temporary injunction was issued.

28. For their part the Respondent argue that the demolitions are necessary in order to expand the road so as to ease congestion for benefit of the public. The Respondent’s position would appear to represent greater public interest while the Applicants interest is private.

29. Although there is no doubt the Applicants would be greatly inconvenienced and would suffer damages if their developments on the suit property were to be demolished, yet the wider public would suffer more if construction of the road is stalled by reason of an injunction having been granted barring its construction.

30. Thus it is my view that the wider and greater public good and interest would militate against the court granting an injunction in favor of the Applicants.

31. It is my consideration that the Applicants can be adequately compensated in damages after valuation of their, if at the conclusion of the trial their title is found to have been validly issued and/or if they have not encroached on the road reserve. Taking into account all the circumstances of this matter the balance of convenience would be against hindering the completion of the construction of the road hence it tilts against granting an injunction.

32. Consequently, I dismiss the application dated 7<sup>th</sup> April 2017.

33. Each party to bear their own costs.

**Dated and delivered at Nyahururu this 31<sup>st</sup> day of January 2018.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**